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Rights and American Constitutional Identity

Gary Jeffrey Jacobsohn
University of Texas at Austin

Much of contemporary constitutional theory underestimates the disharmonies within and disharmonies of constitutional orders. This article examines the dissonance characterizing constitutional identity that is present either in the disjunction between a constitution and the social order within which it functions, or between commitments internal to the document itself. From very early on, American framing of rights has revealed a tension between individual and collective meanings, between rights of persons and rights of the people. This article explores the manifestation of this tension in the evolution of the vexing concept of unenumerated rights. While expressive of the particularities of the American constitutional experience, the story illustrates a broader developmental process that is endemic to the constitutional condition.
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> I wish most sincerely … that a Constitution was form'd and settled for America, that we might know what we are and what we have, what our Rights and what our Duties in the Judgment of the Country as well as in our own.[1]
>
> —Benjamin Franklin

Constitutional Disharmony and the Identity Question

In the wish above, Benjamin Franklin closely tethers the emerging identity of his new country to its as yet undrafted Constitution. Moreover, the substance of this identity—"what we are"—is defined in part at least by the rights and duties that such a document might embody. Conveying his sentiments in a letter from England, Franklin intimates a connection between the rights in Great Britain and

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1. Quoted in John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (Madison, WI: The University of Wisconsin Press, 1986), 200.

those in his new country. The latter's revolutionary origins are, of course, traceable to the failure of the distant imperial power to guarantee to its American subjects a like enjoyment of the rights available to citizens of England.

In this article I address this question of identity and its relationship to constitutional rights. I argue for a dynamic conception of rights that is consistent with the evolution of a polity's constitutional identity. Thus, the rights inscribed in the Constitution that emerged from the Convention of 1787 and the addition of a Bill of Rights left a clear imprint on the new nation's constitutional identity. Unlike many nations, the agreement on a constitutional settlement—in which rights were to be guaranteed not simply by textual enumeration but principally through structural design—was vital to America's self-understanding. But as distinctive as this identity was at the inception of the regime, it, like all constitutional identities, underwent revision through the subsequent course of constitutional development.

The idea that one can establish the identity of a constitution has, however, encountered skepticism within the scholarly community. For example, Laurence Tribe has argued: "[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."[2] Tribe's skepticism 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"[3] raises more questions about a discernible identity than in the United States. Even if his belief that the American Constitution "as a whole embraces conflicting, even radically inconsistent, ideas at one and the same time"[4] 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. To some extent, therefore, I share Tribe's critique of such eminent constitutional theorists as Ronald Dworkin, John Hart Ely, and Richard Epstein, who discern a central, unifying idea that confers unambiguous and lasting meaning to American constitutionalism. Indeed, their work points to a related problem, which is that constitutional theory too often ignores the disharmonies of constitutional dynamics and prefers to conceptualize the constitution at a level of abstraction that enables apparent tensions to disappear

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

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

4. Ibid.

when theorizing is done correctly, which is to say, in line with the presumed unifying idea.

In what follows I argue that a constitution acquires an identity through experience. Its identity exists neither as a discrete object of invention nor as a heavily encrusted essence that is embedded in a society's culture and requires only to be discovered. Rather, identity emerges *dialogically* and represents a mixture of political aspirations and commitments that express both a nation's past and the determination of those seeking in some ways to transcend that past. For example, the Constitution's Preamble affirms that the document is about several things, among them establishing justice for ourselves and our posterity. One way to understand this commitment is to see it in aspirational terms. Thus constitutional fulfillment of the commitment to justice can be measured and assessed in accordance with the progressive achievement of goals identified by the Constitution's founders. For some, these goals are inscribed in the Declaration of Independence, which Martin Luther King famously described as a promise to realize as quickly as circumstances permit. In this account, *We the People* were initially unable (and in many cases unwilling) to extend the justice of the Constitution to all those who fell under its sway, but the posterity of the excluded will in due course see their constitutional entitlement fulfilled. The Constitution is thus both a legal code and a codification of certain ideals that are historically tethered to moments of constitutional framing and subsequent revision. These ideals establish broad limits for the legitimacy of constitutional change. When these boundaries are crossed, a significantly altered identity may emerge, perhaps signifying the onset of a constitutional revolution.[5] Indeed, radical

5. Bruce Ackerman has developed a non-text based understanding of constitutional change, which in the American context means forgoing an exclusive reliance on Article V's amendment procedures. He finds "revolutionary reform of the old regime" emanating from efforts that "did not respect established norms for revision." Bruce Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998), 12. In two volumes he has examined several "constitutional moments," or transformative exertions of popular sovereignty. These include post-Civil War developments that culminated in the formal incorporation of Martin Luther King's promissory note. He believes that these constitutional moments fundamentally redefined constitutional meaning in the United States. Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991); Bruce Ackerman, *We the People: Transformations*. But in distinguishing between normal and transformative change, has Ackerman provided an adequate understanding of constitutional identity? John Finn cogently argues that he has not and that the account fails to identify "who 'We the People' are, and how we are constituted." John E. Finn, "Transformation or Transmogrification? Ackerman, Hobbes (as in Calvin and Hobbes), and the Puzzle of Changing Constitutional Identity," *Constitutional Political Economy* 10 (1999): 355. This alleged failure results from a miscalculation of the significance to be attached to entrenched constitutional principles. Thus, Ackerman's commitment to "dualist democracy" (requiring deference to all legitimate expressions of the popular sovereign will) as opposed to foundationalism (requiring resistance to any deeply constitutive changes) leaves him, in Finn's view, incapable of "address[ing] fundamental questions of constitutional identity." Ibid., 363. For example, Ackerman's sovereignty-based theory of constitutional change requires accepting the legitimacy of any amendment—even one that would make Christianity the state religion—as an expression of the authentic voice of the demos. In this regard,

constitutional transformation entails the replacement of one aspirational agenda for another. But before the boundaries of this sort of change are reached, there is considerable room for evolution within the extant constitutional identity.

The ways in which changes in constitutional identity occur vary widely among countries.[6] But important as the country-specific patterns are, cross-national similarities are also discernible. It is my contention that the fundamental dynamics of identity are less the result of any specific set of background cultural or historical factors than the expression of a developmental process endemic to the phenomenon of constitutionalism. Key to this phenomenon is the concept of disharmony, which ensures that a nation's constitutional order—a term that denotes more than the constitutional document itself—may come to mean quite different things. These alternative possibilities retain identifiable characteristics that enable us to perceive fundamental continuities through any given transformation of identity. In Hanna Pitkin's instructive formulation, "[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."[7] The idea of rights as understood by the founding generation is a case in point.

