Trinity College Dublin

Coláiste na Tríonóide, Baile Átha Cliath

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SCHOOL OF LAW

LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 10/2023

December 2023

[Constitutional Identity and Unamendability]

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Constitutional Identity and Unamendability

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[Forthcoming in Ran Hirschl and Yaniv Roznai (eds), Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity (Cambridge University Press, 2024)]

1. Introduction

Constitutional theory has become a global enterprise, aspiring to general accounts of constitutional phenomena informed either by large-N statistical analysis or case studies drawn from an increasingly wide range of constitutional systems. Gary Jacobsohn's work on constitutional identity was an early exemplar of this work, testing and refining broad theoretical claims against deep analysis of constitutional developments in diverse constitutional systems. One aspect of Jacobsohn's rich and multi-textured theory is the claim that constitutional identity constrains amendment powers. In this chapter, I explore that claim through the lens of the two seminal Irish cases with which Jacobsohn engages: *State (Ryan) v Lennon*[1] and *Re Article 26 and the Information (Services outside the State for the Termination of Pregnancy) Bill 1994*.[2] These cases, while rejecting unamendability, illustrate Jacobsohn's central distinction between generic constitutional identity and particular constitutional identity.[3] Jacobsohn correctly claims that generic constitutional identity – conformity to the moral values of constitutionalism – constrains constitutional amendment, but the salience he assigns to a country's distinctive constitutional identity is problematic. I interpret Jacobsohn's particular constitutional identity not as a substantive

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[1] [1935] IR 170.

[2] [1995] 1 IR 1, hereinafter the *Abortion Information case*.

[3] The Supreme Court has since endorsed the relevance of constitutional identity but not unamendability. *Costello v Government of Ireland* [2022] IESC 44 (Rainford 2023).

constraint on amendment but rather an argumentative frame for debate about the legitimacy of amendments. This argumentative frame lacks a sound normative basis and encourages an excessive focus on the constitutional past, diminishing the potential of constitutional amendment as a site of democratic deliberation.

2. Identity and amendability

Constitutions can be identified formally – i.e. with reference to content-neutral considerations such as the fact that they are accepted as such by law-applying officials in a particular place at a particular time (Doyle 2018b) – or substantively. Jacobsohn's signal contribution to constitutional theory has been the analysis of what it means for a constitution to have a substantive identity. For Jacobsohn, constitutional identity is neither static nor unchanging:

> [A] constitution acquires an identity through experience … this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Rather, 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. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings. (Jacobsohn 2010, 7)

He argues for:

> a more fluid concept of identity, in which constitutional assertions of self-definition are just part of an ongoing process entailing adaptation and adjustment as circumstances dictate. It is not fluidity without boundaries, however, and textual commitments such as are embodied in preambles often set the topography upon which the mapping of constitutional identity occurs. (Jacobsohn 2010, 13)

As intellectually stimulating as the discernment of substantive constitutional identity may be, its significance depends on its relevance to other important questions. Constitutional identity could play a doctrinal role across several legal systems, one example being a national law limit to the scope of the EU's competence (De Witte and Fromage 2021). A further example is the constraint of constitutional amendment powers with reference to constitutional identity. In Germany, the Constitutional Court has explained the textual limits on constitutional amendment as protecting a core constitutional identity (Heun 2011, 29). In Colombia, the Constitutional Court has held that constitutional amendments cannot amount to constitutional replacements (Bernal 2013). The question for constitutional theory, however, is whether the fact that several jurisdictions constrain amendment with reference to identity counts as support for the general claim that constitutional identity constrains amendment. At the level of empirical observation, many jurisdictions do not constrain constitutional amendment in this way: are they mistaken and, if so, what type of mistake are they making?

Jacobsohn argues that constitutional identity implies limits on the amendability of all constitutions (Jacobsohn 2006; 2010). He speaks of constitutional identity *constraining* amendment (Jacobsohn 2010, 18, 35, 78). The existence of constraints on the power of constitutional amendment in general – i.e. not contingent on the doctrines or practices of a particular jurisdiction – can be advanced on either a conceptual or normative basis (Doyle 2017). Conceptual constraints are necessary features of the phenomenon being analysed; normative constraints require justification under a theory of political morality.[4] It is difficult, given the numerous examples of constitutional texts that grant apparently unconstrained amendment powers, to maintain a conceptual argument that constitutional amendment powers are necessarily constrained by constitutional identity. In any event, the better reading of Jacobsohn is that powers of constitutional amendment are *normatively* constrained to respect constitutional identity. In other words, irrespective of the breadth of

[4] I later consider the implication of moralised concepts that potentially draw together these two strands. But to advance the argument, it is clearer to keep the strands separate for now.

amendment power that a constitution appears to grant, constitutional amenders *ought not* exercise that power inconsistently with their constitution's identity. This formulation does not determine the appropriate response by judges to amendments inconsistent with constitutional identity. I now turn to the Irish examples to illustrate Jacobsohn's claims in more detail.

