

CONSTITUTIONAL IDENTITY

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Abstract: Constitutional theorists have had relatively little to say about the identity of what they study. This article addresses this inattention with a philosophical and comparative exploration of the concept of constitutional identity. Without such attention, a major preoccupation of theorists—constitutional change—will continue to be inadequately considered. The argument is advanced that there are attributes of a constitution that allow us to identify it as such, and that there is a dialogical process of identity formation that enables us to determine the specific identity of any given constitution. Representing a mix of aspirations and commitments expressive of a nation's past, constitutional identity also evolves in ongoing political and interpretive activities occurring in courts, legislatures, and other public and private domains. Conceptual possibilities of constitutional identity are, herein, pursued in two constitutional settings—India and Ireland—that highlight its distinctive features.

[T]he Constitution is a precious heritage; therefore you cannot destroy its identity.¹

What is a constitutional identity? If constitutions embody specific identities, how might knowing this affect one's thinking about constitutional change? Is the term "identity theft" relevant to constitutions as well as to credit cards? Can identity be anything more than an opportunistic constitutional label used to advance a politically desirable result? Is Laurence Tribe correct in saying, "[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

In this article, I argue that clarifying the concept of constitutional identity should engage the interest of constitutional theorists. To be sure, the frequency with which constitutional arguments are tendentiously framed in the pursuit of political ends should also temper extravagant claims for the analytical utility of the idea.³ Arguably, however, we can specify

¹*Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789, 1798.

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

³Skepticism, too, flows from the logic of conventional identity politics, which begins with the claims of a part against the whole. Thus, there is little expectation of viewpoint-neutrality in the political dynamics of representing the felt needs and

the attributes of a constitution so that we can identify that document as a constitution when we see these attributes incorporated in a particular legal document. These attributes enable us at least tentatively to affirm the existence of a constitution before engaging in further analysis of the content of any specific constitutional identity.⁴ The certification is similar to our recognition of a table after seeing something that conforms to the criteria applicable to that particular object. We may then go on further to establish particular identities related to the general type, as when we distinguish a dining room table from, say, a pool table. If we wanted to preserve the identity of the latter, we would prevent the removal of its pockets and distinctive felt playing top, just as we would protect the identity of any table by guaranteeing that its base and horizontal surface remain in place.

That the defining attributes of a constitution will quickly be found more contestable than a table's ought not to discourage further inquiry. Indeed, the table analogy is not only apt, but also receives implicit endorsement in the texts of many constitutions. For example, the Guaranty Clause of the American Constitution (Art. 4, sec. 4), in effect, says that a republican form of government must prevail throughout the federal system, that failure to secure it would be like cutting the legs out from under the constitutional table. Similarly, a number of constitutions, as illustrated by the French in its express prohibition of any change that would destroy the republican form of government, are protective of basic regime defining characteristics that provide general definitional content to constitutional identity.⁵ These text-based substantive bars to certain kinds of constitutional change are designed—in theory at least—to preserve, as in the case

aspirations of identity based groups. What is recognized as a fundamental constitutional norm will tend to reflect the strategic requirements of differently situated actors within the political process.

⁴The distinctions between generic and specific constitutions will become clearer in subsequent discussion of Edmund Burke's constitutional ideas, as well as in the analysis of the Indian case in section II. I agree, however, with Stanley N. Katz's criterion for affirming the presence of constitutional government. "[G]eneric constitutionalism consists in a process within a society by which a community commits itself to the rule of law, specifies its basic values, and agrees to abide by a legal/institutional structure which guarantees that formal social institutions will respect the agreed-upon values..." Stanley N. Katz, "Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience," in Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 1999), 285.

⁵In 1992 the French Conseil Constitutionnel ruled that the Maastricht Treaty on European Union did not violate the requirement that the French State adhere to republican principles. Decision 92-308 (1992). At least as interesting as that finding is the fact that the Court did not avoid the question, thus, in effect, affirming that the question of constitutional identity is a justiciable matter.

of the pool table, a preexisting identity by obstructing the removal of those attributes without which the object in question would become something very different.⁶

Most tables, however, do not require interpretation, even if a specific identification may be obscured by the fact that a table used for dining may function on other occasions as a work surface. With constitutions, of course, we are always in the realm of interpretation. Included within this interpretive provenance is the question of how one establishes what identity is. There is a vast philosophical literature going back to Plato that continues to provide vibrant, and sometimes passionate, debate over the criteria for determining identity, at least on the personal level. Much of the controversy surrounding the status of personhood is not directly transferable to constitutional matters, although constitutional theorists would be wise to give it measured consideration. In the next section, I refer to some of this literature (as well as to accounts less philosophical) to help structure the ways in which we might reflect on the subject of identity and constitutions, and why it should matter to those who theorize about constitutions. I argue, following Edmund Burke, that a constitution acquires an identity through experience, that its identity neither exists as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Identity emerges dialogically and represents a mix of political aspirations and commitments that is expressive of a nation's past, as well as the determination of those within the society who seek, in some ways, to transcend that past.⁷ It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings, as I attempt to demonstrate in subsequent sections devoted to a discussion of constitutional identity in India and Ireland.

⁶This is the underlying logic of constitutional entrenchment. When those who frame a constitution act to prevent future actors from changing certain elements of their handiwork, they are, in effect, establishing an insurance policy in favor of a present identity against an imagined future identity that is deemed unacceptable. As Akeem Bilgrami has pointed out, this logic runs counter to the familiar liberal understanding (exemplified in John Stuart Mill's *On Liberty*) that seeks to accommodate the future by insuring that all present arrangements are adhered to in a tentative fashion. See Akeem Bilgrami, "Secularism and Relativism," *Boundary* 31 (2004): 173.

⁷I use the word "commitments" in the sense employed by Jed Rubenfeld, who distinguishes it from "intentions," the latter term lacking the temporally extended dimension that creates constitutional obligations. "[D]emocracy does not consist ideally of governance by present democratic will, but also, in fundamental part, of adhering to the nation's fundamental, self-given commitments over time." Jed Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* (Cambridge: Harvard University Press, 2005), 112.

I

Constitutional theorizing about identity has deep historical roots. In book 3 of *The Politics*, Aristotle asked, “On what principle ought we to say that a State has retained its identity, or, conversely, that it has lost its identity and become a different State?”⁸ His answer requires that we distinguish the physical identity of a state from its real identity. Thus, “The identity of a polis is not constituted by its walls.”⁹ Instead, it is constituted by its constitution, which for Aristotle refers to the particular distribution of the offices in a polis—what the moderns imply by sovereign authority—as well as the specific end towards which the community aspires. When this end changes or when these offices come to be distributed differently, the constitution is no longer the same, and the identity of the state is likewise transformed. Much as a chorus is not the same chorus when its members shift from comic to tragic mode, a polis may physically retain all of its recognizable characteristics but project a different identity if its “scheme of composition” is transformed.¹⁰

We might call this approach to identity “deeply constitutive,” as it reflects an understanding of the constitution as the foundation for both legal and social relations within a polity. Conflating the identity of the state with the substance of the constitution suggests “a city could not change its constitution without committing suicide.”¹¹ Such a consequence will appear extreme to those nurtured in the teachings of modern constitutionalism. Who today would say, for example, that the identity of Ireland had changed with the replacement of the constitution of 1922 with the subsequent 1937 document, or even that a new identity for Poland had emerged from the pages of its post-Communist constitution? The latter case, to be sure, is a more unambiguous example of radical constitutional change, but would we not still be inclined to say that Polish national identity was continuous through the regime transition? If so, perhaps our hesitancy to affirm otherwise bespeaks a less ambitious view of constitutional determinism, which is to say that what is constitutive of the identity of a polity seems to us to be rooted more in

⁸*The Politics of Aristotle*, edited and translated by Ernest Barker (New York: Oxford University Press, 1962), 98.

⁹*Ibid.*

¹⁰*Ibid.*, 99. Rousseau in *The Social Contract* suggests something similar when he says, “[B]efore examining the act by which a people elects a king, it behooves us to examine the act by which a people is a people. For this act necessarily precedes the other and is the true foundation of society.” Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses* (New Haven: Yale University Press, 2002), 162.

¹¹Richard Robinson, *Aristotle’s Politics: Books 3 and 4* (Oxford: Clarendon Press, 1995), 10.

extraconstitutional factors such as religion and culture than in the language of a legal document.

The more encompassing Aristotelian notion of a constitution includes many of the factors typically viewed in the contemporary setting as extra-constitutional, which in Aristotle accounts for the direct correspondence between national and constitutional identities. But even in the less comprehensive and more familiar constitutional model that imagines a clearer separation between these two identities, echoes of this older conception are present, heard, for example, in those aforementioned entrenched provisions that, to borrow from Eric Erikson's definition of identity, seem designed "to maintain inner sameness and continuity."¹² Erikson also observed, "Identity is safest . . . when it is grounded in activity,"¹³ which, in the case of a constitution, points to a correspondence between the words of a document and the behavior of those who fall under its jurisdiction, some independent empirical demonstration that the text is, in fact, mainly consistent with constitutional experience.¹⁴ The language may indicate a commitment on the part of its authors to establish a constitutional identity, but until confirmed in the accumulated practice of a constitutional community, the goal, however noble, will remain unfulfilled. Who would say, for example, that the constitutional identity of the former Soviet Union was discernible within the folds of its governing charter?

While one need not labor over the Soviet case to come to some fairly obvious conclusions, the question of identity is a vexed one in constitutional theory, especially in relation to legal change. In reflecting on the issue of words and behavior, Michel Rosenfeld notes that "[T]he predominant identity underlying American constitutionalism was at best only partially given expression by the 1787 Constitution."¹⁵ "[C]onstitutional identity," he suggests, "can take many different forms, and evolve over time, because it is often immersed in an ongoing process marked by substantial changes."¹⁶ Presumably the changes marked by the adoption of the post-Civil War amendments aligned the constitutional document with founding principles that had provided the original constitution with

¹²Erik H. Erikson, *Dimensions of a New Identity* (New York: W. W. Norton & Co., 1974), 204.