In the next section I discuss a central constitutional disharmony that speaks directly to the conception of rights prevalent during the founding period and that has helped shape the constitutive understandings of succeeding generations. This reference is not to an entrenched contradiction at the core of the state's identity—such as the commitment in Israel's founding document to be a Jewish and democratic state—but a tension within an extant tradition that has triggered constitutional development. Here, I rely on Alasdair MacIntyre's notion of a living tradition: "[W]hen a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose."[8] Vital traditions "embody continuities of conflict."[9]

Jeffrey Tulis criticizes him for not "distinguish[ing] amendment from revolution." "Amendment presupposes a constitution whose identity persists over time. Revolution presupposes the disjunction of identities, the possibility of marking a change in fundamental political attributes that make a new polity truly new." Jeffrey K. Tulis, "Review of Bruce Ackerman, 'We the People: Foundations'," *The Review of Politics* 55 (1993): 542.

6. See, for example, Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (Baltimore, MD: Johns Hopkins University Press, 2009), 30.

7. Hanna Fenichel Pitkin, "The Idea of a Constitution," *Journal of Legal Education* 37 (1987): 167.

8. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: Notre Dame University Press, 1981), 206. For a thoughtful application of MacIntyre's thinking to the American constitutional tradition see, H. Jefferson Powell, *The Moral Tradition of American Constitutionalism* (Durham, NC: Duke University Press, 1993). "A tradition is . . . historical not merely in the sense of being temporally extended but more fundamentally in that it is constituted by an ongoing argument in which its fundamental agreements are expressed, defined, and revised," 24.

9. Ibid., 206. For a provocative and erudite discussion of tradition as a non-static form of social order, see H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000), 21–25.

MacIntyre built his understanding in opposition to Edmund Burke, whom he thought had defended dying traditions.[10] Rather, "A living tradition is . . . an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition . . . . [A]n adequate sense of tradition manifests itself in a grasp of those future possibilities which the past has made available to the present."[11]

A principal argument within the American political and constitutional tradition concerns alternative conceptions of rights, as manifesting either individual or collective meaning. After exploring the developmental significance of this founding antinomy, I consider the much-vexed subject of unenumerated rights in the context of the dialogical unfolding of constitutional identity in the United States. By either design or accident, the dissonance in a polity's formal constitution functions to foment change. Much of what derives from the discord will have an interpretive aspect to it—"[i]nterpretation . . . lives in dialectical tension"[12]—although we would be remiss, particularly with regard to those rights left unenumerated by the founders, if this led us to focus exclusively on the activity of courts.

The judiciary is of course a principal actor in the shaping of constitutional identity, but it is rarely a unilateral actor. And when it seeks to be a unilateral actor, it risks undermining its institutional legitimacy. As Keith Whittington explains, "The constitutional choices made with the drafting and ratification of the text only partially covers the field . . . . A great deal has to be worked out in subsequent practice, most familiarly through judicial interpretation of the Constitution but routinely and importantly through political action that construes, implements, and extends the constitutional text."[13] Although the political incentives for passing the buck on a regime's "meta-narrative" from the more transparently political institutions to the courts has been well documented,[14] a pattern of interactive institutional involvement in such questions is nevertheless

10. "[W]hen a tradition becomes Burkean, it is always dying or dead." Alasdair MacIntyre, *After Virtue*, 206.

11. Ibid., 207. Elsewhere MacIntyre elaborated on his critique of Burke: "Burke was . . . an agent of positive harm. For Burke ascribed to traditions in good order, the order he supposed of following nature, 'wisdom without reflection.' " Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: Notre Dame Press, 1988), 353.

12. Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (Cambridge: Cambridge University Press, 1998), 180.

13. Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007), 291. A similar view is at the heart of what its advocates refer to as the theory of "democratic constitutionalism." Thus, "Democratic constitutionalism views interpretive disagreement as a normal condition for the development of constitutional law." Robert Post and Reva Siegal, "*Roe* Rage: Democratic Constitutionalism and Backlash," 42 *Harvard Civil Rights-Civil Liberties Review* 373 (2007): 374.

14. See Ran Hirschl, "The Judicialization of Mega-politics and the Rise of Political Courts," *Annual Review of Political Science* 11 (2008): 93–118.

ubiquitous. The contesting strands in a nation's constitutional tradition will find their alternative visions embodied in competing power centers, prompting activity that may serve to clarify the uncertainties surrounding constitutional identity or expand its meaning in a particular direction.[15] Often this clarification or expansion occurs in conjunction with an ongoing articulation of the rights to be guaranteed a nation's people.

The Rights of the People

While identity is not fully revealed by any single constitutional document, to establish the identity of a constitution it obviously makes sense to study the text. It provides us with a transcript of how a particular group of framers provided for the governance of their polity, and often reveals their aspirations for its subsequent development. These aspirations may co-exist harmoniously within the four corners of the document, or their articulation may reveal, explicitly or implicitly, a dissonance that will need to be addressed through the constitutional politics that commences after the adoption of the document. A perfectly harmonious constitution is an illusion, as will be evident once we agree that the object of our interest is only partly incorporated in any given charter.

Again, Hanna Pitkin is illuminating: "[H]ow we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history."[16] We need not adopt the specific Burkean formulation of the prescriptive constitution, "whose sole authority is, that it has existed time out of mind," to understand that submission to the authority of constitutional rule is bound up in the narrative of a people's prior experiences, and that the constitution is "less something we *have* than something we *are*."[17] But who we are is also entwined in the conflicts of the past. These do not dissipate with the inception of a new constitutional experiment, even one that culminates in a seemingly coherent document.

The relevance of this thought to the origins of constitutional rights in America is evident in the generally accepted view that the rights to which people give their most urgent attention are those they feel they already possess. "The colonists began the controversy with the mother country because they feared losing English rights, and they declared independence only after being convinced

15. In the American constitutional context, as George Thomas maintains, the pursuit of alternative aspirational agendas in different institutional settings is the direct result of constitutional planning: "In attempting to balance agonistic principles, which furnish the basis for a workable and contained political order, the Madisonian framework necessarily invites struggles over constitutional meaning and identity." George Thomas, *The Madisonian Constitution* (Baltimore, MD: Johns Hopkins University Press, 2008), 38.

16. Hanna Fenichal Pitkin, "The Idea of a Constitution," 169.

17. Ibid., 167.

that English rights would be lost or drastically curtailed should they remain within the British fold."[18] Those rights that the colonists believed to be threatened by British policies were eloquently defended—often with language that invoked universalist themes. Colonists held that these rights were their rightful inheritance, even if many of the rights could, as an additional reason for fighting for them, also be justified as endowed by nature.

