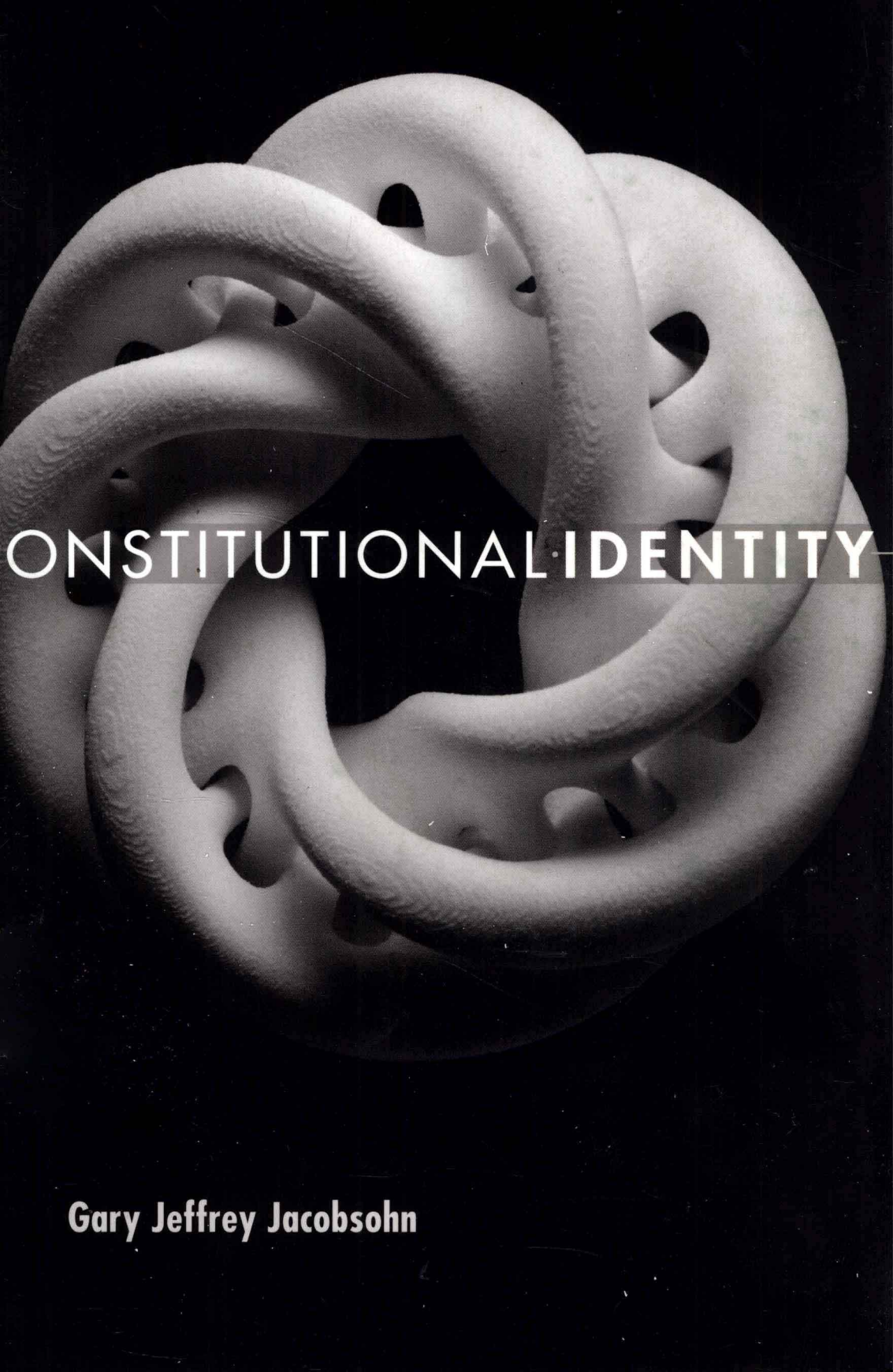
ONSTITUTIONAL IDENTITY
Gary Jeffrey Jacobsohn

Constitutional Identity

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Preface

THE COMPLETION OF THIS BOOK happened to coincide with what has become one of the more ritualized events in American national politics: the confirmation hearings for a Supreme Court Justice. In her appearance before the Senate Judiciary Committee, President Barack Obama's nominee for the Court, Judge Sonia Sotomayor, followed a familiar script that, since the ill-fated nomination of Judge Robert Bork twenty-two years earlier, more or less guarantees that these proceedings will be as dull as they can possibly be. Candidates for a position on the bench are carefully instructed to reveal precious little about their views on substantive issues; moreover, it is clear that their prospects for confirmation will be enhanced to the degree that they are adept and consistent in uttering platitudes about the role of judges in a constitutional democracy.