¹³*Ibid.*, 105.

¹⁴Whether or not one embraces the deeply constitutive meaning of the ancient constitutional understanding, the Aristotelian distinction between a physical identity and a real identity requires that one withhold judgments about identity until after confirming that the codified hopes of the founders actually resonate in the practices and culture of the body politic.

¹⁵Michel Rosenfeld, "Modern Constitutionalism as Interplay between Identity and Diversity," in *Constitutionalism, Identity, Difference, and Legitimacy*, ed. Michel Rosenfeld (Durham: Duke University Press, 1994), 8.

¹⁶*Ibid.*, 10.

a “predominant identity,” albeit one that was not consistent with subsequent constitutional experience. When in 1963 Martin Luther King, Jr. referred to this principled identity as “a promissory note to which every American was to fall heir,”¹⁷ his implication was that the formal incorporation of the Declaration of Independence’s promise into the document had yet to be translated into full realization. For that to occur, in Erikson’s terms, further activity would be required, including the direct involvement of judges, politicians, and perhaps most importantly, an aroused citizenry.

These activities, in particular the latter, are at the center of Bruce Ackerman’s unfolding project in constitutional theory.¹⁸ Ackerman has developed a nontextual understanding of constitutional change, which in the American context means forgoing an exclusive reliance on Article V’s amendment procedures. Thus, he finds “revolutionary reform of the old regime” emanating from efforts that “did not respect established norms for revision.”¹⁹ In two volumes he has examined several constitutional moments, transformative exertions of popular sovereignty—including post-Civil War developments that culminated in the formal incorporation of King’s promissory note—that he believes to have fundamentally redefined constitutional meaning in the United States. Indeed, as noted by John Finn, for Ackerman, “American constitutional history is best understood as an ongoing struggle over our collective constitutional identity.”²⁰

However, in distinguishing between normal and transformative change, has Ackerman provided an adequate understanding of constitutional identity? Finn argues forcefully that he has not, that the account fails to identify “who ‘We the People’ are, and how we are constituted.”²¹ This alleged failure results from a miscalculation concerning 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.”²²

¹⁷Martin Luther King, Jr., “I Have a Dream,” speech delivered in Washington, DC, August 28, 1963.

¹⁸Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991); Bruce Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998).

¹⁹Bruce Ackerman, *We the People: Transformations*, 12.

²⁰John E. Finn, “Transformation or Transmogrification? Ackerman, Hobbes (as in Calvin and Hobbes), and the Puzzle of Changing Constitutional Identity,” *Constitutional Political Economy* 10 (1999): 355–65.

²¹*Ibid.*

²²*Ibid.*, 363.

Finn's own account may attribute too much importance to entrenchment, thereby making evolution in the substance of constitutional identity hard to apprehend. Does the framing of a constitution effectively establish a fixed identity, such that prospects for change must focus on the revolutionary option? In his First Inaugural, Lincoln said, "This country ... belongs to the people who inhabit it. Whenever they should grow weary of the existing government, they can exercise their CONSTITUTIONAL right of amending it, or their REVOLUTIONARY right to dismember or overthrow it."²³ When the latter right is exercised, there is no doubt that the goal sought is a substitution of one constitutional identity for another (assuming the post-revolutionary regime is a constitutional one); less certain is whether the constitutional process can be legitimately used to effect such a change, whether there are implicit substantive limits to change achieved through procedures enumerated in the document.²⁴ As Walter Murphy has argued, "The word *amend*, which comes from the Latin *emendere*, means to correct or improve; amend does not mean 'to deconstitute and reconstitute,' to replace one system with another or abandon its primary principles. Thus, changes that would make a polity into another kind of political system would not be amendments at all, but revisions or transformations."²⁵

Murphy's view has not penetrated very deeply into the American legal or scholarly imagination.²⁶ More consonant with conventional opinion is Ackerman's sovereignty based theory of constitutional change, which, in addition to allowing for sweeping transformation outside of the procedures outlined in Article V, requires accepting the legitimacy of any amendment—even one that would make Christianity the state religion—as an expression

²³Abraham Lincoln, "First Inaugural Address," in *American Constitutional Law: Essays, Cases, and Comparative Notes*, ed. Donald P. Kommers, John E. Finn, and Gary J. Jacobsohn (Lanham, MD: Rowman & Littlefield, 2004), 1050.

²⁴Jeffrey Tulis has criticized Ackerman 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): 540, 542.

²⁵Walter F. Murphy, "Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson (Princeton: Princeton University Press, 1995), 177.

²⁶See, for example, Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process," *Harvard Law Review* 97 (1983): 386, 387. For the Supreme Court's unsympathetic view of the idea of an unconstitutional amendment, see *National Prohibition Cases*, 253 U. S. 350 (1920) and *Leser et al. v. Garnett et al.*, 258 U. S. 130 (1922).

of the authentic voice of the demos.²⁷ But constitutionalism is about limits and aspirations; whether there are implicit substantive constraints on formal constitutional change is a question that implicates our most basic intuitions—and also our most troubling uncertainties—about constitutions. Resolving them without addressing the challenge of identity is scarcely imaginable. Constitutional theorizing about change—in both the normative sense of distinguishing between progress and decline and in the empirical sense of distinguishing between reform and revolution—cannot afford to marginalize the identity question.

Consider another example, constitutional change through emulation, specifically the use of foreign sources and precedents of one national court by justices from another. This practice has become an intensely debated issue in scholarly circles, on the Supreme Court, and in the halls of Congress. Among the various criticisms of the practice is that it has the potential for obscuring and perhaps undermining the distinctively unique character of American constitutionalism. Its most outspoken critic is Justice Antonin Scalia, who argues, “[I]rrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people. We must never forget that it is a Constitution for the United States of America that we are expounding. . . .”²⁸ Or, as one scholar much more sympathetic to constitutional borrowing, has written, “If law and individual legal systems can be understood as having distinct local identities with identifiable authentic experiences, what happens when such experiences are continually exposed to external influences?”²⁹

These concerns should not be taken lightly, especially in the United States, where it has become a commonplace that the American Constitution, as the embodiment of the political ideas that provide definition to the nation, is constitutive of the society. Other polities, as is often pointed out, are more dependent on such factors as ethnicity, race, religion, or language to establish a secure basis for national unity, identity, and membership. Therefore, to trifle with indigenous constitutional sources by exposing them to the importation of transnational materials is potentially to compromise the integrity of the American national experiment.

On the other hand, if American aspirations implicate rights that citizens are meant to enjoy not only because they are citizens, but by dint, as well, of their common humanity, then an interpretive dimension of

²⁷ Along these lines and in answer to the question, “What makes a constitution constitutional?” the constitutional theorist Frederick Schauer avers, “Nothing, nor does or can anything make a constitution unconstitutional.” Frederick Schauer, “Amending the Presuppositions of a Constitution,” in *Responding to Imperfection*, 145.

²⁸ *Atkins v. Virginia*, 536 US 304 (2002), at 347.

²⁹ Sarah Harding, “Comparative Reasoning and Judicial Review,” *The Yale Journal of International Law* 28 (2003): 410, 462.

extraterritoriality need not be viewed as a dangerous threat to American constitutional integrity. Indeed, as Rosenfeld suggests, if the predominant identity underlying American constitutionalism is embodied in certain principles of transcendent justice that are prior to the written constitution, then to reach beyond our constitutional borders for guidance may be both wise and legitimate. Again, as with the amendment process, assessing the costs and benefits of foreign legal experience is bound up in the phenomenon of constitutional identity. So it behooves us to see if we cannot achieve a fuller appreciation of its meaning.

Toward this end, the philosopher Kwame Anthony Appiah has described two approaches to individuality that have suggestive possibilities for the task at hand. The first, which derives from romanticism, emphasizes the idea of authenticity and argues that identity is fundamentally concerned with discovery, that the “meaning of one’s life is already there, waiting to be found.”³⁰ In contrast, what he calls the “existentialist account” stresses invention and the view that “existence precedes essence,” that individuality is basically volitional, a function of deciding for oneself how one wishes to live one’s life.³¹ Appiah makes a persuasive argument that both of these understandings are not quite right. Thus, the authenticity approach, in holding that our individualities are essentially determined by our natures, goes too far in excluding creativity from the making of a self. On the other hand, the existential approach overstates the role of creativity, resulting in a de-contextualization of individuality, which is to say, a fundamentally flawed understanding of identity construction as a process involving no “response to facts outside oneself, [to] things that are beyond one’s own choices.”³² Not surprisingly, he prefers a middle position, which he finds best developed in the writings of John Stuart Mill, and to a lesser extent in Charles Taylor. In Mill’s view, man “has, to a certain extent, a power to alter his character.” Thus, “His character is formed by his circumstances (including among these his particular organization); but his desire to mould it in a particular way, is one of those circumstances, and by no means one of the least influential.”³³ Taylor echoes this view with a

³⁰Kwame Anthony Appiah, *The Ethics of Identity* (Princeton: Princeton University Press, 2005), 17.

³¹Ibid.

³²Ibid., 18. It is worth considering this balanced view against that of Norbert Wiley, who appears to accept both internally developed and externally imposed identities without the need for their reconciliation. “[Identity] usually refers to some long-term, abiding qualities which, despite their importance, are not features of human nature as such. Identities individuate and allow us to recognize individuals, categories, groups, and types of individuals. They can be imposed from without, by social processes, or from within, in which case they are often called self-concepts.” Norbert Wiley, “The Politics of Identity in American History,” in *Social Theory and the Politics of Identity*, ed. Craig Calhoun (Oxford: Blackwell, 1994), 130.