But how best to understand the nature of these rights? Did they make more sense as rights possessed by individuals against a governing power, or as rights claimed by individuals in their collective capacity as agents of governance? It may, of course, be that the question presents a false dichotomy, as a combination of the two formulations may be necessary for the attainment of political liberty.[19] How better to ensure that tyrannical government not emerge and threaten the rights of *persons* than to ground governmental power in the sovereign will of the *people*? But if this conceptualization of the problem enables us to perceive in the very rich and copiously documented efforts of the founding generation a coherent theory of rights, it also establishes a basis for serious contestation over how the rights of the people are most expeditiously protected as the nation embarked on a new constitutional direction.[20] Given the tensions inherent in balancing the rights of persons and the right of the people, a commitment to

18. Reid, *Constitutional History of the American Revolution*, 5. For a critique of this emphasis on English rights as opposed to nature as the source of rights, see Rogers Smith, "The Politics of Rights Talk, Then and Now," in *The Nature of Rights at the American Founding and Beyond*, ed. Barry Alan Shain (Charlottesville, VA: University of Virginia Press, 2007), 308.

19. Such a conclusion may be warranted after considering the debate between Justices Scalia and Stevens in the case that affirmed an individual's constitutional right to bear arms. Citing the First, Fourth, and Ninth Amendments, Justice Scalia argued that the Second Amendment should be seen in a similar fashion: "All three of these instances unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." *District of Columbia v. Heller,* 554 U. S. 570, (2008). As we shall see, the Ninth Amendment is not so unambiguous, and the same might be said of the other provisions. Justice Stevens's effort to argue for a collective right leaves one with the impression that both of the justices overstate their cases, and that the Second amendment, like those cited by Scalia, cannot so easily be dichotomized into a choice between individual and collective interpretive alternatives. The truth lies somewhere in between.

20. The notion of "the people" is a much-vexed topic, but it is important to appreciate how in the American context it is connected to the natural rights of the individual. A notable contrast is the Israeli conception of the people as understood in its founding document, the Proclamation of Independence. Thus, the one mention of natural right in the Israeli Declaration is, from the perspective of Western political philosophy, a curious one, as it refers to "the natural and historic right of the Jewish people" to establish a state. Accustomed as we are to thinking of natural right in the idiom of Lockean individualism, its association in this document with people is somewhat striking. Thus, whereas the American Declaration emphasizes self-evident truths bearing directly on the status of *individuals*, the Israeli counterpart refers to "the self-evident right of the Jewish people to be a nation, like all other nations, in its own sovereign State." If the legitimacy of the Jewish State is ultimately rooted in the chronicle of a particular people, the claim of the American people to an independent state is based on principles that are notable for their timelessness.

rights grounded in popular sovereignty was destined to be a paradigmatic case of a tradition's "continuities of conflict" in the arena of constitutional politics.

Consider the two rights that were accorded most attention by the Americans in the revolutionary period: the right to self-governance and the right to trial by jury, the second of which may be considered a corollary of the first. Writing in 1687, William Penn indicated that "this Birth-right of Englishmen shines most conspicuously in two things: 1. Parliaments 2. Juries."[21] Nearly one hundred years later, in 1774, the Continental Congress declared: "[T]he first grand right is that of the people having a share in their own government by their representatives chosen by themselves, and in congruence, of being ruled by *laws*, which they themselves approve, not by *edicts* of *man* over whom they have no controul . . . . The next great right is that of trial by jury."[22] Popular derivation of law may be the core right for which the British subjects in the American colonies fought, and while these subjects moved into separate camps of defenders and opponents of the proposed new Constitution of 1787, Federalists and anti-Federalists alike broadly agreed that the people's rights required moving the locus of sovereignty away from institutional ownership. The colonists may have passionately asserted their rights as Englishmen, but they were not content with leaving these rights—or any others—subject to the unquestioned discretion of legislative or executive supremacy.

Yet, it is a commonplace that the original Constitution protected rights through an elaborate set of inter-locking institutional mechanisms and dynamics. The Constitution, as Alexander Hamilton famously said, was itself a bill of rights. Its structure was designed to prevent the exertion of power from culminating in the evisceration of rights. James Madison, echoing his sentiments in Federalist 10, argued in the First Congress, "The prescriptions in terms of liberty, ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this is not found in either the executive or legislative departments of government, but in the body of the people,

21. William Penn, "The Excellent Privilege of Liberty and Property Being the Birth-right of the Free-born Subjects of England," in *The Founders' Constitution*, ed. Philip Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1987), 432.

22. Continental Congress to the Inhabitants of Quebec, 26 October 1774, in Kurland and Lerner, eds., *The Founders' Constitution*, 442. As the historian Jack Rakove observes, "The colonists' commitment to the right of representation is . . . the controlling theme in the narrative of the American Revolution." Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1960), 297. Also, Walter Berns, "[The Constitution] is a bill of *natural* rights, not because it contains a statement or compendium of those rights—it does not—but because it is an expression of the natural rights of everyone to govern himself and to specify the terms according to which he agrees to give up his natural freedom by submitting to the rules of civil government." Walter Berns, "The Constitution as Bill of Rights," in *How Does the Constitution Secure Rights?* ed. Robert Goldwin and William Schambra (Washington, DC: AEI, 1985), 54.

operating by the majority against the minority."[23] This analysis expresses the nation's most constitutionally salient disharmony: the collective right of self-government, which is to say the essence of democratic liberty, requires that laws be created by political majorities; but those majorities must, through either the internal architecture of structural design or an external check on their occasional excesses, be rendered compatible with the rights of individuals. From the nation's inception, the logic of a specific enumeration of rights was in tension with the enumeration of powers that was central to the constitutionalism of the Convention's immediate winners. This original disharmonic arrangement established one of the major paths along which American constitutional identity would develop in the years ahead.[24]

The pervasiveness of this disharmony can be seen in the scholarly controversy surrounding the proper conceptualization of the Bill of Rights, which became the textual source for the principal check on the excesses of the people as might be imposed by a willful majority. Or not. Madison's articulated concerns about the potential dark side of majority rule surely provided a dominant checking motif for the amendments he was so instrumental in getting adopted. Yet, a powerful argument has been advanced to the effect that the primary purpose of the Bill of Rights was not to inhibit popular majorities but to empower them.[25] One need not embrace uncritically Akhil Reed Amar's controversial thesis—that underlying the amendments was a structural logic intended to promote majoritarianism and thus reaffirm the ultimate sovereignty of "We the People of the United States"—to appreciate that the authors of our constitutional rights tradition were as much preoccupied with how to facilitate popular governance as they were in creating methods to obstruct it. "[V]irtually every Bill of Rights provision … evinces at least as much concern with the agency problem of protecting the people generally from self-interested government policy as with protecting minorities against majorities of fellow citizens."[26]

My purpose is not to weigh in on either side of the debate over the Amar thesis; rather it is to underscore the fact that to "take rights seriously" requires a recognition that an account of the entitlements under the provisions of the Constitution is not in itself sufficient. Persons do indeed have a guaranteed set of rights. Some of them may be understood as unalienable and others the

23. James Madison, "Debate in the First Congress," in *Contexts of the Constitution*, ed. Neil H. Cogan (New York: Foundation Press, 1999), 808.