3. Ireland and constitutional unamendability

3.1 The constraint of generic identity

In the aftermath of Ireland's war of independence, the Constitution of the Irish Free State 1922 was enacted by the Oireachtas in Dublin sitting as a constituent assembly and then enacted by the Westminster Parliament (Cahillane 2016). Article 50 of the 1922 Constitution allowed amendments by way of ordinary legislation for the first eight years; thereafter a referendum would be required. In 1929, the Oireachtas amended Article 50 to extend the period for amendment by ordinary legislation for a further eight years. The legislative power of amendment was then deployed to circumvent constitutional protections for human rights and the rule of law in the face of significant challenges to the authority of the state both from the Irish Republican Army, a paramilitary organisation which rejected the legitimacy of the Irish Free State on the grounds that it was not sufficiently independent from the United Kingdom, and from the Blueshirts, a conservative movement that bore mostly superficial similarities to fascism. In 1931, the 17th Amendment introduced Article 2A, a draconian crime control provision. For instance, prescribed offences were to be tried not by judges but by military tribunals authorised to impose a greater penalty (including the death penalty) than that stipulated by law if the Tribunal thought it was necessary or expedient.

In *State (Ryan) v Lennon*, the Supreme Court rejected a challenge to the constitutionality of Article 2A.[5] FitzGibbon J viewed Article 2A as an egregious departure from constitutional

[5] [1935] IR 170.

standards, but his strongly textualist approach meant this could not translate into a finding of unconstitutionality. The Constitution as originally enacted allowed amendment by the Oireachtas within the initial 8-year period and did not preclude the Oireachtas amending the Constitution to extend that 8-year period. The 17th amendment was validly made within that extended period because it did not infringe any explicit prohibition on amendment.

Kennedy CJ, however, vigorously dissented, identifying several grounds on which the amendment was unconstitutional. First, the constitution had – at least from the Irish perspective – been enacted by the Oireachtas sitting as a constituent assembly. The relevance of this was not the Schmittian distinction between constituent and constituted authority. Rather, members of the Oireachtas *qua* constituent assembly had not been required to take an oath of fidelity to the British monarch, in contrast to the later members of the Oireachtas *qua* legislature. The constituent assembly and the referendum-amendment process could therefore, in Kennedy CJ's view, more authentically express the will of the people than could the Oireachtas acting as legislature under the 1922 Constitution.[6] Second, since the Constitution Act stated that all power came from God to the people, any act would be unconstitutional if it could not be justified under authority derived from God. The actions and conduct authorised by Article 2A could not be reconciled with the Natural Law and were therefore null and void.[7] Third, the Constituent Assembly had expressed fundamental principles in a way that conveyed they were immutable and absolute subject only to specific qualifications. Given that Article 6 provided that personal liberty was inviolable, albeit that it could be deprived in accordance with law, the constitution could not be amended to permit indefinite detention without charge on the say-so of a soldier or police officer.[8] Fourth, Article 50 effectively created two powers of amendment: the time-limited power conferred on the Oireachtas and the indefinite power

[6] Ibid, 210-11.
[7] Ibid, 204-5.
[8] Ibid, 208.

conferred on the people. The Oireachtas could not exercise the former power in such a way as to seize the latter power. [9]

Placed in its historic context – a fledgling state in 1930s Europe facing a significant threat from political violence seeking its overthrow; legal norms that emphasised the literal interpretation of statutes; several decades prior to any court in the world declaring a constitutional amendment unconstitutional (Roznai 2013) – the result in *Ryan* should not surprise. Moreover, while a setback for the value of constitutionalism in the short run, *Ryan* was shortly followed by the enactment of the new Constitution of Ireland (1937), which required referendum approval for all amendments after an initial unextendible three-year period. This requirement has underpinned rights protection and foreclosed possibilities for democratic backsliding (Doyle 2018a, 198–203), thereby meeting a pre-*Ryan* objective of prime minister Éamon de Valera to identify which provisions of the 1922 constitution should be regarded as fundamental and protected from change (Coffey 2012). While counter-factual examples are fraught, there is significant reason to doubt that a Supreme Court decision to strike down Article 2A would have strengthened protection of constitutionalism in Ireland over the medium to long term. Without losing sight of that historical context, however, *Ryan* provides a useful test for theories about constraints on the power of constitutional amendment.