³³Quoted in Ibid., 17.

somewhat greater emphasis on external circumstance. "I can define my identity only against the background of things that matter. But to bracket out history, nature, society, the demands of solidarity, everything but what I find in myself, would be to eliminate all candidates for what matters."³⁴ Taylor proposes that we understand identity "dialogically," that is to say, as an interactive process in which a person develops a self in response to an environment consisting of religion, state, family, and so on. Appiah concludes, "To create a life is to create a life out of the materials that history has given you."³⁵

The same idea arguably applies in the political domain as well as in relation to the creation of a constitutional identity. Here the dialogic process is a continuing one involving the evolution of constitutional identity through interpretive and political activity occurring in courts, legislatures, and other public and private domains.³⁶ But there is an important difference, namely a contingent quality distinctive to the identity of a constitution. A person may be said to have an identity even in the absence of widespread agreement on what exactly it is.³⁷ One might not be true to that identity in how one chooses to present oneself to others, but the resulting misperceptions are only relevant if their cause is a direct

³⁴Quoted in *Ibid.*, 18. H. Patrick Glenn makes a similar point in his consideration of tradition and identity. "Concern with identity arises from external contact; identity is then constructed by explicit or implicit opposition. The other becomes essential in the process of self-understanding. H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000), 31.

³⁵*Ibid.*, 19. As Appiah, following Taylor, observes, "[B]eginning in infancy [it is] in dialogue with other people's understandings of who I am that I develop a conception of my own identity." *Ibid.*, 20. On this point, at least, there seems little reason to think that moving from the personal to the constitutional would not entail a similar consequence with regard to the phenomenon of identity.

³⁶As William Harris has argued, "A constitutional order both creates the larger public identity that is to be recognized and constructs the conditions by which those who have their political life through it come to realize its preexistence as something they are established as identifiable entities to have made." William Harris, *The Interpretable Constitution* (Baltimore: The Johns Hopkins University Press, 1993), 177.

³⁷Within the philosophical literature, this is a contestable point. In their historical overview of Western theorizing about personal identity, Raymond Martin and John Barresi distinguish between an intrinsic relations view and an extrinsic relations view. In the first, or Lockean, perspective, "what determines whether a person at one time and one at another are the same person is how the two are physically and/or psychologically related to *each other*." In the more recent second account, "what determines whether a person at one time and one at another are the same person is not just how the two are physically and/or psychologically related to *each other*, but how they are related to everything else – especially *everybody* else." Raymond Martin and John Barresi., eds., *Personal Identity* (Oxford: Blackwell Publishing, 2003), 1.

extension of who that person is. Erikson's familiar view about identity as "[t]he ability to maintain inner sameness and continuity," echoes earlier accounts, such as the eighteenth century Scottish philosopher, Thomas Reid's observation that "[c]ontinued uninterrupted existence is . . . necessarily implied in identity."³⁸ In focusing, however, on a constitution, this ability arguably is necessary, but not sufficient, for establishing a viable basis for a genuine identity. That the guardians of the Soviet constitution were in a position to maintain its continuity, and to keep the document essentially the same over the many decades of its existence, did not mean that it represented anything more than a cruel, if transparent, hoax in the lives of the Soviet people. The constitution was a decidedly insignificant presence in the actions of citizens and state and the relations between the two. The durability of the regime—or in the language of personal identity, its survival—did not hinge on the polity's reaching a particular level of constitutional legitimacy.

When, in contrast, James Madison, writing on the new American regime's need to achieve a "requisite stability," famously argued in *Federalist* #49 against a too frequent appeal to the people for constitutional change, so as not to "deprive the government of that veneration which time bestows on every thing," he calculated the benefits of consistency in terms of winning over the "prejudices of the community." It was, after all, only in "a nation of philosophers" that "[a] reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason."³⁹ Implicit in his calculation is the idea that a constitution, however reasonable and clear in its articulation of rules and principles, can only succeed in translating word into deed (and thereby establish a discernible identity) if fundamental continuity in basic law and actual constitutional practice are seen as two sides of the same coin.

This same point was developed with sustained eloquence in the work of Great Britain's most outspoken supporter of the revolution that led to Madison's constitution—Edmund Burke. "Against the images of an age that saw the constitution as a formal and explicit founding contract, Burke sets the image of a constitution as that imperfectly known order—an order that none directly intends—that is set up between people as they live together."⁴⁰ In Burke's thought, the "prejudices of the community" were at the core of his theory of the constitution, which rested on the principle of inheritance, more familiarly known as "prescription." The prescriptive

³⁸Quoted in *The Cambridge History of Seventeenth-Century Philosophy*, eds. Daniel Garber and Michael Ayers, vol. 1 (Cambridge: Cambridge University Press, 1998), 253.

³⁹James Madison, "Federalist # 49," in *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), 314.

⁴⁰Garrett Barden, "Discovering a Constitution," in *Ireland's Evolving Constitution 1937-1997*, eds. Tim Murphy and Patrick Twomey (London: Hart Publishing, 1998), 3.

constitution has been the subject of insightful scholarly treatment⁴¹; its bearing on the question of identity as it has so far been considered will structure the discussion in the next sections, which address constitutional identity in India and Ireland, two of the three places (the other being the American colonies) that preoccupied Burke during most of his lengthy political career. In so doing, I focus on two strands in Burke's thought where the logics of constitutional and personal identity converge: continuity and discovery/invention.

Continuity

"[A] nation is not an idea of local extent, but is an idea of continuity, which extends in time as well as in numbers, and in space. . . . [It] is a deliberate election of ages and generations; it is a Constitution . . . made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people that disclose themselves only in a long space of time."⁴² Constitutions must be viewed as embodiments of unique histories and circumstances. Burke, a man totally consumed by the political debates of his time, did not participate in the philosophical debates over personal identity that raged among his contemporaries, notably David Hume and Thomas Reid, both of whom were struggling with the Lockean legacy of empiricism from the previous century. Yet it is possible to see in Burke's account of the prescriptive constitution a version of this identity discussion writ large.

Much of the debate centered on the role of consciousness in personal identity, which in Locke was, controversially, all that mattered. It was this that accounted for "the unity of one continued life;" stated otherwise, a person's accumulated memories constitute an individual as a person. In Hume and Reid, we get different understandings of the significance of consciousness or memory in establishing identity (the latter was particularly critical of Locke's views), but the larger point of agreement was the requirement of, in Reid's words, "an uninterrupted continuance of existence." "Identity in general I take to be a relation between a thing which is known to exist at one time, and a thing which is known to have existed at another time."⁴³

⁴¹See in particular, Francis P. Canavan, *The Political Reason of Edmund Burke* (Durham: Duke University Press, 1960); Gerald W. Chapman, *Edmund Burke and the Practical Imagination* (Cambridge: Harvard University Press, 1967); and Michael Freedman, *Edmund Burke and the Critique of Political Radicalism* (Chicago: The University of Chicago Press, 1980).

⁴²Edmund Burke, "Speech On a Motion made in the House of Commons, the 7th of May 1782, for a Committee to inquire into the state of the Representation of the Commons in Parliament," in *On Empire, Liberty, and Reform*, ed. David Bromwich (New Haven: Yale University Press, 2000), 274.

⁴³*Works of Thomas Reid*, vol. 2 (Charlestown: Samuel Etheridge, 1814), 339.

In Burke, the nation was at once a “moral essence” and, in Gerald Chapman’s apt phrase, “a cultural personality in time.”⁴⁴ Or as Laurence Tribe, whatever his skepticism concerning the concept of constitutional identity, has eloquently pointed out, “To be free is not simply to follow our ever-changing wants wherever they might lead. . . . [T]o make . . . choices without losing the thread of continuity that integrates us over time and imports a sense of our wholeness in history, we must be able to . . . choose in terms of commitments we have made.”⁴⁵

Prescription is the key to constitutional identity, for it stands for continuity, for what is enduring through the changes that occur within the natural progression of any society. The collective memories that persist as part of the cultural personality of a nation form the core of constitutional identity, which is not established by acts of abstract reason, but is developed over time, evolving in tandem with the habits and experiences of the body politic. The Burkean constitution is, as Francis Canavan has noted, “a contingent part of the moral order,”⁴⁶ which places severe limits on change as it applies to the essentials of constitutional identity.⁴⁷ But as the Indian, Irish, and American controversies that so defined Burke’s political career make absolutely clear, prescription is not a synonym for the status quo. Indeed, the commitment to established institutions (including the rule of law) may—as was true in these three cases—a quite energetic program of reform that belies Burke’s reputation for stodgy conservatism. Burke often distinguished between reform (healthy) and innovation (problematic), the latter having more to do with change that is disconnected from principles engrained in the prescriptive constitution.

Discovery/Invention

Prescription, for Burke, is “a presumption in favour of any settled scheme of Government against any untried project. . . .”⁴⁸ Within the framework of

⁴⁴Chapman, *Edmund Burke*, 90.

⁴⁵Laurence Tribe, “Ways Not to Think about Plastic Trees: New Foundations for Environmental Law,” *Yale Law Journal* 83 (1974): 1315, 1326–27.

⁴⁶Canavan, *The Political Reason of Edmund Burke*, 134.

⁴⁷The contemporary debate over these matters in personal identity focuses on the relationship between survival and identity and is a much-contested subject. For example, David Lewis claims, “[W]hat matters in survival is mental continuity and connectedness. . . . What matters in survival is identity.” David Lewis, “Survival and Identity,” in *The Identities of Persons*, ed. Amelie Oksenberg Rorty (Berkeley: The University of California Press, 1976), 17–18. From this, Lewis draws the same conclusion that Burke drew for the constitutional question. “Change should be gradual rather than sudden, and (at least in some respects) there should not be too much change overall.” *Ibid.*, 17.