24. As Daniel T. Rodgers has noted, "[The Bill of Rights] was a document born in debate, dissention, compromise, and contending power—born, in short, out of the usual processes of popular politics." Daniel T. Rodger, "Rights Consciousness in American History," in *The Nature of Rights at the American Founding and Beyond*, ed. Barry Alan Shain (Charlottesville, VA: University of Virginia Press, 2007), 265.

25. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998).

26. Ibid., 67.

creation of those with the power to bestow them. But the people, acting in their collective capacity, have the authority as a matter of right to determine, legislatively or through the amendment process, the scope and substance of these as well as additional rights.[27]

Take, for example, the second of the grand rights held sacrosanct by the framers: trial by jury.[28] In the same debate in the First Congress in which Madison warned against the danger to liberty posed by the majority, he observed: "Trial by jury cannot be considered as a natural right, but a right resulting from the social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any of the preexistent rights of nature."[29] Given the context of Madison's speech, this right to "secur[e] the liberty of the people" can be interpreted to mean that the jury right is vital to the freedom of the individual, indeed that it is part of the larger political project of "regulat[ing] the action of the community." But consider another view from the anti-Federalist camp. "[Trial by jury] is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. To hold open to them the offices of senators, judges, and offices to fill which an expansive education is required, cannot answer any valuable purposes for them; they are not in a situation to be brought forward and to fill those offices; these, and most other offices of any considerable importance, will be occupied by the few."[30] Reflective of the differences between the alternative political visions vying for supremacy at the time, the second account emphasizes the jury as an institutional arrangement that enables citizen participation in politics.

We of course know which side prevailed—at least as far as the adoption of the Constitution is concerned. But in the contest between supporters and detractors it makes sense to avoid declaring winners and losers. With regard to the right to trial by jury, there surely existed agreement on the virtues of the jury system. The differences in how the right might best be formulated, mirroring the individual/collective conceptualizations discussed above, represent differences in degree more than in kind. The original Constitution had included an explicit

27. The recent debate in the Second Amendment case of *District of Columbia v. Heller,* 554 U.S. 570 (2008), provides a unique look at the originalist debate concerning collective and individual rights. While the text of the Second Amendment explicitly invites such a debate—taken up by Justices Scalia and Stevens—the arguments set forth in that case have broader implications for the larger question of constitutional design.

28. This evaluation has deep roots; thus, John Philip Reid writes of "the sacrosanct centrality of jury trial in British constitutional thought during the age of the American Revolution." *Constitutional History,* 48. Once the colonists asserted that a right they were claiming—for example, the jury right—was a British right, they were able to invoke an even broader right, namely the right to equality. Ibid., 62.

29. Madison, "Debate in the First Congress," *Contexts*, 807.

30. Letter from the Federal Farmer, No. 4, in Ibid., 710.

mandate for jury trial in federal criminal cases (Article III); and the Bill of Rights, which had been the rallying cry of the Constitution's opponents, incorporated no fewer than three amendments guaranteeing juries (Amendments 5, 6, and 7). Thus, to the extent that one can speak of a tradition of trial by jury in the United States, it commenced with wide support, despite some internal tension over the prerogatives claimed on behalf of jurors vis-à-vis their role as actors in the workings of the larger democratic order.

In fact this tension became more pronounced over time.[31] Whereas today the jury is, with rare exception, informed that it has an obligation to follow the law as stated by the court, in the nation's formative years, and through approximately the first half of the nineteenth-century, the prevailing practice was to allow, and often to encourage, the jury to consider the law as well as the facts in the exercise of its responsibilities. Such was the consensus on this matter that politicians as far apart in their views as Jefferson and Hamilton could agree on this issue of citizen involvement.[32] No longer, however, does the jury enjoy this power as a matter of right. Evolution of the American jury has been characterized by a movement from a sharing of responsibilities between judge and jury to a division of responsibilities. In theory at least, juries are confined to judgments of facts. As a result, the policymaking role of the jury has been significantly attenuated.[33]

We have traveled a great distance from the time when Alexis de Tocqueville could say: "The institution of the jury . . . places the real direction of society in the hands of the governed . . . and not in that of the government . . . . [I]t invests the people, or that class of citizens, with the direction of society . . . . The jury system as understood in America appears to me as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority."[34] This assessment cannot but strike us as anachronistic even as the depiction perhaps appeals to our antiquarian interests. But I suggest that we take it seriously

31. The best historical accounts may be found in Mark DeWolfe Howe, "Juries as Judges of Criminal Law," *Harvard Law Review* 52 (1939): 582; Note, "The Changing Role of the Jury in the Nineteenth Century," *Yale Law Journal* 74 (1964): 170; Morris S. Arnold, "Law and Fact in the Medieval Jury: Out of Sight, Out of Mind," *American Journal of Legal History* 18 (1974): 267; and Roscoe Pound, *Justice in America* (New York: H. Holt and Co., 1930).

32. Statements of support from Jefferson and Hamilton, as well as many others, for the doctrine of jury nullification may be found in Justice Gray's lengthy dissenting opinion in *Sparf and Hansen v. United States*, 156 U.S. 51 (1895).

33. Important examples of juries regularly refusing to enforce the law: the navigation acts passed by the British Parliament in the eighteenth century; the fugitive slave laws in the nineteenth century; and prohibition in the first part of the last century.

34. Alexis de Tocqueville, *Democracy in America*, 2 vols. (New York: Random House, Vintage Books, 1945), I, 293.

for the larger point embedded in Tocqueville's observation, which remains relevant to our understanding of the original constitutional provision for rights in connection with our evolving constitutional identity.