If learning very much about the views of judicial nominees to the highest court in the land is not a result realistically to be hoped for, following the hearings may nevertheless yield useful information about the state of mainstream legal thinking as seen from within the political realm. It was instructive, for example, to hear Judge Sotomayor, who had prior to her nomination acknowledged the wisdom of judges remaining open to good ideas from abroad, mainly accede to Republican

Senators' categorical rejection of foreign law and jurisprudence as legitimate sources for decision making on the Supreme Court. While she did not repudiate her earlier openness to learning from foreign law, she emphasized that such law could not be used to influence a decision involving an interpretation of the American Constitution. What is more, the reluctance of Democrats at the hearings seriously to engage their minority colleagues on the question suggested that, whatever the disagreements in legal and academic circles, the safe political position was acquiescence in what could be characterized as a jurisprudence of insularity.

At the same time as these proceedings were unfolding in the American Congress, a court in New Delhi was boldly challenging a long-standing provision of the Indian Penal Code that had criminalized "unnatural" consensual sexual acts between consenting adults in private. Introduced by the British in 1861, the law directed against homosexual conduct was declared unconstitutional by the High Court of Delhi in a ruling that was promptly described by informed observers as a landmark judgment in Indian jurisprudence. As one of these commentators said of the judges in the case, they "fashion[ed] a historic decision heard loud and clear, not only in India, but across the world."[1] Indeed, the judgment "is likely to rival the mango this summer as India's top export!"[2]

Unlike the mango, however, which is indigenous to the Indian subcontinent, the Court's opinion was so heavily influenced by foreign sources that it could with equal justification be described as India's top import of the summer. It fashioned a constitutional right of privacy largely out of materials appropriated from abroad, with copious references to American precedents. Prominent among these references was the majority opinion in Lawrence v. Texas, whose invocation of foreign case law, while tangential to the outcome, did much to fuel the hostility in this country toward constitutional "borrowing" that was much in evidence at the confirmation hearings. To be sure, an ex-Chief Justice of the Indian Supreme Court, whose reaction to the High Court's judgment

1. Vikram Raghavan, Law and Other Things: A Blog about Indian Law, the Courts, and the Constitution, July 7, 2009.

2. Ibid.

was that it should not be interpreted as an endorsement of homosexual conduct nor accorded any constitutive significance, opined that Indians should be more skeptical about incorporating accepted practices in the West into their own jurisprudence.[3] Still, this sentiment was decidedly at odds with the prevailing view in the Court's opinion, which saw the invalidation of the nineteenth-century British-mandated criminalization of homosexual conduct as critical to the furtherance of twenty-first-century Indian "constitutional morality."[4]

The timing of these events—the Sotomayor hearings and the ruling in Naz Foundation v. Union of India—was for me propitious, as they reinforced my sense that the subject of constitutional identity merited sustained consideration. Neither in Washington nor in New Delhi were the underlying identity-related assumptions of the protagonists in the American Congress or the Indian court elaborated. The Indian judges saw themselves as defending "a constitutional morality derived from constitutional values," and they embraced the teaching of B. R. Ambedkar, their nation's Madison, who had said at the Constituent Assembly: "[I]t is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution."[5] But these judges failed to explain the relevance of the many pages of their opinion devoted to *other* peoples' constitutions to maintaining the spirit of *their* constitution.