⁴⁸Burke, “Speech on a Motion. . .,” 274.

Appiah's alternative visions of identity, one would expect to find Burke a partisan of discovery. So it is not surprising for an interpreter of Burke to write, "Constitutions are to be discovered, that is, the constitution that people have given themselves in their interaction with one another is to be discovered. . . . One may think of [the constitution] not as the attempt to found and establish the polity but as the attempt to discover and express the characteristics of the polity that already exists."⁴⁹ The flip side of this, of course, is suspicion (or hostility, as in Burke's scathing condemnation of French political creativity) of efforts to invent the essentials of constitutional identity out of the building blocks of theoretical materials.

But while the critique of abstract theory is, perhaps, the most familiar feature of Burke's political science, reducing constitutional identity to discovery alone does not do justice to its complexity. It does not capture, for example, his dual track understanding of identity, by which I mean that the identity of a constitution represents an amalgam of generic and particularistic elements consisting of certain attributes of the rule of law that are the necessary condition for constitutional governance, and the specific inheritance that provides each constitution with its unique character.⁵⁰ As tellingly revealed in Burke's prodigious labors on the Indian front, whatever the identity of a governance that does not provide basic Magna Carta-like liberties, it is not constitutional. Thus, his impeachment prosecution of Warren Hastings for the latter's maladministration of India was premised on the idea that "The laws of morality are the same everywhere."⁵¹ This did not mandate a particular form of government, as it did in the imaginings of the theoreticians of natural rights whom Burke held in such contempt, but it did mean that to be properly identified for what it was, a constitution would have to be able, in Lon Fuller's words, to "save us from the abyss."⁵² "I never was wild enough," Burke said, "to conceive that one method would serve for the whole; that the natives of Hindostan and those of Virginia could be ordered in the same manner."⁵³ One would never mistake the constitutional identities of these wildly divergent peoples, just as one would not confuse the aesthetic identities of an ornate eighteenth-century French writing

⁴⁹Barden, "Discovering a Constitution," 6–7. Surprisingly, Tom Paine, the un-Burke, expressed similar sentiments. "A constitution is a thing antecedent to a government." Quoted in Charles McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1966), 2.

⁵⁰I have addressed this issue elsewhere in "An Unconstitutional Constitution? A Comparative Perspective," in *ICON-International Journal of Constitutional Law* 4 (2006). See also, Frederick Whelan, *Edmund Burke and India: Political Morality and Empire* (Pittsburgh: University of Pittsburgh Press, 1996) for an excellent discussion of Burke's attempt to reconcile the universal and the particular.

⁵¹Quoted in Whelan, *Edmund Burke and India*, 281.

⁵²Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), 44.

⁵³Edmund Burke, "Letter to the Sheriffs of Bristol," in *The Works of Edmund Burke*, vol. 2 (Boston: C. C. Little & J. Brown, 1839), 119.

table and its minimalist twentieth-century Finnish counterpart. Yet just as the presence of a horizontal surface assures the viewer that the latter contrast pertains to the category of tables, the constitutional observer will have to be satisfied that analogous generic criteria establish a common basis for comparing the two bodies politic.

A presumption in favor of settled practice is just that—a presumption. To the extent that prescription is critical to the determination of constitutional identity, it must allow for the possibility that what is settled is also mutable. Slavery in the United States, for example, may have produced a body of settled law, but its incompatibility with the precepts of constitutionalism rendered its status as a constitutionally sanctioned inheritance fatally suspect. The argument over its presumptive validity was a way of addressing the question of whether the peculiar institution had any standing in a fair account of American constitutional identity. Properly understood, a Burkean approach requires a deeply contextualized balancing of the universal and the particular as a predicate for assessing the features of a constitutional order that might lay claim as markers of identity. The deference to entrenched cultural norms and historical practices that are vital to the concept of the prescriptive constitution must in the end be qualified by a healthy skepticism towards what Burke referred to as “geographical morality,” the view in Hastings’ defense denying legitimacy to the application of universal standards to established local behavior. Within this space of deference and skepticism, constitutional identity is both discovered and invented.⁵⁴

II

The Supreme Court of India has confronted the problem of constitutional identity much more explicitly and directly than have the courts in most countries. The principal occasions for doing so have been cases involving constitutional amendments that were thought by many to have in substance violated the constitution. In the years of wrestling with the recurring question of the unconstitutional constitutional amendment, the Court developed the basic structure doctrine, according to which specific features of the constitution were deemed sufficiently fundamental to the integrity of the constitutional project as to warrant immunity from significant change.⁵⁵ The

⁵⁴What Anthony D. Smith has written in regard to national identity applies as well to constitutional identity. “[T]he role of ‘invention’ and ‘construction’ in the formation of national identity varies considerably depending in part on the pre-existing local ethnic configuration.” Anthony Smith, *National Identity* (Reno: University of Nevada Press, 1991), 101.

⁵⁵This history has been described in many works. See in particular, A. Lakshminath, *Basic Structure and Constitutional Amendments: Limitations and Justiciability* (New Delhi: Deep & Deep Publications, 2002); and Paras Diwan and Peeyushi Diwan, *Amending Powers and Constitutional Amendment*, 2nd ed.

doctrine had its roots in German constitutional jurisprudence, which had accepted the idea that there are implied and enforceable limits to constitutional change through the amendment process, but which, unlike in India, has never led to a ruling invalidating an attempted revision.⁵⁶

Underlying the basic structure jurisprudence is a preoccupation with constitutional identity. The German interest in the subject is historically obvious; as would the interest in individual identity of anyone who has been close to another whose personality appears at some point to have drastically changed for the worse. The Indian concern with constitutional identity is perhaps less obvious, but not difficult to figure out. For so many years the jewel of an empire that had maintained its rule over its distant possession largely through denying it any sense of national integrity, independent India sought separation and integration, both of which required direct constitutional expression. In *Kesavananda Bharati v. State of Kerala*, the leading Indian case on implicit substantive limits to constitutional revision, one of the justices concluded that "one cannot legally use the Constitution to destroy itself." He then added, "The personality of the Constitution must remain unchanged."⁵⁷

Of course, any amendment process is intended to change a constitution, and in India, the procedural hurdles are comparatively easy to overcome. So it cannot be the case that any change in the constitution will mean a change in its personality. In fact, the Indian document has been altered many times. The most recent incarnation is, in a sense, a different document from the original version, but in another sense, assuming the Supreme Court pursues and acts on the logic of *Kesavananda*, the same document throughout the changes. The latter sense comports with a philosophical intuition first powerfully articulated by Locke (and later criticized by others), which, in summary form, argues that "an entity of any sort can remain the same throughout its changes provided that the changes that take place in it are characteristic of entities of that sort and are allowed for it in their concept."⁵⁸ Accordingly, the growth of a thing will not affect its sameness as long as the changes in its dimensions do not transform those attributes essential to its fundamental character or "thingness." Or as Thomas Reid put it, "[The identity which we ascribe to bodies, whether natural or artificial] admits of a great change of the subject, provided the change be gradual; sometimes even of a total change. And the changes which in

(New Delhi: Deep & Deep Publications, 1997). I have discussed the major cases in "An Unconstitutional Constitution? A Comparative Perspective."

⁵⁶The two important cases are *Southwest Case*, 1 BverfGE 14 (1951); and *Privacy of Communications Case* (Klass Case), 30 BverfGE 1 (1970).

⁵⁷*Kesavananda Bharati v. State of Kerala*, 1973 SC 1461 (1973), 1624.

⁵⁸*The Encyclopedia of Philosophy*, s.v. "personal identity."

common language are made consistent with identity differ from those that are thought to destroy it, not in kind, but in number and degree."⁵⁹

In *Kesavananda*, we find a view akin to this incorporated in the Court's efforts in ascertaining the scope of the term "amendment." "The word 'amendment' postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations."⁶⁰ To "destroy its identity" is to abrogate "the basic structure of the Constitution."⁶¹ In a later case involving Indira Gandhi's attempt to remove the Court's power of review over constitutional amendments, the justices summarized their long evolving position on this question, declaring, "[I]f by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity."⁶²

To be sure, the deep concern of the justices in these cases about the constitution doubtless reflected, in no small part, worries about their own institution's identity. Thus, their "basic structure" response to the various efforts of Mrs. Gandhi to alter the constitution must be seen against the backdrop of a protracted struggle by the Supreme Court to assert its credibility and independence in the face of a blatant campaign to diminish its standing as a significant force in Indian politics.⁶³ But implicit in the emergency-inspired

⁵⁹*The Works of Thomas Reid*, vol. 2, 344.

⁶⁰*Kesavananda Bharati v. State of Kerala*, at 1860. This position runs as a constant theme in the majority opinions. Another judge wrote, "The expression 'amendment of this Constitution' does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article." *Ibid.*, at 1565.

⁶¹*Ibid.*, at 1756.

⁶²*Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789, 1824. The language in question appeared in the 42nd Amendment, which stated, "No amendment . . . shall be called into question in any court on any ground." An interesting contrast may be found in a neighboring South Asian state, Sri Lanka. That nation's constitution explicitly permits the repeal of the constitution itself through the amendment process. As a result, the Supreme Court of Sri Lanka has concluded that there is no unalterable basic structure. See *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill*, 2 Sri L.R. 312 (1987). "[T]here is no basis for the contention that some provisions which reflect fundamental principles or incorporate basic features are immune from amendment. Accordingly, we do not agree with the contention that some provisions of the Constitution are unamendable." *Ibid.*, at 330.

⁶³The Prime Minister's self-interest in all of this was even more obvious than the Court's, as seen in *Indira Gandhi v. Raj Narain*, AIR SC 2299 (1975), which concerned several amendments, including one that prevented any judicial inquiry into her own election. A high court had upheld criminal charges against her for the crime of electoral fraud, which confronted her with the distinct possibility of removal from office.

amendment initiatives was a much larger assault on the institutions of constitutional government, and with it the real danger that a fledgling democracy, instituted within an inauspicious supportive socioeconomic environment, might descend into the netherworld of harsh authoritarian rule.