Thus a nation's constitutional identity extends beyond the text itself, and the trial jury provides a prismatic look into the process by which identity evolves. A dialogical engagement between the core commitment(s) in a constitution and its external environment is crucial to the formation and evolution of a constitutive identity. In this sense, the identity of any constitution presumes that, as Robert C. Post notes, "[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture."[35] Or as Anne Norton suggests, "Those who constitute themselves in writing too often remain willfully unconscious of the unending dialectic of constitution. They prefer to see the writing of the Constitution as the perfect expression of an ideal identity."[36] She continues: "The written text, which exists beyond the moment of its composition, speaks to the people and their posterity of their identity and aspirations. It claims to speak to them not as artifacts of the past, but as present Law. No text, however transcendent, is unmarked by its time. No text, however abstract, speaks to all circumstances. For all these reasons there will be disjunctions between what is said to be and what is, between a people and its Constitution."[37]

These disjunctions—or using my term, disharmonies—between text and behavior provide context for one of the roles of the trial jury as imagined by the framers. Whether applying the law applicable to the facts in a given case, or considering the law in relation to rights germane to the circumstances presented in the legal situation, jurors will be confronted by the realities of social change and contingency. Theirs is not a license to innovate radically on the regime of rights established by the Constitution, but to anticipate and consider the changes inevitably occurring in the mores and practices of the social order. "[W]e must never forget," Chief Justice John Marshall famously reminded us, "that it is a *constitution* we are expounding."[38] While he was addressing himself to the *powers* of government, the idea that the document needed to be "adapted to the various *crises* of human affairs"[39] is equally applicable, as I argue in the next section, to the domain of *rights*.

35. Robert C. Post, "The Supreme Court, 2002 Term—Forward: Fashioning the Legal Constitution: Culture, Courts, and Law," *Harvard Law Review* 117 (2003): 8.

36. Anne Norton, "Transubstantiation: The Dialectic of Constitutional Authority," *University of Chicago Law Review* 55 (1988): 467.

37. Ibid., 469.

38. McCulloch v. Maryland, 17 U. S. 316 (1819), at 408.

39. Ibid., at 415.

Unenumerated Rights

It is beyond the purview of this article to dwell on the unenumerated structures of governmental power that have attained constitutional legitimacy over the years, often with the blessings of people well-known for their passionate originalist jurisprudential commitments. These structures, while perhaps traceable to a specifically enumerated power, may take on a functional role that realistically places them in an unenumerated categorical status. One irrefutable response to this development is to argue, "As the enumerated powers are given expanded interpretation ... constitutional rights assume a greater importance within the constitutional scheme."[40] A more controversial rejoinder is to argue in tit-for-tat fashion that the expansion of enumerated powers beyond those specifically contemplated by the framers justifies a commensurate expansion of enumerated rights. Much as we might recoil from the playground sentiment animating such a construction, it does have the virtue of seemingly advancing the goal of constitutional balance and equilibrium.[41]

Of course the case for unenumerated constitutional rights is not solely dependent on developments occurring elsewhere within the constitutional system. Consider the familiar debate among the pro and anti ratification factions over the wisdom of adopting a Bill of Rights. The debate culminated in amendments that satisfied the opponents' insistence on a specific enumeration of rights while responding to the Federalists' concerns about the threat to rights posed by just such an enumeration. As Jack Rakove notes, "[A]nti-Federalists came close to adopting a modern, positive law position on the authority that rights, however ancient or natural their origins, would have once the Constitution was ratified. By implying that traditional rights and liberties would be rendered insecure if they went undeclared, Anti-Federalists in effect suggested that the existence of these rights *depended* upon their positive expression."[42] In his famous latter to Madison in late 1787, Thomas Jefferson summed up the view that had been elaborated often and at great length during the ratification debates. "[A] Bill of Rights is what the people are entitled to against every government

40. Randy E. Barnett, "James Madison's Ninth Amendment," in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*, ed. Randy E. Barnett (Fairfax, VA: George Mason University Press, 1989).

41. Such a construction is consistent with the very persuasively argued thesis about rights set forth by Richard Primus. "[T]he major pattern of development of American rights discourse has been one of concrete negation: innovations in conceptions of rights have chiefly occurred in opposition to new adversities, as people articulate new rights that would, if accepted, negate the crises at hand." Richard A. Primus, *The American Language of Rights* (Cambridge: Cambridge University Press, 1999), 7. Just as many of the rights claimed by the colonists were asserted in reaction to the expansion of power thrust upon them by the British administration, an analogous post-Constitution claim might be seen as appropriately responsive to similar adversities flowing from governmental accretion of power.

42. Jack N. Rakove, *Original Meanings,* 324.

on earth, general or particular, and what no just government should refuse, or rest on inference."[43]

Jefferson was less impressed than Madison by the argument often made on the other side and as recently as three weeks before the former's letter had been sent to his Virginia colleague. "If we accept an enumeration," James Wilson had emphatically contended, "everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete."[44] That the original Constitution had in fact incorporated certain rights under the ambit of its protection did not help Wilson's argument. But I find the disagreement about the efficacy and wisdom of enumeration of less importance to the question at hand than the fact that the eventual addition of the ten amendments did not threaten either side's substantive commitments to the rights critical to their contrasting, if overlapping, political visions. Moreover, the enumeration that found its way into the Constitution was fully compatible with the prevailing view regarding constitutional provisions: they were intended to comport with the needs and contingencies of the future.

Thus, in his second essay, the anti-Federalist Brutus wrote: "When a building is to be erected which is intended to stand for ages, the foundation should be firmly laid. The Constitution proposed for your acceptance, is designed not for yourself alone, but for generations yet unborn."[45] Looking at this building from the perspective of our time, the philosopher Joseph Raz has written: "It is still the constitution adopted two hundred years ago, just as a person who lives in an eighteenth-century house built two hundred years ago. His house has been repaired, added to, and changed many times since. But it is still the same house and so is the constitution."[46] The house metaphor in both instances is intended to caution against confusing change with loss of identity, which in general is very good advice. Much as an old person differs in substantial ways from the person of his or her youth, old renovated houses and old frequently altered constitutions differ in salient respects from their earlier incarnations but arguably remain alike in terms of the properties that establish the sameness of identity. Yet, however clarifying, this reasoning, when applied to constitutions, could also obfuscate matters if it encourages us to think of identity purely in dichotomous terms rather than as something connected to a continuum. The language of *loss* and *gain* describes dramatic instances of identity transformation. But framing the issue in this way fails to capture the idea of identity as an

43. Thomas Jefferson to James Madison, 20 December 1787, in Kurland and Lerner, *The Founders' Constitution: Major Themes*, 457.

44. James Wilson, "Debate in the Pennsylvania State Convention," in *Contexts of the Constitution*, ed. Neil H. Cogan, 739.

45. Kurland and Lerner, *The Founders' Constitution: Major Themes*, 451.

46. Joseph Raz, "On the Authority and Interpretation of Constitutions," 191.

evolving phenomenon, in which change is compatible with continuity rather than opposed to it. Unlike structures such as houses, constitutions are in decisive ways characterized by disharmony, and this condition generates a dialogical process that may result in changes in identity that, however significant, seldom culminate in a wholesale transformation of the constitution.