In Jacobsohn's theory of constitutional identity, *State (Ryan) v Lennon* belongs in a category of cases where constitutional identity categorically prohibits amendment. In Jacobsohn's view, Article 2A was a 'constitutional monstrosity', the majority judgments allowing an 'amendment process functioning in total difference to itself and its own system of legality' (Jacobsohn 2010, 41, 44). This suggests that Article 2A infringed what Jacobsohn elsewhere characterises as the most important, *generic* constraint provided by constitutional identity (Jacobsohn 2010, 18). While each constitution has a specific and distinctive constitutional identity, there are also – following Lon Fuller's account of the morality of law (Fuller 1977) –

[9] Ibid, 213-9.

certain criteria that determine the very existence of constitutional governance. In this light, the problem with Article 2A was its departure from the very characteristics of constitutional governance itself thereby depriving the Irish Free State constitution of its identity *qua* constitution.

3.2 The constraint of particular constitutional identity

The 1937 constitution retained many of the provisions of the 1922 constitution but gave greater prominence to scholastic natural law theory as the basis for law and rights while also enhancing the people's role as the ultimate source of political power. On the one hand, Article 41 referred to the Family as possessing 'inalienable and imprescriptible rights, antecedent and anterior to all positive law' while Article 43 stated that 'man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods'. On the other hand, Article 6 referred to all powers of government deriving, under God, from the people, whose right it was 'to designate the rules of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good'. Whereas the unamendability question under the Irish Free State constitution had focused on a diminution in generic constitutional identity, the question under the 1937 constitution concerned whether its particular constitutional identity – i.e. its endorsement of natural law as the basis for law and rights – circumscribed the range of constitutional amendments that the people could validly approve.

In 1983, the constitution was amended to give explicit recognition to the right to life of the unborn child, subsequently interpreted to preclude the distribution within the state of information relating to the provision of abortion services outside the state.[10] In 1992, an amendment was approved by referendum to qualify the right to life of the unborn as not

[10] *Attorney General (The Society for the Protection of Unborn Children Ireland Limited) v Open Door Counselling Limited* [1988] IR 593.

limiting the freedom to obtain or make available information relating to services lawfully available in other states. The Houses of the Oireachtas then passed a Bill to allow for the provision of such information. The President exercised her power to refer the Bill to the Supreme Court for a decision as to its constitutionality. Counsel assigned to argue on behalf of the unborn advanced an argument developed in legal commentary since the constitutional amendment was passed: the Bill was unconstitutional because the constitutional amendment underpinning it was itself unconstitutional (O'Hanlon 1993). The constitutional provisions endorsing the antecedence of natural law and natural rights provided some support for this argument. Moreover, the courts had frequently elaborated on those provisions, with Walsh J in *McGee v Attorney General* perhaps going furthest when stating that the constitutional provisions indicated, 'justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection'.[11] These provisions and dicta were the basis for the claim that the constitution was subordinate to natural law, rendering invalid any amendments that infringed the natural law.

The Supreme Court must agree a collegial judgment, in practice delivered by the Chief Justice, within 60 days of the presidential reference, leaving little opportunity to develop sophisticated judicial reasoning. Even by that standard, however, the Court's judgment in *Re Article 26 and the Information (Services outside the State for the Termination of Pregnancy) Bill 1994*,[12] was deeply unsatisfactory (Doyle 2003). The Court cited constitutional provisions and court decisions that emphasized the state was subject to the constitution but failed to grapple with the constitutional provisions and case law that suggested the constitution itself was subject to natural law. As a result, the Court cursorily rejected the possibility of substantive limits on the amendment power, a position re-emphasised in subsequent cases.[13]

[11] [1974] IR 245, 310.
[12] [1995] 1 IR 1 (hereinafter the *Abortion Information Case*).
[13] *Riordan v An Taoiseach* (No2) [1999] 4 IR 343.