The identity that was the object of so much judicial concern in these cases was generic, implicating the cluster of attributes or characteristics that makes *a* constitution (rather than *this* constitution) a distinctive governing code. It was less a question of distinguishing the personality of Jerry from that of Fred, but of investigating allegations concerning the very personhood of Jerry or Fred. In its principal pursuit, it resembled the eighteenth-century inquiry into the maladministration of India that led to the controversial impeachment trial of Warren Hastings, in which Burke opened the proceedings with a speech imploring the House of Commons to see what was at stake as directly affecting “our Constitution itself, which is deeply involved in the event of this Cause.”⁶⁴ For Burke, the prescriptive model was nowhere more beautifully realized than in the British Constitution. But the “substantial excellence of our Constitution” was not a judgment of smug satisfaction in the success of the inheritance principle; it was a happy acknowledgment of the mechanisms by which the “rules of immutable justice” had come to be incorporated in the workings of inherited British political institutions. In anticipation of a defense based on the acceptability of “Oriental despotism” in Indian experience and tradition, Burke wished to emphasize that approval of this argument would, in effect, challenge that aspect of British constitutional identity which expressed a universal commitment to constitutionalism. Thus, Hastings’ crimes were “not against forms, but against those eternal laws of justice, which are our rule and our birthright.”⁶⁵

Burke had not used the terminology of “basic structure,” and if he had, one cannot know how he might have evaluated its various applications by the Supreme Court of independent India. The constitutional infirmity in the amendments widely deemed most outrageous (e.g., removal of judicial review over the legality of the prime minister’s election) was that they subverted the rule of law, a failing that had also been alleged in regard to the abuses attributed to Hastings. Given that constitutionalism is, in essence, a rule of law in conformity with procedural justice, we could speculate that Burke might have viewed this application of the basic structure doctrine sympathetically; but when we move to aspects of basic structure

The Court spared her that ignominy, but invalidated the amendment as a violation of a fundamental attribute of basic structure—the rule of law.

⁶⁴Edmund Burke, “Speech in Opening the Impeachment of Warren Hastings, Esq.,” in *On Empire, Liberty, and Reform*, ed. David Bromwich (New Haven: Yale University Press, 2000), 383.

⁶⁵*Ibid.*, 388. “I impeach him in the name, and by virtue, of those eternal laws of justice, which he has violated.” *Ibid.* 400.

that are more expressive of the identity of this particular Indian Constitution, such speculation would be pointless. Yet how might a Burkean perspective shed light on the question of contemporary Indian constitutional identity?

Consider the debate over secularism in India. The Indian Constitution was adopted against a backdrop of sectarian violence that was only the latest chapter in a complex centuries old story of Hindu—Muslim relations on the Asian subcontinent. Much of that history had been marked by peaceful coexistence; nevertheless, the bloodbath that accompanied Partition reflected ancient contestations and insured that the goal of communal harmony would be a priority in the constitution-making process.⁶⁶ But it was not the only priority. If not as urgent, then certainly as important, was the goal of social reconstruction, which, as I have argued elsewhere, could not be addressed without constitutional recognition of the state's interest in the "essentials of religion."⁶⁷ So deep was religion's penetration into the fabric of Indian life, and so historically entwined was it in the configuration of a social structure that was by any reasonable standard grossly unjust, that the framers' hopes for a democratic polity meant that state intervention in the spiritual domain could not be constitutionally foreclosed. The design for secularism in India required a creative balance between socioeconomic reform that could limit religious options and political toleration of diverse religious practices and communal development.

Over the years, this constitutional equilibrium has come under repeated assault from different points on the political spectrum, with the greatest challenge issuing from the Hindu right. The Supreme Court's main response was to declare, following *Kesavananda*, that secularism was "part of the basic structure of the Constitution and also the soul of the Constitution."⁶⁸

⁶⁶"We have accepted [secularism] not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism. It is our cardinal faith." *S. R. Bommai v. Union of India*, 3 SC 1 (1994), 148.

⁶⁷Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton: Princeton University Press, 2003).

⁶⁸*S. R. Bommai v. Union of India*, at 143. This is the leading Indian case on secularism. In it the Court upheld the authority of the central government to dismiss the elected governments in three states because of the alleged failures of their administrations in implementing and respecting the constitutional commitment to secularism. By upholding the deployment of emergency powers under Article 356, the Court agreed that these governments had not acted "in accordance with the provisions of the Constitution." Article 356 had been modeled after the American Guaranty Clause (Article IV, Section 4), but the willingness of the Indian Court to confront the question of identity contrasts sharply with the American Supreme Court's reluctance to engage it. Indeed, the judicial practice of invoking the "political question" doctrine to avoid difficult constitutional questions began in *Luther v. Borden*, which

Describing the commitment to secularism in this dramatic way added a notable rhetorical flourish to a landmark decision in Indian jurisprudence, but it also demonstrated that the same concern with constitutional identity that lay behind the earlier rulings on unconstitutional amendments generated the outcome in the secularism case. There is, of course, no reason to think that a judicial reference to the “soul of the Constitution” was used with any awareness of debates in the seventeenth and eighteenth centuries (or, indeed, as far back as Plato) over the significance and place of the soul in determining personal identity, but there is every reason to suppose that its usage was intended to mark secularism as critical to Indian constitutional identity.

Indian secularism, however, poses an interesting problem for our understanding of identity. When reviewing the debates over secularism at the Constituent Assembly and the various judicial pronouncements on the subject over the years, one sees very clearly that a principal purpose behind it was to challenge an entrenched way of life and to modify it in the direction of a democratic way of life rooted in equality. In a very real sense the constitutional “soul” was intended to be ornery, projecting an identity that was at once confrontational and emblematic of the document’s abiding commitments. But in both the philosophical ruminations about consciousness and the Burkean reflections on nationhood and prescription, the concept of identity is associated with the idea of continuity rather than fundamental revision. This emphasis, in turn, has important implications for radical change, namely a presumption that it should not occur. How, then, are we to explain the expansive ambitions of the soulful concept at the core of Indian constitutional identity?

There are two points to be made here. First, constitutional identity can accommodate an aspirational aspect that is at odds with the prevailing condition of the society within which it functions. Burke’s prescriptive constitution might suggest that what is, must be (identity as pure discovery), but a strictly positivistic implication need not be drawn from the principle of inheritance. In the case of India’s constitutional framers, the prevailing social structure, while deeply rooted in centuries of religious and cultural practice, was contestable in accordance with sources from within the

was, in essence, a case of political identity, in which the Supreme Court refused to say what it was that the republican guaranty clause guaranteed. The same jurisprudential choice to avoid the question of identity underlies the American Court’s unwillingness to find implied limits to formal constitutional change. When, several years later, the abolitionist senator from Massachusetts, Charles Sumner, suggested that republican identity was incompatible with slavery, and, hence, the federal government should do what the constitution commanded and remove those governments that supported it, his arguments were easily defeated by John C. Calhoun and the logic of *Luther v. Borden*.

Indian tradition that are also a part of the prescriptive constitution.⁶⁹ “One of the remarkable developments of the present age,” wrote Nehru shortly before independence, “has been the rediscovery of the past and of the nation.”⁷⁰ Nehru was one of several delegates at the Constituent Assembly to invoke the name of Ashoka, the third king of the Mauryan dynasty in the third century B.C., and a legendary figure whose famous edicts have endured as a source of moral and ethical reflection for more than a millennium. Used both as an emulative model for behavior towards society’s destitute and as a basis for criticizing the Hindu nationalist rejection of Indian nationhood as rooted in a composite culture, the Ashokan example shows how continuity in the construction of a constitutional identity can draw upon alternative (and even dissenting) sources within one tradition, and then reconstitute them to serve at times as a reproach to other strands (and their societal manifestations) within the same tradition.

The second point speaks directly to the authenticity/existentialism polarity introduced earlier. A defense of secularism as a central feature of the Indian Constitution’s basic structure inevitably finds people differing in the meanings they assign to this consensus on fundamental commitment. For example, the Hindu right has often assured Indians that it accepts the constitutional centrality of secularism, which it embraces as a version of the strict separationist model endorsed by many in the United States, and which it contrasts with the “pseudo-secularism” championed by its political opponents.⁷¹ The latter include the justices on the Supreme Court, most of whom have incorporated the differing perspectives of Gandhi, Nehru, Ambedkar and others to articulate a uniquely Indian understanding that has been aptly described by Rajeev Bhargava as “contextual secularism.” At the core of this position is the strategy of “principled distance,” which, according to Bhargava, means that “[T]he State intervenes or refrains from interfering, depending on which of the two better promotes religious liberty and equality of citizenship.”⁷² Thus, the specific forms that secular

⁶⁹As H. Patrick Glenn has observed, “Opposition to a tradition may be . . . conducted within the tradition itself, using both its language and its resources (the struggle from within).” Glenn, *Legal Traditions of the World*, 17.

⁷⁰Jawaharlal Nehru, *The Discovery of India* (Oxford: Oxford University Press, 1997), 515.

⁷¹This position often has been espoused by Arun Shourie, perhaps the leading ideologue of the Hindu right, who insists, in explicit reference to American church/state separatism, that the state must take no formal cognizance of religion. See Arun Shourie, *A Secular Agenda* (New Delhi: Harper Collins, 1997). As I have argued elsewhere (*The Wheel of Law: India’s Secularism in Comparative Constitutional Context*), in the Indian context, this view has the effect of advancing the cultural / religious beliefs and practices of the majority, which, of course, in India is represented overwhelmingly by its Hindu population.