Brutus' sentiment is consistent with Hamilton's view in *Federalist 34*: "[W]e must bear in mind, that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil Government are not to be framed upon a calculation of existing exigencies; but upon a combination of these, with the probable exigencies of ages, according to the natural and tried course of human affairs."[47] To be sure, Brutus was criticizing the 1787 document for its failure to entrench a "full declaration of rights," while Hamilton was invoking the future to defend the powers delegated to the federal government. But the contexts for these remarks are not irrelevant to the question of future rights. The rectification of the framers' failure produced a document that included language intended to counteract the limitations of entrenchment discussed by Wilson and many others: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (Ninth Amendment). And the same language might be seen as allaying the fears of those worried about the expansion of governmental authority that Hamilton described in his defense of the Constitution. Yes, "[t]here ought to be a CAPACITY to provide for future contingencies, as they may happen;"[48] but a similar capacity should exist to ensure that such provisions will not leave unaddressed new threats to rights that might thereby have been created.[49]

The Ninth Amendment, so long neglected in both law and scholarship, has experienced something of a renaissance in recent decades. Much of it has been prompted by two related events: Justice Arthur Goldberg's concurring opinion in the 1965 case of *Griswold v. Connecticut*[50] and Judge Robert Bork's rejection, during his 1987 confirmation hearings to be a Supreme Court justice, of efforts by Goldberg and others to use the amendment to establish a constitutional right of privacy. In the ensuing debate the Ninth Amendment quickly became hotly contested constitutional terrain on which very old battles, especially over such issues as judicial activism and states rights, are being fought.

Rather than enter the battlefield, I want to place the Ninth Amendment at the center of my argument about rights and constitutional identity. That placement

47. No. 34.

48. Ibid.

49. As Justice Joseph Story pointed out: "[I]t is not always possible to foresee the extent of the actual reach of certain powers which are given in general terms"; which "may be construed (and perhaps fairly) to certain classes of cases which did not at first appear within them."

50. 381 U.S. 479 (1965).

fits comfortably with the "generations yet unborn"/"probable exigencies of ages" orientation of the Constitution's framers. Thus I agree with Charles L. Black, Jr.'s observation that "The Ninth Amendment was put where it is by people who believed they were enacting for an indefinite future."[51] Yet, I also concur with Norman Redlich's description of the amendment as "the original 'safety net' to compensate for imperfection of language and the inability to provide for changing circumstances."[52] Neither of these commonsensical affirmations requires taking a position on the question much debated by scholars—namely, to whom was the future-oriented language of the Ninth Amendment directed?

That scholarly debate is a version of the collective right/individual right dispute discussed earlier. On one side are Akhil Reed Amar and his student Kurt Lash. According to Amar, "the most obvious and inalienable right underlying the Ninth Amendment [is the] collective right of We the People . . . To see the Ninth Amendment, as originally written, as a palladium of countermajoritarian individual rights—like privacy—is to engage in anachronism."[53] In Lash's take on the majoritarian directive of the amendment, "the area of retained freedom is left to the sovereign control of the people in the states."[54] Rather than legitimating the creation of new rights by the federal judiciary, the Ninth Amendment is, along with the Tenth, an important anchor for the Constitution's system of federalism. "The history of the Ninth Amendment is inextricably bound to the history of federalism under the American Constitution . . . . The rejection of federalism as a constraint on federal power led to the disparagement of both amendments during the New Deal."[55]

Other scholars, notably Randy Barnett, have found this account wanting. As far as engaging in anachronism is concerned, "[T]he collectivist interpretation of the phrase 'others retained by the people' is anachronistic—a projection of contemporary majoritarianism onto a text that is and was most naturally read as referring to the natural rights retained by all individuals, and to these rights alone."[56] Barnett stresses the antimajoritarianism of the founders (in particular, James Madison, the key figure in the adoption of the Ninth Amendment),

51. Charles L. Black, Jr., "On Reading and Using the Ninth Amendment," in *The Rights Retained By the People*, ed. Barnett, 337. Or as the constitutional historian Leonard W. Levy noted, "Nothing in the thought of the Framers foreclosed the possibility that new rights might claim the loyalties of succeeding generations." Leonard W. Levy, *Origins of the Bill of Rights* (New Haven, CT: Yale University Press, 1999), 255.

52. Norman Redlich, "The Ninth Amendment," *Encyclopedia of the American Constitution*—Vol. 3 (New York: Macmillan Publishing Co., 1986), 1319.

53. Amar, *The Bill of Rights*, 120.

54. Kurt T. Lash, *The Lost History of the Ninth Amendment* (Oxford: Oxford University Press, 2009), 357. For Lash, the amendment reduces essentially to the "right to local self-government." Ibid., 360.

55. Ibid., 360.

56. Randy E. Barnett, "Kurt Lash's Majoritarian Difficulty: A Response to a Textual-historical Theory of the Ninth Amendment," 60 *Stanford Law Review* 937 (2008): 940.

disputes the federalism interpretation, and presses his long-held argument that the architects of this provision intended it to be a judicially enforceable source for guaranteeing certain fundamental rights. "The fact that the Framers of the Constitution . . . preferred structural constraints to the 'paper barriers' enforced by judges does not mean that they would have us ignore judicial review of such barriers if their structural constraints were found wanting in practice."[57] Though the task may be difficult, the judiciary is not justified in declining, especially on the basis of erroneous historical and textual reasoning, the vindication of rights left unspecified in the Constitution.

One of the problems with this debate lies in its failure to acknowledge sufficiently the disharmonic aspects of American constitutionalism and their implications for individual rights. Situating the meaning of the Ninth Amendment in an interpretive contest between alternative originalist models—majoritarian and antimajoritarian—presents a false dichotomy. It is as if the framers had not been inclined toward both. As Richard Primus has shown, the rights that received official recognition at the founding embodied a distinctly situational content. Many of them arose in response to specific British policies and thus can best be viewed as having been substantially conditioned by contemporary exigencies.[58] This experience, moreover, has been replicated in subsequent American constitutional development; and the reactive pattern has implications for how we should consider those "rights retained by the people." "If rights are features of a social practice . . . then changed circumstances and attitudes engender new rights. Those new rights may not be specified in the Constitution. But the Constitution, through the Ninth Amendment[,] provides a mechanism for recognition and enforcement of unenumerated rights."[59]

Such recognition occurs within a political dynamic that entails both majoritarian and antimajoritarian inputs. Rights that today enjoy constitutional status but which can only be deemed unenumerated at the founding—perhaps most prominently privacy—reveal that the course of their development involved multiple efforts in courts, legislatures, and executive offices.[60] What's more,

57. Randy E. Barnett, "James Madison's Ninth Amendment," 28.

58. Richard A. Primus, *The American Language of Rights*, 97.

59. Ibid., 245. See also, Laurence H. Tribe, *The Invisible Constitution* (Oxford: Oxford University Press, 2008), 146. An interesting interpretation of the debate over enumerated rights may be found in Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (London: Routledge, 2010). "Unenumerated rights loom as the most unbound and open-ended. Yet, precisely because of this, they have the greatest need for anchoring and binding within the confines of constitutional identity and beyond." Ibid., 75.