Jacobsohn criticises the Supreme Court judgment not on the basis that it should have declared the amendment unconstitutional, but rather that its reasoning was instructively deficient for failing 'to confront the fundamental dilemma concerning constituent power and constitutional identity' (Jacobsohn 2010, 48). In Jacobsohn's view, the referendum provision allowed the Court to rely simply on the constituent authority of the people rather than engage with more fundamental questions of what an amendment is or what a constitution is. As thin as the Court's reasoning was, it is somewhat short-changed by Jacobsohn's criticism. The Court did not rely on the amendment provision in coming to its conclusion but rather on other provisions, most tellingly the statement in Article 6 that the people retain the right, in final appeal, to determine all questions of national policy. The judgment's deficiency lies more in its neglect of the natural law strands of constitutional text and jurisprudence, failing to attempt any reconciliation of that strand with the strand endorsing popular sovereignty and an unlimited amendment power. Irish scholars have attempted such reconciliations (Duncan 1995; Whelan 1995; Whyte 1997).

Plausible accounts of Ireland's particular constitutional identity could, in my view, have been constructed that *either* empowered judges to review whether constitutional amendments cohered with the constitution's substantive vision of democracy *or* empowered the people as authoritative interpreters of the natural law to which constitutional amendments must conform (Doyle 2003, 73–80). These more nuanced accounts might find favour with Jacobsohn, who rejects the claim that the validity of Irish constitutional amendments could be conditional on their strict adherence to natural law. Even a right with a natural endowment should be open to modification. And while there might be 'grounds for principled resistance to excision of a constitutionally prescribed right … the claim on behalf of resistance would still have to be made upon a demonstration that the result of this more radical change [was] at least constitutionally incoherent' (Jacobsohn 2010, 49).

The *Abortion Information case* illustrates that particular constitutional identity constrains constitutional amendment in a very different way from generic constitutional identity. If 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', then it will always be open to argument whether an amendment is precluded by constitutional identity. The indeterminacy here is not merely that associated with all contested concepts. Rather, the constraint of constitutional identity validates diametrically opposed directives: past political aspirations and commitments *but also* the determination to transcend those aspirations and commitments. On this analysis, the Supreme Court decision was flawed not for its outcome but for its failure to assess the legitimacy of the abortion information amendment as an identity-consistent transcension of past commitments.

Particular constitutional identity, as presented by Jacobsohn, does not constrain the power of constitutional amendment in the sense of foreclosing certain substantive changes. Rather, the constraint of particular identity lies in its imposition of a mode of argumentation. As an argumentative frame, this governs those who exercise the power of amendment not just the judges who might review the lawfulness of particular amendments. I derive this point from Jacobsohn's suggestion that judicial power to strike down amendments – for breaches of both generic and particular identity – should be commensurate with amendment difficulty, with a stronger presumption against judicial review where onerous amendment requirements encourage or even guarantee moderation. But even in those situations, retaining a judicial power 'could serve to remind politicians and citizens that … constitutional change is inherently bounded' (Jacobsohn 2010, 82–83).

4. The normative justification for identity-based constraints on amendment powers

Jacobsohn considers that the Supreme Court in *State (Ryan) v Lennon* should have struck down the constitutional amendment on the grounds that it failed to respect generic constitutional identity, i.e. the Fullerian internal morality that a posited constitution must exhibit in order to be truly a constitution. While it is plausible that the value of constitutionalism constrains amendment powers (Dixon and Landau 2015), we could capture this insight without reference to identity, as illustrated by removing references to identity from the following statement:

> Whatever one might think of ~~the identity of~~ an authority that does not provide Magna Carta-like liberties, it is not ~~an identity that is~~ properly constitutional. (Jacobsohn 2010, 75)