⁷²Rajeev Bhargava, “What is Secularism For?” In *Secularism and its Critics*, ed. Rajeev Bhargava (New Delhi: Oxford University Press, 1998), 515.

states take should reflect the particular constitutive features of their respective polities. In India this means (as is so enshrined in the Constitution) that for certain purposes—for example, establishing separate sectarian electorates—the state cannot recognize religion, but for others—for example, establishing a limited regime of personal laws—it may do so. The state need not relate to all religions in the same way; the bottom line, however, is that public policy regarding intervention, non-interference, or equidistance be guided by the same nonsectarian principle of equal dignity for all.

The process by which this concept of secularism emerged as a mark of constitutional identity, then to be extended protected status under the Court's basic structure jurisprudence, is roughly analogous to the dialogical formation of personal identity, which is developed—recall Charles Taylor's account—“only against the background of things that matter.” Much as a self evolves interactively within the specific contours of its environment, India's constitutional identity, as refracted through the determinative lens of secularism, is the product of historically conditioned circumstances in which choices are limited by the dual realities of complex communalism and religiously inspired societal inequality.⁷³ The nation as an “idea of continuity,” in which, as Burke said, a constitution discloses itself “only in a long space of time,” can go far to explain how the main outlines of a secular identity are discoverable as a contingent part of the political and moral order. But within these broad outlines is considerable space for inventive statesmanship, as is illustrated not only in the work of the Constituent Assembly, but also in the earlier efforts of the Indian National Congress culminating in such documents as the Nehru Constitutional Draft of 1928 and the Karachi Resolution of 1931.⁷⁴

Secularism's designation as a basic structure makes it, in the words of a former Indian chief justice, “immutable in relation to the power of

⁷³As Anthony D. Smith has observed, “A national identity is fundamentally multi-dimensional; it can never be reduced to a single element. . . .” Smith, *National Identity*, 14. The same applies to constitutional identities. Thus, Smith's discussion of the Indian case appropriately invokes the communal question as one of the relevant dimensions. “The Indian example reveals the importance both of manufactured political identity and of preexisting ethno-religious ties and symbols from which such an identity can be constructed.” *Ibid.*, 113.

⁷⁴These documents addressed in particular the rights of minorities to their own culture and religion. But the prescriptive constitution is not inscribed only in official documents. A constitutional identity expresses as well important—and continuous—developments in the private sphere that are integral to the dialogical process of identity formation. In India this includes the very long tradition of reform movements within the various Hindu communities that helped shape the constitution's commitment to socioeconomic reconstruction. See in this regard, Charles H. Heimsath, *Indian Nationalism and Hindu Social Reform* (Princeton: Princeton University Press, 1964).

Parliament to change the Constitution.⁷⁵ Jed Rubenfeld, the American constitutional theorist, has described “[r]adical interpretation... [as] a new interpretation of the basic principles or purposes behind a constitutional provision.”⁷⁶ As applied to Indian constitutional secularism, a radical move is one that seeks to replace the commitment underling this basic structure with something fundamentally different. The chief justice’s comment in 2000 was made in response to an initiative of the BJP-led government to establish a national commission to review the constitution and to make recommendations for change within the constraints of basic structure. For those who suspected the intentions of the Hindu nationalists in power, the concern was not that the commission would consign secularism to oblivion, but that the commitment would, in effect, become a victim of identity theft. If, for example, it were denuded of its ameliorative content or rendered incompatible with public policies protective of religious minorities, then there would be reason to worry about a fundamental transformation in the concept’s essential meaning.⁷⁷ Were secularism to be redefined to implement the principle of noncognizance of religion (in other words, strict separation), this development would mark a substantial change in constitutional identity.

Opposition to such a contemplated change might again bring Burke to India, this time embodied in the following points:

1. There ought to be a strong presumption on behalf of continuity in the prevailing contextual understanding of secularism. Such a presumption is rooted in the prescriptive constitution and is consistent with a view of identity (or personality), according to which the distinctive character of a constitution (or person) is bound up in a specific set of characteristics that is constant over time;
2. This presumption can be overcome only by a showing of substantial changes in the polity of the sort that would clearly indicate that the extant secular identity no longer conforms to the requirements of the newly constituted fundamentals of the regime.⁷⁸ So, for example, if the social injustices resulting from religiously mandated practices were addressed through internal communal reform (a nearly impossible

⁷⁵M. N. Venkatachaliah, “There are Some Things of Eternal Verity,” Interview in *Frontline*, v. 17, February 19, 2000.

⁷⁶Rubenfeld, *Revolution by Judiciary*, 9.

⁷⁷In fact, the union law minister, Ram Jethmalani, suggested reviewing the “misguided secularism” that had emerged in the Supreme Court’s church/state jurisprudence. It would have been consistent with the commission’s terms of reference to seek an emendation to existing constitutional language concerning secularism that explained exactly what this unamendable basic structure meant.

⁷⁸If, in other words, “the fixed form of a constitution whose merits are confirmed by the solid test of long experience and an increasing public strength and national prosperity” no longer accurately describes the situation. Edmund Burke, *Reflections on the Revolution in France* (Indianapolis: The Bobbs-Merrill Company, Inc., 1955), 66.

eventuality given the radically heterodox and nonhierarchical character of the major religions in India), then the ameliorative identity of constitutional secularism should be permitted to fade or perhaps even disappear; and

3. Absent such a demonstration, be wary of those who “have some change in the church or state, or both, constantly in their view.”⁷⁹ Their advocacy likely flows either from the anticipation of some direct and particular political gain or from a theoretically driven agenda whose goal is to achieve a more satisfactory compliance with the mandate of principle. The attempt to reconfigure a constitutional model of spiritual-temporal relations should, therefore, not be undertaken absent compelling evidence that doing so is essential to the pursuit of the constitution’s unique historically rooted vision of development. Resistance to the change should be premised on the Indian Court’s wise injunction: “[T]he Constitution is a precious heritage; therefore you cannot destroy its identity.”

III

Such would appear to be the view as well of Justice Anthony Kennedy, who recently noted, “We have a legal identity, and our self-definition as a nation is bound up with the Constitution.”⁸⁰ This is clearly the case in Ireland, where, in contrast with India, a constitutional identity developed in more harmonious accord with the socio-cultural-economic environment within which it came into being. Thus, Irish “self-definition as a nation” was arguably more comfortably embodied in its fundamental law than in India, if for no other reason than that the commitments behind its design were much less antagonistic to the existing social structure and its cultural/religious underpinnings. As such, it points to a reduced role for creativity or construction in explaining constitutional identity and, instead, suggests an account more consistent with the model of discovery, which holds that the constitution gives expression to “characteristics of the polity that already exists.”⁸¹

⁷⁹Ibid., 73.

⁸⁰*The New Yorker*, September 12, 2005, 45. Justice Kennedy made this remark in an interview concerning his support for the practice of referring to (if not relying on) foreign law in the course of adjudicating constitutional cases. Kennedy differs from Justice Scalia in seeing no necessary conflict between borrowing and constitutional identity.

⁸¹Barden, “Discovering a Constitution,” 7. As I previously indicated, this does not mean that Indian constitutional identity is not rooted in sources internal to the national narrative. It is, however, in greater tension with other important strands in the tradition, and thus may be said to represent a more complicated instance of discovery than the Irish case.

The predominant characteristic in Ireland was the religion of the vast majority of the population, the constitutional significance of which is manifest in the preamble's invocation of "the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred."⁸² Of course, the constitutional salience of Catholicism in Ireland is as much political as theological, a phenomenon found in many other places, notably Hinduism in India and Judaism in Israel. But there is a difference. The imprint of the dominant religions in India and Israel on the formation of identity is not immediately and directly discernible in the constructs of constitutional design. In the former, as we have seen, constitutional identity evolved in creative tension with the religious identity of the majority; its imprint, therefore, was substantial but decidedly reactive in content. In the Israeli case, the failure to adopt a formal comprehensive written constitution after the establishment of the state was partly attributable to a fundamental disagreement over the role that the religion of the majority should play in constituting the polity. A half century later, the controversy over the judicially inspired constitutional revolution essentially reenacted the early debates over the shape and substance of constitutional identity, the contestants still arguing over the appropriate balance between democracy and Judaism.⁸³

The Trinitarian cast to Irish constitutional identity does not mean that the supreme law in Ireland is deeply constitutive in the Aristotelian sense, or in the theocratic sense that applies, say, to the Iranian Constitution.⁸⁴ The adoption of a document in 1937 that made no effort to conceal the sectarian sources of its deepest commitments did not appreciably alter the identity

⁸²Section 2 of Article 44 in the original constitution (deleted in 1972) also recognized "the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens." Section 3 (deleted at the same time) went on to recognize other denominations, including, uniquely, "the Jewish congregations." It should be noted that the section 2 language was not as emphatic as some of the Catholic advisors to Eamon de Valera had preferred. For example, de Valera rejected the recommendation of Edward Cahill, the Jesuit priest, that the constitution proclaim, "The Holy Roman Catholic Church... occupies in the social life and organization of the Irish nation a unique and preponderant position, which is recognized as a fact by the Constitution and shall be duly recognized by the state." Quoted in Sean Faughnan, "The Jesuits and the Drafting of the Irish Constitution of 1937," *Irish Historical Studies* 26 (1988): 94.

⁸³I have examined this controversy in Gary Jeffrey Jacobsohn, *After the Revolution*, 34 *Israel Law Review*, 139 (2000).