60. See, for example, Neal Devins, *Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate* (Baltimore, MD: Johns Hopkins University Press, 1996). As Devins observes, "The last word [on the Constitution's meaning] . . . is never spoken. Through an ongoing dialectic that involves all of government, constitutional meaning is more a work-in-progress than a finished product." Ibid., 55.

the history of rights discloses that their recognition involved efforts from below as well. As Daniel T. Rodgers has argued, "Rights have been made, quested, remade at every level of American society, often by outsiders to the polity, far from the structures of power."[61] The process I am referring to is hardly a coordinated endeavor. It is typically characterized by contention, checking, and balancing. My concern lies less with identifying the exact institution that was intended to serve as trustee for the implementation of unenumerated rights, than with the development of constitutional identity. So, I view the Ninth Amendment as part of the aspirational component of American constitutionalism, a symbol of the framers' commitment to progressive realization of their founding principles.

Publius announced in the last paper in *The Federalist* that "I am persuaded that it [the Constitution of 1787] is the best which our political situation, habits, and opinions will admit."[62] In his famous "I Have a Dream" speech, Martin Luther King stated that more could be said about the document. "When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir."[63] Following Lincoln and others who apprehended an aspirational dimension in American constitutional development, King, in effect, attached three additional words to the Publius comment: "at this time." The framers might not have dwelled on the perfect solution to the political problem, but in King's persuasive account they did more than achieve what was immediately possible.

This distinction between the actual and the ideal is sufficiently familiar that it prompts one to consider if it is endemic to the constitution-making process. From a comparative perspective on constitutional design, the Ninth Amendment bears a striking resemblance to the directive principles that in other countries are included in governing documents to guide subsequent constitutional development. For example, the most distinctive feature of the Indian Constitution is its inclusion of a section of Directive Principles of State Policy, which found its way into the document "in the hope and expectation that one day the tree of true liberty would bloom in India."[64] The Principles are non-justiciable. However,

61. Rodgers, "Rights Consciousness," 277.

62. *The Federalist*, No. 85, Henry Cabot Lodge, ed. (New York: G. P. Putnam's Sons, 1888), 547.

63. Martin Luther King, "I Have a Dream," Keynote Address of the March on Washington, D.C., for Civil Rights (August 28, 1963), in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* ed. James M. Washington (San Francisco, CA: Harper & Row, 1986), 217.

64. Other examples of constitutionally inscribed directive principles may be found in the constitutions of Nigeria, Spain, Portugal, and Namibia. See Nigeria Constitution ch. 2, arts. 13–24; Constitución tit. I, ch. 3, arts. 39–42 (Spain); Constituição Da Republica Portuguesa, Sec. I (Portugal); Namibia Constitution, ch. 11, arts. 95–101. The practice has also been incorporated in international agreements, such as the International Covenant on Economic, Social and Cultural Rights. See G.A. Res. 2200A, U.N. GAOR, 21st Sess. Supp. No.16, at 49. U.N. Doc. A/6316 (1966).

through judicial interpretation they have acquired more than simply hortatory significance. They inform the meaning of enforceable fundamental rights provisions, and they include the idea that the Indian State is constitutionally mandated to realize radical social reconstruction. The nation's framers wished to affirm that their new Constitution was both an aspirational document and a strictly legal charter, and they expected the directive principles, while non-justiciable, to play a role in placing moral and political obligations on the state.

The comparative experience has implications for Americans, whose predominant inclination has been to view the judiciary as exercising a monopoly over constitutional interpretation. When the aspirational dimension of constitutionalism is made explicit, as in the case of those constitutions that include directive principles, the collaborative role of other political institutions in the realization of constitutional norms is also made more evident.[65] The lesson is not that others consider adoption of similar provisions; rather it is that they take seriously the existence of implicit constitutional commitments (promissory notes if one likes) that create obligations—political, moral, and legal—extending beyond the jurisdiction of courts. Or, in the case of Americans and their rights, the specifications of rights retained by the people confers upon officials responsible for constitutional development (i.e., more than just judges) an invitation to diminish the gap between actual conditions and political ideals.

While the task possesses a special poignancy and meaning in places like India where the contradictions between constitutive ideals and existential reality are so pronounced, it needs to be confronted in all polities. The salient contradictions will vary from place to place, but inherent in the constitutional condition, whether subtle or dramatic, is a disharmony manifest either in the disjuncture between a constitution and a society or between commitments internal to a constitution. As social mores change and as the demographics of a society undergo major transformations, views of what constitutes an entitlement may change as well. Is the right to marry guaranteed to all regardless of sexual preference? Is the right to health care something to which every individual is entitled regardless of economic circumstance?

The answers to these questions will depend on developments occurring on multiple fronts. In the case of matrimonial rights, for example, legal changes at the state level—whether the result of actions in courts, legislatures, or directly in voting booths—may intersect with efforts pro and con at the federal level. Together, they may establish some new understanding about the reach of the

65. This is not to say that the Directive Principles are unrelated to the Court's own interpretive powers. As the Indian example illustrates, they can be relied upon to influence judicial interpretation of enforceable provisions (especially fundamental rights), and they can be a source to be drawn upon to assess the constitutionality of legislative enactments.

Constitution with reference to a matter that was clearly not within the purview or consideration of the authors of the document. As Robert Post and Reva Siegal point out, "Understanding the recent controversy about same-sex marriage ... requires us to appreciate the many subtle ways that constitutional norms circulate among divergent actors in the American constitutional system, traveling along informal pathways that do not always conform to official accounts of constitutional lawmaking and interpretation."[66]

Of course, just as the framers had not addressed themselves to the specific same-sex claim at issue, they had also left unaddressed the more general right to marry. Was it therefore an unenumerated right to be later affirmed and ratified in the name of the people? Some of the specific variations possibly subsumed within the marriage right—to a person of a different race, to multiple partners—have over time been given definitive answers through the elaborate workings of the larger political process. Whether the ban on same-sex marriage will follow the path of anti-miscegenation laws or anti-polygamy restrictions remains to be seen. But just as had occurred in these instances, the final determination will not be the product of any unilateral institutional fiat, and it will have important societal implications that could affect the identity of the larger constitutional order.