The ironic aspect of this omission was accentuated by the judges' insistence that the contested section of the Indian Penal Code, drafted for the colonial administrators by Lord Macaulay in the nineteenth century, was itself an alien intrusion into the subcontinent. It embodied the "Western concept" that certain sexual practices were "against the order of nature," but the jurists were quick to point out that "in India we didn't have this concept."[6] The clear implication was that in declaring the provision in question unconstitutional the Court was in effect cleansing the

3. J. S. Verma, Law and Other Things: A Blog about Indian Law, the Courts, and the Constitution, July 24, 2009.

4. Naz Foundation v. Government of India, WP(C) No. 7455/2001 (2009), par. 79.

5. Ibid.

6. Ibid., at par. 84.

Indian legal order of foreign ideas that had compromised the integrity of the indigenous culture. Or put differently, the Court manifestly intended its decision to be interpreted as a defense of an Indian constitutional identity that "protects and celebrates diversity."[7] Strangely, however, the ruling failed to include an explanation for why an identity-based defense of this kind required such a heavy reliance on foreign ideas. In moving so dramatically to excise an externally imposed source of constitutional corruption from the Indian Penal Code, what understanding of constitutional identity enabled the Court to achieve its goal by appealing to sources external to the legal order?

As for the Senators and the Supreme Court nominee, the conveniently cobbled together consensus on the dubious standing of any judicial outcome that bore an imprint of extraterritorial sway was noticeably lacking in reflection on just why the most durable constitutional order in the world required assurances that its official interpreters would not be susceptible to foreign influence. "I will not use foreign law to interpret the Constitution," Sotomayor told the Committee, some of whose members rightly suspected that her notion of usage was more narrowly conceived—and thus less categorical—than theirs. For these Senators it would not be sufficient simply to disavow foreign case law as binding or controlling precedent; to be confirmed for the Supreme Court one would have to more broadly renounce comparative usage as a legitimate source of ideas in trying to understand the Constitution.

Given the nature of these proceedings, it should not be surprising that the principals in the highly charged political setting that is a confirmation hearing failed to delve very deeply into the intricacies of the subject. In observing the spectacle, however, I wondered if even in a less fraught environment whether the issue would have received the consideration it deserved. My misgivings had to do with a sense that the problem, which understandably triggers strong opinions about the role of judges in a democratic polity, would be framed in a too limited way for establishing the connection between judicial function—the micro question—and the more macro-level question of constitutional identity. Of additional concern, this projected failure would only replicate the

7. Ibid., at par. 80.

shortcomings of constitutional scholarship, whose inattention to the phenomenon of identity was the difficulty I had sought to rectify in writing this book.

Making the micro-macro connection would mean situating the decision to "use" foreign law within a broader comparative framework that encourages one to assess the contested practice in relation to the particular circumstances of a given constitutional polity. In the same way that one might evaluate jurisprudential commitments—for example, to the original intent of the framers or to the text of the document—in light of the specific constitutional context judges in a given society operate within, the implications of applying legal materials originating outside national borders to cases adjudicated internally are likely to vary accordingly. If judges in India are less inclined than their American counterparts to attach much weight to founding understanding, or if structural principles play a more decisive interpretive role in South Africa than, say, in Australia, it would be foolish reflexively to attribute such differences to the prevalence of a more genuine judicial commitment to the rule of law in one place as opposed to the other. Of course that explanation could turn out to be true, but we should consider the strong possibility that factors associated with the character of the constitutional cultures in question will in the end yield more explanatory value.

As I argue in this book, constitutions may be variously described in terms of the mix of universal and particular attributes that define their identities. The insularity that Judge Sotomayor's questioners seemed implicitly to endorse could have been justified by aspects of American constitutional identity that arguably render such a preference highly desirable and functional. Others, in turn, might have disputed such a justification, perhaps by relying on an alternative account of constitutional identity, or by drawing different inferences from the same rendering. Had there been, for example, an inclination to challenge the prevailing wisdom at the hearings, the argument could have been pressed that the number of constitutional aspirations that the United States shares with other nations is such that following their example in cases raising comparable issues, or at least attempting to learn from them, is surely compatible with American interests. Where these aspirations can be shown to differ, there would still be some benefit, so the argument might have

gone, in looking through the prism of the other to deepen the understanding of one's own distinctive constitutional commitments.

Some version of this rationale might also have accompanied the Indian judges' use of foreign law. In anticipating the allegation of inconsistency in their opinion, these jurists could have cogently argued that there is in principle no contradiction between the selective rejection and embrace of legal inputs from abroad. In support of this claim a comparative perspective might suggest that there is no inherent problem in distinguishing among national judiciaries in terms of their propensities to encourage the international transference of law-related ideas and experience. The extensive use of foreign precedents in a transitional regime might not suit the circumstances of a polity where a discernible constitutional identity has been shaped and reinforced over many years; for example, in regard to certain rights questions that manifest a particular historical orientation toward the role of government in enforcing entitlements.

