

Book Notes: Constitutional Identity, by Gary Jeffrey Jacobsohn

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Book Note

CONSTITUTIONAL IDENTITY, by Gary Jeffrey Jacobsohn¹

GRANT LOPATRIELLO

IN HIS NEW BOOK, *Constitutional Identity*, Gary Jeffrey Jacobsohn rejects the skepticism with which many constitutional theorists² greeted his earlier work on the same subject.³ Jacobsohn argues that the concept of constitutional identity is fundamental to, and should sit at the very heart of, constitutional theory. He arrives at this conclusion through a thorough examination of critical issues in comparative constitutional theory in his seven-chapter book.

Jacobsohn begins his analysis by examining what he coins a “disharmonic constitution” and its importance in constitutional theory: “The dissonance within and around the constitution that is key to understanding its identity.”⁴ Among other things, he argues that constitutional disharmony is critical to the development of the identity of a constitution, despite the fact that it may make the task of establishing the specific substance of that identity more challenging. In fact, Jacobsohn maintains that contesting constitutional identity is central to one’s ability to comprehend it.

In chapter two, Jacobsohn asks the question “can a constitution be unconstitutional?” to introduce the reader to the challenge of constitutional identity. In examining the puzzle of the unconstitutional constitutional amendment, he turns to examples from contrasting constitutional contexts, including India, Ireland, and Sri Lanka. On the one hand, Jacobsohn uses Ireland and Sri Lanka to illustrate that “a constitutional order is capable of furnishing those committed to its subversion

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1. (Cambridge: Harvard University Press, 2010) 355 pages.
 2. Laurence Tribe and Joseph Raz among others.
 3. See e.g. Gary Jeffrey Jacobsohn, “Constitutional Identity” (2006) 68 Rev Pol 361, “An Unconstitutional Constitution? A Comparative Perspective” (2006) 4 Int’l J Cont L 460, and “The Permeability of Constitutional Borders” (2004) 82 Tex L Rev 1763.
 4. *Supra* note 1 at 15.

with the lawful means to secure their objectives.”⁵ And on the other, Indian jurisprudence is used to “engage the deepest issues of identity implicated in the genus of constitutional change that may culminate in a reconstituted order.”⁶

Jacobsohn argues, in chapter three, that the shaping and evolution of a constitution’s identity is a function of contesting the manner in which constitutionalism is practised. His analysis of tradition and experience builds on those first advanced by Alasdair MacInyre and Edmund Burke—that constitutional identity should be considered as an artifact of the dissonance in a nation’s divided inheritance. He contends that constitutional identity must to take into account the various disharmonies that are entrenched in nation’s constitutional history.

Expanding on the sentiments first discussed in the preface, Jacobsohn, in chapter four, examines the use of foreign sources and precedent in the courts’ shaping of a nation’s constitutional identity. While he notes that the consideration of foreign law by judicial decision-makers is an intensely debated issue, he suggests that assessing the costs and benefits of foreign legal experience is undoubtedly entwined in the details of constitutional identity. Jacobsohn draws from the experience of the United States to illustrate “that critical to the success or failure of the enterprise is the impact that the insinuation of foreign examples into the domestic arena exerts on the balance of disharmonic constitutional elements in a given society.”⁷

In chapter five, Jacobsohn discusses two models of constitutionalism that exhibit divergent orientations with respect to the expected impact of a constitutional presence in the life of the larger community. He characterizes constitutions in two ways, militant, and acquiescent—the former being an expression of defiance directed against an existing social structure whose transformation had been deemed desirable by the document’s framers, and the latter, a preservative predisposition, a commitment to maintain the essential continuity of structures of societal stability.

Jacobsohn examines the disharmonics of constitutional identity using Israel’s family unification decision as a case study in chapter six. He observes that the contest over family rights was a struggle of something bigger than those rights—it was a struggle over the meaning of Israel’s constitutional identity. This watershed case is the most recent addition to Israel’s evolving constitution, having served as a vehicle through which the judges of court attended to the

5. *Ibid* at 17.

6. *Ibid*.

7. *Ibid* at 22.

interdependent issues of identity and the role of the judiciary. Jacobsohn focusses on the different approaches taken by the individual judges and argues that their differing assessments of the disharmonies in Israel's historical landscape prescribed their contrasting conclusions of the nation's constitutional identity.