The strike-throughs reflect a broadly legal-positivist approach that separates the concept of a constitution from its evaluation. Jacobsohn's Fullerian move, in contrast, works as follows: just as a positive legal system that failed to conform to the internal morality of law – through non-promulgation, retroactivity, etc – would not truly be a legal system, so a constitutional amendment that offended the value of constitutionalism would deprive its constitution of its generic constitutional identity. Constitutions are not simply posited facts of human existence but rather instantiate at least an aspiration to constitutional values – Magna Carta-like liberties of due process, in Jacobsohn's terminology. An extreme failure to instantiate those values results not simply in a bad constitution but a defective constitution, a document that is constitutional in a peripheral sense but not in the focal sense.[14] This account integrates the moral value of constitutionalism – in the sense of negative, legal constraints on government to protect individual liberties (Barber 2015) – with a concept of constitutions. Jacobsohn's Fullerian move has sound jurisprudential underpinning but, in my view, risks a value-monist assessment of constraints on constitutional amendment, potentially blind to other constraints or seeking to maximise the instantiation of constitutionalism irrespective of the cost to other values, such as democracy (Doyle 2017). I shall return to this concern below but for now wish to focus on the differences between generic and particular constitutional identity.

Generic constitutional identity derives normative force from a moral theory of constitutionalism. Despite the semantic similarity, particular constitutional identity cannot derive normative force from the same source. A particular constitutional identity, unlike generic constitutional identity, can be malign. Even a constitution that adequately conforms to generic constitutional identity may have a particular identity that is malign in certain

[14] This formulation is my adaptation of John Finnis's explanation of *lex iniusta not est lex* (Finnis 2011, 364).

respects.[15] Is there an obligation to preserve a malign constitutional identity? Jacobsohn considers this challenge with reference to how the US constitution, as originally enacted, envisaged the continuation of slavery. The reconstruction amendments abolished slavery and guaranteed equal protection of the laws. Jacobsohn (Jacobsohn 2010, 60) identifies two views on the relationship of the reconstruction amendments to constitutional identity: a radical transformation (Brandon 1998, 200–203); or the non-rupture of constitutional identity (Murphy 1987). Ultimately, Jacobsohn considers that whether or not the reconstruction amendments 'radically reconstituted the American polity or enabled it in time to make due on its inaugural promise', they represented the dialogical interaction of internal and external constitutional disharmonies (Jacobsohn 2010, 354). In other words, the US constitution contained a sufficient aspiration towards justice at its adoption that even the radical change of abolishing slavery and guaranteeing equal protection of the laws could be understood as an evolution rather than rejection of identity.

While Jacobsohn's account may be persuasive as a matter of US constitutional law and history, it raises two broader problems for the theoretical claim that particular constitutional identity constrains the power of constitutional amendment. First, it avoids rather than answers the challenge of malign constitutional identity. A possible answer to that challenge – not canvassed by Jacobsohn – is that the obligation is only *pro tanto*: particular constitutional identity should only be preserved to the extent that it is not malign. The difficulty with this answer is that it increases the imprecision of the constraint imposed by constitutional identity, exacerbating the second problem. In this regard, Jacobsohn's treatment of the US reconstruction amendments strengthens the concern that arose from the *Abortion Information case*. The dialogic account of identity – that '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' –

[15] In 2018, the Irish Constitution was amended to replace a near-absolute prohibition on abortion with a general competence for the Oireachtas to introduce abortion. This amendment did not affect the constitution's generic constitutional identity but – depending on one's perspective – the constitution's particular constitutional identity had a malign dimension either before or after the amendment.

does not circumscribe outcomes. Rather than prohibit certain amendments, particular constitutional identity dictates a mode of argumentation around amendment. Proposed amendments must be assessed for legitimacy in terms of whether they are straightforwardly consistent with particular constitutional identity, or a reconciliation of the constitution's disharmonic elements, or perhaps a justified response to a malign constitutional identity. This frame orients debate away from the merits of any proposed amendment to its relationship to constitutional identity.

If particular constitutional identity were tied to the political aspirations and commitments expressive of a nation's past, a broadly Burkean account could justify its constraint on constitutional amendment (Jacobsohn 2010, 69–104). Constitutions being 'artifacts of time and experience' implies that amendments are only legitimate if the old constitution survived without loss of identity. The basic core of constitutional identity should be protected against radical changes that would disrespect fundamental law as an 'idea of continuity'. It is doubtful, however, whether Burke's account of developing a UK-style constitution easily translates to the amendment of mastertext constitutions. His rejection of radical change would equally apply to the issue of constitutional replacement, which most doctrines and theories of unconstitutional constitutional amendments assume to be unconstrained. A closer fit as a justificatory theory, therefore, might be Dworkin's theory of integrity (Dworkin 1986), translated to require consistency of constitutional treatment across time. In that justificatory frame, constitutional replacement might overcome the demands of integrity.