Without necessarily relying upon a carefully elaborated theory of exceptionalism, defenders of a more restrictive policy on extra-national sources could counter the universalistic thrust of the aspirational argument with a more particularist account of identity that underscores the judiciary's obligation to prevent any dilution or erosion of a distinctly American constitutional way of life. This protective posture in turn raises the question—one that I address at length in the pages to follow—of the nature of change in constitutional identity: how it occurs and what it looks like. The debate over interpretive sources—foreign and domestic—is just one instance where the struggle between forces seeking fundamental change in the nature of the Constitution and others intent on preserving its constitutive meaning is often the crux of a controversy incorporated in more mundane matters. Indeed, other events in the summer months of 2009, including constitutionally portentous struggles for power in two countries—Iran and Honduras—were in different ways revealing for the issues they raised about the durability of constitutional identity. These countries were not among those I had studied in this book, but it was easy to recognize in the crises that consumed both places some of the concerns that have been a preoccupation of mine for a number of years.

Indeed, these concerns have been at the center of my work long before I attached the constitutional identity appellation to them. When it was only the American case that was the focus of my research and writing, the questions that interested me most were those that spoke to the larger meaning of the Constitution. I was particularly taken with Lincoln's appropriation of the biblical metaphor of an "apple of gold" framed by a "picture of silver" to understand the role of antecedent principles in constituting a polity that had been compromised at its very inception by practices antithetical to those principles. For Lincoln, American constitutional identity made sense only in aspirational terms, much as it did a century later for Martin Luther King Jr., for whom the propositions of the Declaration of Independence were a "promissory note" creating regime-defining constitutional obligations.

As my scholarly interests took a comparative turn—first to Israel and then to India—the ways in which those aspirations were instrumental in constituting the American polity became clearer to me. The absence in Israel of a formal written constitution that might function as a frame to that country's foundational principles—as they had been inscribed in its Proclamation of Independence—was a testament to the hotly contested nature of those principles. The contrast with the United States was striking and instructive, but not only in highlighting the differences between the two nations and their constitutional circumstances. For while the comparison of Israel and the United States served to accentuate the constitutive prominence in the latter of non-ascriptively based commitments, it also helped me to understand that the process by which a polity's constitutional identity emerges is not necessarily as variable as those differences might lead one to expect. If, for example, the disharmony between the particularistic and universalistic strands in Israeli political culture was critical in driving the formation of constitutional identity, that dynamic existed in the American context as well, albeit in a less obvious way. Viewing constitutional development in the United States through the prism of the Israeli experience enabled me to see with greater clarity that the ascendance of certain foundational principles was not inconsistent with the continuing vitality of opposed principles and thus with an ongoing contest for the American constitutional soul.

As I progressed to my work on India, my sense sharpened that the characteristics that enabled one to draw defining contrasts among constitutions also provided a basis for identifying commonalities among regimes of disparate organizing structure and principles. The Indian Constitution's confrontational deportment vis-à-vis the surrounding social order was distinguishable from the more compliant relationship of its counterpart in the United States; but the difference led me to consider the ways in which the American document, particularly as amended after the Civil War, coexisted in a less harmonious relationship with the institutions of civil society than I had for so long assumed. As important as it is to understand the ways in which constitutions differ—a recognition that reaches back to Aristotle—so too is it vital to the comparative study of constitutionalism to appreciate the continuities in the things we compare. Comparative analysis of course confronts one with the diversity of national experiences in constitutional governance, but it also makes one aware of the ubiquitous quality of the characteristics that, in varying degrees, serve to mark constitutions as distinguishable entities of a certain type. As I hope to demonstrate, the dynamics of constitutional identity are to a significant degree an expression of a developmental process endemic to the phenomenon of constitutionalism. The specific ways in which the process unfolds will vary from one constitutional context to another—and the differences are fascinating to behold—but so too are the elements of constitutional identity that are reflective of the constitutional condition more generally and that will be featured in the pages to follow.