⁸⁴Nevertheless, in the first few decades under the 1937 constitution the state proved itself unwilling or unable to make policy opposed to the Catholic Church's wishes. As Basil Chubb has suggested, this record could qualify as "theocratic" by some definitions. Basil Chubb, *The Politics of the Irish Constitution* (Dublin: Institute of Public Administration, 1991), 48.

of a polity that had previously been governed by a constitution notably lacking in any explicit religious identification. Eamon de Valera, the guiding force behind the change in constitutions, implicitly acknowledged that the new charter had not reconstituted the Irish polity with a freshly configured orientation to develop society along Catholic lines. "Since the coming of St. Patrick fifteen hundred years ago, Ireland has been a Christian and Catholic nation. . . . She remains a Catholic nation."⁸⁵ More than a new departure in constitutional engineering, the document was, in essence, a confirmation of the prescriptive constitution.⁸⁶ As Basil Chubb has pointed out, the Catholic Church was not made an established church under the Irish Constitution because it did not need to be.⁸⁷ All that was necessary (or at least desirable) was for the document to validate an identity that had long been instantiated in centuries of religious tradition and political struggle. The behavioral reality of the Irish people was expressed in what was approvingly referred to as "the wonderful Christian spirit which animates the whole constitution."⁸⁸ To be sure, an expressive component is present in all constitutional identities; where, as in the Irish instance, the principal marks of identity are largely a projection of the extant social or cultural condition rather than mainly or even partly a reproach to it, expressiveness might be viewed as a synonym for the concept of identity and not merely a component of it.

Thus, Irish constitutional identity is endowed with a preservative mission that is distinguishable from its counterpart in India, where it is central to that nation's larger project of societal transformation.⁸⁹ To be sure, Irish society has hardly been static in recent decades; indeed, by most measures, it has been one of Europe's most dynamic in both economic and cultural terms. Moreover, the sectors experiencing the most dramatic change have been those in which the religious strand in constitutional identity has been

⁸⁵Quoted in *Ibid.*, 27.

⁸⁶In saying this, I do not mean to overlook the obvious break with British colonial ties signified by the 1937 charter. For Ireland this was, indeed, a new departure, and so a complete account of constitutional identity must include the triumph of republicanism. For a different view of Irish constitutional identity that views the constitution as a text similar to the contradictory texts of literary modernism (for example, James Joyce's *Finnegans Wake*), see Patrick Hanafin, *Constituting Identity: Political Identity Formation and the Constitution in Post-Independence Ireland* (Aldershot, England: Ashgate Publishing Company, 2001).

⁸⁷*Ibid.*, 36.

⁸⁸The comment of a Catholic theologian at the time of the adoption of the Constitution, as quoted in Sean Faughnan, "The Jesuits and the Drafting of the Irish Constitution of 1937," 97.

⁸⁹The distinction between preservative constitutions and transformative constitutions has been made before. See, for example, Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), 216–17. Sunstein's prime example of the latter is South Africa.

particularly expressive and consequential. Perhaps foremost among these is the family, in which orthodox Catholic teaching on subjects like divorce, abortion, contraception, sexual orientation, and gender equality have been vigorously challenged in courts of law as well as courts of public opinion. “[I]rish society is undergoing profound changes. The influence of institutionalized religion is on the wane and . . . communal views of society are increasingly challenged by a growing emphasis on the rights of the individual.”⁹⁰ How does constitutional identity figure in these changes, particularly those that implicate the very substance of the identity in question?

In India, as we have seen, the challenge to a constitutional identity that incorporates in its secular aspect an ameliorative aspiration itself poses a threat to change. Constitutional progressivism, in other words, supports the status quo. This explains the concern within the Indian judiciary and elsewhere that a radical transformation in the constitution’s identity could prevent necessary societal transformation. In Ireland the challenge to constitutional identity fosters the opposite concern, namely that societal transformation will occur without the benefits of a salutary restraint that is anchored in the fundamental law. Hence, the importance of Burke, for whom prescription was the key to constitutional identity, providing continuity in the midst of flux. Burke was not opposed to change unless its unfolding manifested a repudiation of (or abrupt severing from) the past. As a conservative presence, constitutional identity should, therefore, be resistant to change but not necessarily by posing an insuperable obstacle to it. To elaborate, I turn to the paradigmatic institution of Irish constitutional identity—the family.

A notable difference between the Constitution of 1937 and the document it superseded was that the latter had made no references to familial matters. Drawing upon Catholic teaching and papal encyclicals, the republican constitution not only made provision for the family, but also sanctified it with the framers’ explicit natural law imprimatur. If any language can be said to have designated a constitutionally recognized institution as a basic structure (in the Indian sense of the term), it surely would be the words of Article 41, Section 1: “The State recognizes the family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.” As explicated on the Irish Supreme Court in a landmark case, “‘Inalienable’ means that which cannot be transferred or given away while ‘imprescriptible’ means that which cannot be lost by the passage of time or abandoned by non-exercise.”⁹¹ The latter term, in particular, displays a distinctive (and possibly unique) etymological recognition of the *grundnorm* of Burkean constitutionalism, and, thus, invites us to consider the

⁹⁰Gerard Whyte, “Religion and the Irish Constitution,” *John Marshall Law Review* 30 (1997): 725, 725.

⁹¹*Ryan v. Attorney General* (1965) IR 294, 308.

interpretive implications of such a formal acknowledgment of the constitution's prescriptive reality.

This consideration builds on two factual predicates of Irish constitutional politics: first, the presence of a Thomistic natural law jurisprudential tradition, which has historically figured prominently as an important factor in constitutional identity⁹² and second, the increasing threat to this tradition embodied in the steady secularization of society (since the 1960s) and the rapid pace of Irish integration into the European community.⁹³ Since the constitutional status of the family is directly implicated in the first predicate, the developments associated with the second are strongly correlated with an alteration in the existential status of the family. The question is whether the nature and scope of this alteration would be appreciably different if the broad sweep of societal change occurred absent the presence of the first. In other words, how does (or at least might) constitutional identity affect social change?

Change, of course, has occurred across a broad range of issues concerning the family. If, as has been suggested in regard to that institution, the 1937 Constitution blurred the boundaries between ecclesiastical and civil law,⁹⁴ the last decades of the twentieth century brought those boundaries into sharper focus, such that the spiritual and temporal domains in Ireland came to be characterized by significantly less overlap. Through both the formality of constitutional amendment (divorce, abortion) and the more informal process of constitutional interpretation (abortion, contraception, gender equality), the landscape of domestic relations experienced appreciable change. The latter processes include human rights judgments from the continent, which, as in the case of homosexual rights, have reversed judicial outcomes in Ireland when such rulings veer in an apparently theologically driven antilibertarian direction.⁹⁵ These judgments are a response to the conflicting pressures of both predicates and constitute an integral part of the dialogical process of identity modification.

To see how this has played out, consider the abortion issue. Protection for fetal life was not included in the 1937 Constitution but was added in

⁹²As an Irish justice has written, "[T]he political philosophy of our Constitution owes infinitely more to Thomas Aquinas than Thomas Paine." *Director of Public Prosecutions v. Best*, 2 IR 17, 65 (2000).

⁹³The most dramatic illustration of the threat is the abolition of the constitutional ban on divorce in 1995.

⁹⁴Linda Hogan, "Interpreting the Divorce Debates: Church and State in Transition," in *Religion and Politics in Ireland at the Turn of the Millennium*, eds. James P. Mackey and Enda McDonagh (Dublin: The Columba Press, 2003), 107.

⁹⁵The 1984 decision that upheld the criminalization of homosexual conduct (*Norris v. Attorney General*, 1 I.R. 36) was based on an understanding of "the Christian nature of our State." *Ibid.*, at 65. The European Court of Human Rights found the Irish legislation to be in violation of the European Convention for the Protection of Human Rights. *Norris v. Ireland*, 142 Eur. Ct. H. R. (ser. A) at 21 (1998).

1983 (pursuant to a referendum) in response to concerns provoked by developments on and off of the Court. In particular, the Supreme Court's decision in *McGee v. Attorney General* (1974),⁹⁶ striking down restrictions on access to contraception, gave rise to fears that it would serve the same role in Ireland as did the *Griswold* case in the United States, namely, as a precedent for judicial affirmation of a constitutional right to an abortion. As one observer noted, the worry was that "Ireland might follow the path of other European and North American states in liberalizing access to abortion, as a threat to Roman Catholicism's power to mark national identity."⁹⁷ That *Roe v. Wade* was so fresh in the minds of the readers of *McGee* only heightened the anxiety over a ruling that came to be identified as the first decision in Ireland expressly to challenge a central teaching of the Catholic Church.

Accurate as that identification is, the ruling is distinguished by the imprint of constitutional identity evident in its central argument. The right upheld in *McGee* was not an individual conscience-based right to privacy but a right of a married couple to determine the number of children they wish to have; it was, in the words of the principal opinion, a vindication of the family "as the natural primary and fundamental unit group of society."⁹⁸ By appealing to the Catholic-inspired provisions of Article 41 to upset a Catholic-inspired policy, the Irish Court achieved what many—happily or unhappily—considered a progressive outcome by drawing upon constitutional sources expressive of the particular realities of the local culture. The result was a representative display of the aforementioned predicates of constitutional policy: a benchmark in the secularization of society whose achievement was linked to a natural law jurisprudence with which it was in significant tension.

It was the policy result, of course, that troubled opponents of abortion and led them to take action in response to the decision. But the constitutional path to greater access to birth control is instructive as well for the larger story about constitutional identity and change. The Court-facilitated change in constitutional thinking about these controversial matters produced an outcome that was substantively inconsistent with the views and expectations of those who first formally stamped the constitution with an identity, but an outcome that, nevertheless, was in its construction preservative of that identity. Had the Court accepted *McGee's* claim that the contested restrictions violated her constitutional right to lead her private life in accordance with the dictates of her conscience, nothing would have been materially different with respect to the status of the law in question. But such an alternative scenario might have embodied a different set of implications for subsequent legal evolution; in embracing a constitutional

⁹⁶1 I.R. 284 (Ir. S.C.).