Conclusion

To this point, I have not mentioned the one glaring exception to the framer's commitment to rights. The Constitution's egregious concessions to the institution of slavery are, however, compatible with the argument presented. On its face, the 1787 document stands in massive contradiction to the principles of the Declaration of Independence. Indeed, there is language clearly complacent toward the existence of human bondage in America. But even that language—requiring, for example, the end of the slave trade in twenty years—indicates a level of internal disharmony consistent with the many contentious debates surrounding that issue during the framing of the Constitution.[67] Once, however, the constitutional order is widened to include a philosophical tradition that incorporates the nation's founding document, American constitutional identity assumes an aspirational dimension incompatible with the holding of human beings as property. This was the view held by Abraham Lincoln and eventually

66. Robert Post and Reva Sigal, "*Roe* Rage: Democratic Constitutionalism and Backlash," 382. Or as Daniel T. Rodgers argues, "The current emotionally charged and politically polarized furor over gay rights is no historical aberration; its dynamics are among the most familiar in American history. Yet it is from this ongoing, passionate democratic debate over rights, often far from the dicta of courts, that the expansion of rights has drawn its primary historic energy." Daniel T. Rodgers, "Rights Consciousness in American History," 259.

67. See, for example, David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2008).

Frederick Douglass, both of whom emphasized the profound discordance between constitution and social order.

One need not adopt their aspirational perspective—and many progressives in their time as well as prominent scholars in ours have not—to recognize the dynamic through which an antidiscrimination principle became a fundamental component of American constitutional identity. Over the years, the American document (if not always its interpretation) took on a more aggressive stance towards entrenched interests, at least those implicated in the most egregious of the society's inequalities. According to most scholars, the Civil War and the amendments that followed in its wake either radically reconstituted the American polity or enabled it in time to make do on its inaugural promise. While I favor the second account, the dialogical interaction of internal and external constitutional disharmonies is discernible regardless of one's interpretive preference. Thus, codification by the post-War amendments of the principle of equal treatment was a signal moment in the development of American constitutional identity, marking the official ascendance of the universalist strand in the nation's conflicted constitutional tradition. But the system's highly fragmented distribution of political power guaranteed that the more particularistic strand would not lack for institutional muscle as its advocates fought to undermine the constitutive significance of the changes wrought through the amendment process. The constitutional identity of the text may have changed, but the constitutional identity of the American people (citizens and public officials) was only beginning its transformation. Ultimately, stability in the identity of the constitutional order depended on convergence of the two.

A much chronicled struggle followed. It was a protracted contest involving multiple interventions by political actors distributed across institutions and between levels of government, all responding differently to pressures emanating from a constantly shifting social landscape. There is good reason to portray the process as a uniquely American story.[68] A century after the Constitution's altering, the gap between the ideal and the actual was greatly narrowed, as the "unending dialectic of becoming and overcoming"[69] produced rough alignment between text and behavior.[70]

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68. See, for example, Michael Klarman, *Unfinished Business: Racial Equality in American History* (Oxford: Oxford University Press, 2007).

69. Anne Norton, "Transubstantiation: The Dialectic of Constitutional Authority," 463.

70. Consider Madison in Federalist #49. It was only in "a nation of philosophers" that "[a] reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason." Implicit in his calculation is the idea that a constitution, however reasonable and clear in its articulation of rules and principles, can succeed in translating word into deed (and thereby establish a discernible identity) only if fundamental continuity in basic law and actual constitutional practice are seen as two sides of the same coin. Federalist #49 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor, 1961), 314.

Again, the analogy to the directive-principles model applies to these later amendments, most explicitly in Section 5 of the 14th Amendment (applicable to Congress) but also in the new meaning of the due-process clause that, for many, performs a substantive role not unlike that of the unenumerated rights provision of the Ninth Amendment. As we have seen, the rights retained by the people may be interpreted as rights possessed by individuals against governing power, as well as rights claimed by individuals in their collective capacity as agents of democratic governance. In this respect the innovations of the Fourteenth Amendment replicate the multi-pronged approach of the framers, whose determination to provide for the future was conjoined with a passionate commitment to preserving the rights of the prescriptive constitution that was central to their British inheritance. Whether we focus on questions of rights or structure, creating a balance and continuity between a constitutional past and a constitutional future is ultimately determinative in the forging of a constitutional identity.

Balance and continuity are only part of the story, however. Founding choices are themselves a blending of continuity and change. What emerges as the earliest manifestation of constitutional identity is a preview of subsequent incarnations, as the balance between new and old is transformed over time. The burden of my argument has been that the disharmonies in the constitutional *present* are both explicable in light of the experiences of the past and critical to the shaping of what lies ahead. How a society conceptualizes rights cannot fully account for its constitutional identity, but it can serve as a window into the dynamic determining that identity's evolving content. The dynamic entails prescriptive and disharmonic elements. The latter has both internal and external aspects to it, the first referring to tensions within a constitutional tradition, the latter to the confrontation between constitutional aspirations and the social/political setting in which they are situated. What Alasdair MacIntyre said of a "tradition of enquiry"—that "it is more than a coherent movement of thought"—aptly conforms to the disharmonies within the constitutional domain. Thus, "those engaging in that movement become aware of it and of its direction and in self-aware fashion attempt to engage in its debates and to carry its enquiries further."[71] But, the incoherences are not contained solely within the tradition (or set of constitutional arrangements) itself. Occasionally, they reveal their incongruities when established practices confront changing social realities that were never justifiable in the full light of the rules and principles meant to govern them.[72]

71. Alasdair MacIntyre, *Whose Justice? Which Rationality?* 327.

72. See for example, Robert C. Post: "[C]onstitutional law will be as dynamic and contested as the cultural values and beliefs that inevitably form part of the substance of constitutional law," in "The Supreme Court, 2002 Term," 10.

Gary Jacobsohn *is the H. Malcolm MacDonald Professor of Constitutional and Comparative Law in the Department of Government at the University of Texas at Austin. His research interests lie at the intersection of constitutional theory and comparative constitutionalism. Dr. Jacobsohn has published numerous books, among them* Constitutional Identity (2010), The Wheel of Law: India's Secularism in Comparative Constitutional Context (2003), and Apple of Gold: Constitutionalism in Israel and the United States (1993). *He has received a number of prestigious fellowships—for instance, from the Woodrow Wilson Center for International Scholars, the Fulbright Foundation, and the National Endowment for the Humanities—and is a past President of the New England Political Science Association. He can be reached at* gjacobsohn@austin.utexas.edu.