I have been the beneficiary of much good advice and encouragement from people near and far. To my colleagues and friends, Russ Muirhead and Jeff Tulis, I owe a special debt of gratitude for their generous efforts on my behalf. Others to whom I am indebted are Ran Hirschl, Ruth Gavison, Shylashri Shankar, Amnon Reichman, Pnina Lahav, Hahm Chaihark, Sung Ho Kim, Tom Ginsburg, Bill Kissane, Gretchen Ritter, Zach Elkins, and Mark Graber. I am particularly grateful to two of the giants in Israeli constitutional jurisprudence, Justices Aharon Barak and Mishael Cheshin, for allowing me to question them closely about their

participation in the controversial case that is the focus of one of my chapters. I wish also to thank Mike Aronson, my editor at Harvard University Press, whose enthusiasm and sage counsel were greatly appreciated during the latter stages of the preparation of this book. Finally, I must acknowledge the two Walters—Berns, my earliest mentor, and Murphy, my more recent mentor—who have played such a large role in helping me to see what is important about constitutions and other significant things. They are like bookends for my scholarly life, very different in style and intellectual orientation, but so much alike in their towering integrity and respect for the life of the mind.

A revised version of some of the material in Chapter 2 appeared in "An Unconstitutional Constitution? A Comparative Perspective," 4 *International Journal of Constitutional Law* 460 (2006). Several sections of Chapter 4 appeared in "The Permeability of Constitutional Borders," 82 *Texas Law Review* 1763 (2004); similarly, revised versions of some of the sections in Chapter 5 appeared in "The Sounds of Silence: Militant and Acquiescent Constitutionalism," in Steven Kautz, et al., *The Supreme Court and the Idea of Constitutionalism* (Philadelphia: University of Pennsylvania Press, 2009). Permission to incorporate this material is gratefully acknowledged.

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CHAPTER 1

Introduction: The Disharmonic Constitution

It is our purpose to create completely new laws and thus to tear up the very foundations of the old legal system.

—Mustafa Kemal Atatürk

We need to change the soul of the Turkish Constitution.

—Dengir Firat

The Identity Problem

Four score and three years separate these calls to action by two Turkish political figures. The occasion for the first was a speech in 1925 delivered by Mustafa Kemal Atatürk at a new law school in Ankara, in which the founder and first President of the Republic of Turkey laid out the case for a new civil code that promised to transform the ways in which the people of his nation would henceforth relate to one another. For the second it was an appearance at an old law school in Cambridge, Massachusetts, by the deputy chairman of Turkey's governing party, who was explaining why his Constitution required certain changes that would enable it to reflect the shifting underlying realities of Turkish society. A few months after Atatürk's address, the Turkish Assembly adopted a radical new civil code modeled after the Swiss example; nine weeks after the party leader's appeal for a change in the nation's constitutional soul, the country's highest court invalidated amendments to the Constitution, whose purported anti-secularist

ambitions were deemed too radical for maintaining the coherence of the document.[1]

Both of the speakers were arguably indulging in rhetorical excess; for example, it had been a staple of the governing Justice and Development Party's (AK Party) professed ideological commitments to preserve the fundamentals of the secular settlement codified in Kemalist constitutionalism, which, to be sure, the party had conveniently chosen to understand as not having succeeded in completely eviscerating Turkey's preexisting Ottoman legal foundations.[2] From the party's perspective, the constitutional amendments it had sponsored benignly affirmed that an individual's modest assertion of her religious identity—in the form of attire that denoted affiliation with a faith community to which nearly all members of the society belonged—was not incompatible with the secular underpinnings of the regime. But rhetoric aside, these statements call attention to a critical and perplexing issue in comparative constitutional theory and to the subject of this book: What are we doing when we invoke the particular attributes or characteristics of a constitution that enable us to identify it as a unique legal and political phenomenon? Will doing so help to clarify the stakes involved in struggles between the opposing forces of constitutional preservation and change?

The Turkish case, as embodied in the transition from Ottoman rule to secular republicanism, may be an unusually dramatic instance of an attempt to destroy an existing constitutional identity before entrenching a new one that in time can be expected to inspire countervailing initiatives to recalibrate the foundational commitments of the regime. But as we shall see, the issues raised in the course of Turkish constitutional contestation are hardly peculiar to that polity. In one way or another they are implicated in the constitutional sagas of all nations, even if most of these narratives have unfolded more seamlessly than in Turkey. Among these issues are the questions of most obvious and immediate concern to us: just what is a constitutional identity and how does it come into being and change?

1. E. 2008/16, K. 2008/16 (case 2008/16, decision 2008/16) 2008.

2. See, for example, Esra Ozyurek, "Public Memory as Political Battleground: Islamist Subversions of Republican Nostalgia," in Esra Ozyurek, ed., *The Politics of Public Memory in Turkey* (Syracuse, NY: Syracuse University Press, 2007).