Neither justification, I suggest, is open to Jacobsohn's theory of particular constitutional identity given the way he considers Burke's theory of constitutional identity incomplete because of its failure to allow for required innovation as a radical departure from constitutional continuity (Jacobsohn 2010, 98). For Jacobsohn, the past influences the developmental path of constitutional identity, but constitutional disharmony – aspirational content, dialogical articulation, and generic/local balancing – infuses constitutional identity with its dynamic quality, infusing an element of uncertainty its future course. Consistent with this allowance for radical change, he explicitly rejects Dworkin's account for its 'acceptance of a central, unifying idea that confers unambiguous and lasting meaning to

American constitutionalism' (Jacobsohn 2010, 4). In short, while constraint by a static concept of constitutional identity could be justified on conservative or consistency grounds, a fluid constitutional identity that allows radical change cannot be justified on those normative bases. Conceiving particular constitutional identity as an argumentative frame rather than substantive constraint softens potential normative objections at the cost of severance from any potential normative justification.

I wish to go a little further here, however, and suggest that there is a normative cost for jurisdictions that, through their contingent doctrinal decisions, limit the power of constitutional amendment with reference to identity. Joseph Raz argued that while the authority of new constitutions may derive from their authors – because of the particular esteem in which those authors were held by their contemporaries – old constitutions, if morally valid at all, must derive their authority from other sources (Raz 1998, 169). This argument is founded on the possibility that psychological facts can support normative conclusions. We might develop this insight in relation to constitutional identity and query whether constitutional values are best served by a requirement that amendment debates be conducted through the argumentative frame of constitutional identity. Constitutional amendment provides a site for democratic deliberation, helping to build societal consensus about desirable changes (Doyle and Walsh 2022). The scope of democratic deliberation is restricted by an argumentative frame of constitutional identity. As Jones observes, 'powerful connections to a collective founding, to a national identity … can all combine to enhance the potential effects of constitutional idolatry, and stifle constitutional change' (Jones 2020, 163). Openness to change through democratic deliberation, in contrast, could reinforce respect for the particular constitution on which the realisation of generic constitutional values depends.

The Irish experience provides an illustration of this. The enactment of the 1937 Constitution was a deeply partisan affair reflecting the still bitter divide between the erstwhile opponents of the civil war that followed independence, with only 56 per cent of those voting in support. Over time, de Valera's civil war opponents came to accept his constitution. But as they did so, a cleavage between religious-conservative forces and

secular-progressive forces became more salient, with the constitution a significant site of controversy (Sinnott 2002). With the resolution of that cleavage in favour of secular-progressive forces, partly through constitutional amendments on issues such as same-sex marriage and abortion in the 2010s, the constitution no longer exists at a contested divide in Irish society. Amendment debates were conducted not with reference to constitutional identity but rather on the merits of the change on its own terms. Democratic engagement in constitutional amendment, untrammelled by an argumentative frame of constitutional identity, engendered a greater respect for the constitution than it had ever garnered before. Unlike Jacobsohn's valorisation of the moderation encouraged by an onerous amendment rule, this democratic perspective valorises the constitutional respect encouraged by participation in amendment. There is value to an amendment process that allows us to start a new future rather than re-interpret our past.

5. Conclusion

Jacobsohn provides a rich and provocative account of constitutional identity that distils into theoretical form the instincts that lie behind many doctrines of constitutional unamendability. Generic constitutional identity constrains – at least *pro tanto* – powers of constitutional amendment. But it is difficult to articulate any equivalent moral theory that conveys normative force on particular constitutional identity. While Jacobsohn's dialogic account of particular constitutional identity avoids some of its unpleasant implications, it simultaneously disconnects constitutional identity from the conservative or consistency-focused theories that could provide a justification. More broadly, Jacobsohn's work is testament to the value of deep and sustained engagement with the principles and culture of other constitutional systems. Notwithstanding the greater attention to comparative experience that Jacobsohn's work has been to the forefront in fostering, I suspect constitutional scholars share a tendency to project lessons learned from our own constitutional system onto the general constitutional world. If what we are familiar with works tolerably well, it is easy to derive from this success a normative position that unfavourably evaluates other constitutional approaches. In the spirit of diversifying those

projections rather than making categorical claims, I have drawn attention to the Irish example as an illustration of the possible benefits of enabling rather than constraining constitutional amendment.

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