In this book I argue that the concept of constitutional identity should be at the center of constitutional theory. Understandably perhaps, many constitutional theorists have been skeptical that identity can be anything more than a tendentiously applied label used to advance a politically and constitutionally desirable result. Laurence Tribe's view is doubtless reflective of a not uncommon attitude: "[T]he very identity of 'the Constitution'—the body of textual and historical materials from which [fundamental constitutional] norms are to be extracted and by which their application is to be guided—is . . . a matter that cannot be objectively deduced or passively discerned in a viewpoint-free way."[3] Much as a term like "identity theft" may have relevance to credit cards and other aspects of our digitally filled lives, the concept's bearing on matters of constitutional salience is at best obscure. Yet, if the philosopher Joseph Raz is correct that constitutional theories "are [only] valid, if at all, against the background of the political and constitutional arrangements of one country or another," and that "[f]ew writings on constitutional interpretation successfully address problems in full generality," then it may behoove us—or at least those of us who do constitutional theory—not to give up too quickly on constitutional identity.[4]

Tribe's skepticism, however, derives from an insight into the American constitutional condition that may resonate even more compellingly in other national contexts where the "unruly plurality of the Constitution's ideas"[5] raises additional questions about the existence of a discernible identity than in the United States. But, even if his belief that the American Constitution "as a whole embraces conflicting, even radically inconsistent, ideas at one and the same time"[6] is an exaggerated claim about a document whose authors held divergent aspirations about fundamental things, the undeniable absence of a unitary constitutive vision places a commonsensical obstacle in the way of declaring this or that identity as definitive.

3. Laurence Tribe, "A Constitution We Are Amending: In Defense of a Restrained Judicial Role," 97 *Harvard Law Review* 433 (1983), 440.

4. Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998), 152.

5. Laurence H. Tribe, "The Idea of the Constitution: A Metaphor-morphosis," 37 *Journal of Legal Education* (1987), 173.

6. Ibid.

To some extent I share Tribe's critique of such eminent constitutional theorists as Ronald Dworkin, John Hart Ely, and Richard Epstein for their acceptance of a central, unifying idea that confers unambiguous and lasting meaning to American constitutionalism. Indeed, their work points to a related problem, which is that too often constitutional theory tends to ignore the disharmonics of constitutional dynamics, preferring to conceptualize the Constitution at a level of abstraction that enables apparent tensions to disappear when theorizing is done the right way.

I take the position in the pages to follow that constitutional disharmony is critical to the development of constitutional identity, even as it may make more challenging the task of establishing the specific substance of that identity at any given point in time.[7] I also argue, however, that a vital component of the disharmony of the constitutional condition consists of identifiable continuities of meaning within which dissonance and contradiction play out in the development of constitutional identity. The forging of constitutional identity is thus not a preordained process in which one comes to recognize in the distinctive features that mark a constitution as one thing rather than another the ineluctable extension of some core essence that at its root is unchangeable. The disharmonies of constitutional law and politics ensure that a nation's constitution—a term that incorporates more than the specific document itself—may come to mean quite different things, even as these alternative possibilities retain identifiable characteristics enabling us to perceive fundamental continuities persisting through any given regime transformation.[8]

7. The "Constitution's greatness," as Tribe insists, may lie "in its resistance to neat encapsulation in any one grand tradition" (ibid., 173), yet, as we shall see, following Alasdair MacIntyre, if traditions are viewed correctly as incorporating dissonant perspectives, we will not want to deny their significance in the assessment of constitutional achievement.

8. The political theorist Hanna Pitkin was thus mostly right when she observed, "[T]o understand what a constitution is, one must look not to some crystalline core or essence of unambiguous meaning but precisely *at* the ambiguities, the specific oppositions that this specific concept helps us to hold in tension." Hanna Fenichel Pitkin, "The Idea of a Constitution," 37 *Journal of Legal Education* (1987), 167. To this I would add that such ambiguities and oppositions do not in themselves indicate the nonexistence of a core, but only render less obviously discernible a core that nevertheless endures in the idea of a constitution. As for the distinction between a constitution and a constitutional text, for the most part I follow Walter Murphy, who views the former as incorporating the latter as well as the constitutional order's "dominant