⁹⁷Ruth Fletcher, "Pro-Life" Absolutes, *Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986–1992*, 36 *Osgoode Hall Law Journal* 1, 19 (1998).

⁹⁸*Ibid.*, at 310.

argument for a right not sanctioned by the Church that was also not rooted in a Church-friendly jurisprudence, the Court would have affirmed the moribund state of Irish constitutional identity, thereby pointedly marginalizing it as a factor in constitutional change.

Had such an affirmation been forthcoming, how might it have found expression? One possibility that bears directly on the interface between Irish and European constitutional development involves the transvaluation of natural law jurisprudence. For example, Richard Humphreys, a prominent Irish constitutional scholar, has proposed that “the natural law conception of the Constitution . . . be regarded as effectively a secular one.”⁹⁹ “We are not engaged in an exercise of deciding what was meant in 1937. We are rather searching for the best contemporary understanding of the natural rights which the Constitution mandates the State to protect.”¹⁰⁰ To this end, he has sought a convergence between rights protection in the international community and under the Constitution of Ireland. This “internationalist reorientation of our constitutional law”¹⁰¹ would also facilitate a convergence between the secularizing trends in society and the course of constitutional development, such that the document would, for the most part, not stand as an impediment to the Europeanization of constitutional identity.

The adoption in 1983 of the amendment acknowledging “the right to life of the unborn” (“with due regard to the equal right to life of the mother”) complicated hopes for any such convergence.¹⁰² Based on this amendment, a

⁹⁹Richard F. Humphreys, *Constitutional Interpretation*, 15 *Dublin University Law Journal* 59, 69 (1993). Another variant of this kind of constitutional transvaluation can occasionally be observed in Irish Supreme Court opinions. In a case arising under Article 41, one of the justices (Hardiman) noted that the presumption in favor of parental authority was a strongly held view of Jeremy Bentham. “I would endorse this as a description of the Irish constitutional dispensation, even if any reflection of the views of Jeremy Bentham is coincidental. I do not regard the approach to the issue in the present case mandated by Articles 41 and 42 of the Constitution as reflecting uniquely any confessional view.” *North Western Health Board v. W. (H.)* IESC 70 (2001), <http://www.bailii.org/ie/cases/IESC/2001/70.html>, at 74. This was a response to another justice’s observation that Article 41.1 was the provision in the constitution that came closest to accepting that there is a natural law in the theological sense.

¹⁰⁰Richard F. Humphreys, *Interpreting Natural Rights*, 28–30 *Irish Jurist* 221, 227–28 (1993–1995).

¹⁰¹Humphreys, *Constitutional Interpretation*, 77. This reorientation is, as Humphreys points out, consistent with the prevailing jurisprudence of the European Convention on Human Rights. “The European Court of Human Rights has described the Convention as ‘a living instrument,’ which ‘must be interpreted in the light of present-day conditions.’” *Ibid.*, 64. (The quotation is from *Tyrer v. United Kingdom*, 2 E.H.R.R. 1, 10 (1978).

¹⁰²Prior to 1983, abortion had been illegal under an 1861 statute known as the Offences against the Person Act.

series of cases in the eighties concerning abortion referral services resulted in victories for antiabortion proponents.¹⁰³ But given Ireland's membership in the European community, these victories were tinged with uncertainty, as the general practice and expectation of member states to accede to rulings from the continent when they clashed with local judgments was well established. Indeed, in short order, supranational legal regulation reversed the referral decisions, leaving the status of abortion law in considerable doubt.

This, in turn, led the Irish government to seek and eventually obtain in the 1992 Maastricht Treaty on European Unity a protocol exempting the constitutional ban on abortions in Ireland from any decision affecting its application. The efficacy of the protocol with respect to the specific issue of traveling abroad to secure abortion services was cloudy; moreover, the actual need for it in relation to the fundamental question of maintaining the illegality of abortion (consistent with the life of the mother) was questionable, since the evidence suggested a disinclination on the part of the EC to harmonize national abortion laws throughout the Community.¹⁰⁴ But apart from those considerations, the larger meaning of the protocol lies in the effort to isolate an area of domestic law, specifically one uniquely expressive of constitutional identity, from external forces. Irish identity was constructed in no small measure to resist an external threat centered in Great Britain; years hence, it was thought to require, much in the spirit of the earlier nationalist efforts, a defense against an internal threat—secularization—that would again focus on a perceived external menace.¹⁰⁵

Yet later in 1992, a referendum was held that approved the inclusion of new paragraphs in Article 40 on abortion, guaranteeing freedom to travel and freedom of information. Thus, it also effectively guaranteed that with respect to these freedoms there would be no conflict between Irish law and European supranational obligations. Then in 1995, the Supreme Court affirmed the legitimacy of these amendments against the charge that they contradicted the constitutional obligation to protect unborn life.¹⁰⁶ Perhaps

¹⁰³See, for example, *The Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd v. Open Door Counselling Ltd*, IR 593 (1988); and *The Society for the Protection of Unborn Children (Ireland) Ltd v. Grogan*, IR 753 (1989).

¹⁰⁴"[T]here is no possibility whatsoever of the Community legislature (or indeed the Court of Justice in Luxembourg) acting to legalise abortion itself in Ireland. The question of whether abortion should be legal or otherwise in a given Member State is a moral value judgment outside the scope of Community law and within the sphere of sovereign decision-making by Member States." *Irish Times*, March 2, 1992.

¹⁰⁵On this point, see Ruth Fletcher, "'Pro-Life' Absolutes, Feminist Challenges: The Fundamental Narrative of Irish Abortion Law 1986–1992," 23, who casts it somewhat differently than I do here.

¹⁰⁶*In re Article 26 of the Constitution & In Re Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill*, 1 I.R. 1 (1995). I have discussed this case in

surprisingly, it did so in part by declaring natural law subordinate to the constitution.¹⁰⁷ So how are we to understand this somewhat strange sequence of events?

One way is to see it as an ongoing narrative in the formation of constitutional policy. In this story, a polity determined to accommodate significant social change seeks to do so under the restraining sway of the prescriptive constitution. What appear as discrete and occasionally inconsistent developments (e.g., privileging Thomistic natural law in one case, putting it in its place in another) are best understood as moments in a dialogical unfolding of identity refinement and calibration. In the end, the resulting policy makes sense as a modest adjustment—in this case in the practice of abortion—that more closely aligns Irish constitutional jurisprudence with prevailing norms in many Western democracies, without abandoning the distinctive character of the local constitutional culture. At the same time, it points to a similar adjustment in the evolution of constitutional identity.

The benchmarks of this narrative, as outlined above, are

1. Abortion is illegal under the laws of a State whose Constitution was, and policies are, strongly influenced by a powerful ecclesiastical authority;
2. At a time of changing sexual mores and a weakened Church, the Supreme Court affirms a right to birth control access under a constitutional theory rooted in traditional Catholic natural law doctrine;
3. The constitution is amended to codify protection for unborn life, something previously thought safely shielded under statutory law;
4. Concerns over the finality of abortion judgments in Irish courts lead to a grant of immunity from possible EC overruling; and
5. A referendum leads to additional abortion amendments protecting the freedom to travel and to receive information related to abortion services in another state, and the validation of these changes is accompanied by a pointedly judicial downgrading of the constitutional significance of Catholic theology.

Missing from this list is the landmark Supreme Court case, *Attorney General v. X*, decided in 1992 (chronologically between #4 and #5). It is the “litmus test for determining when abortions may lawfully be carried out in Ireland.”¹⁰⁸

connection with the practice of constitutional borrowing in Gary Jeffrey Jacobsohn, “The Permeability of Constitutional Borders,” 1806–12.

¹⁰⁷A brief submitted by “the counsel for the unborn” had argued that “the natural law is the foundation upon which the Constitution was built and ranks superior to the Constitution.” The judicial response was succinct and direct: “The Court does not accept this argument.” *Abortion Information Case*, at 38.

¹⁰⁸Gerard Hogan and Gerry Whyte, *The Irish Constitution*, 1513.

It is also a case, much like *Planned Parenthood v. Casey* in the United States, which left partisans on both sides of the abortion divide dissatisfied with key elements of the result. The fourteen-year-old victim of an alleged rape was permitted to go abroad to terminate her pregnancy, but this was allowed only because the Court judged her threat to commit suicide to be a substantial risk to the life of the mother. Dicta in the opinions revealed a judicial lack of sympathy, absent compelling evidence of a threat to the mother's life, for permitting travel outside Ireland to obtain an abortion. To the extent that this commitment did not comport with changing mores and external political realities—in relation to the continent, but also Northern Ireland—the amendments of #5 were designed and approved to redress the incongruity.

It appears that abortion law in Ireland has moved toward more flexibility and accommodation in the procedure's availability, without appreciably disturbing the polity's underlying constitutional commitment to maintaining its illegality. Despite the steeply declining influence of the Church in the affairs of state, the constitutional identity it was instrumental in shaping helped forestall a parallel decline in its doctrinally supported moral order. In the process, however, this identity was itself modified; much as abortion policy was forged incrementally and interactively in response to an environment where religion, state, and family have all been in flux, so, too, was constitutional identity. While the Trinitarian cast of the original document (itself an outgrowth of centuries of constitutional development) remains, it has become less specifically Catholic in content. In *McGee*, Justice Walsh affirmed the religious character of family rights that were "superior or antecedent to positive law," but stipulated, "In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law."¹⁰⁹ They were Judeo-Christian, if not specifically Catholic. Twenty years later, in the *Abortion Information Case*, the Court took pains to assert the superiority of positive law over natural law. The shift need not be downplayed, but in practical terms, the Irish Constitution's explicit incorporation of natural law within the folds of its positive law renders somewhat academic the question of superiority.

More to the point at hand, that incorporation—and the jurisprudence extending from it—may be likened to the thread of consciousness that sets apart one individual from another, that is critical, as the philosophers were fond of writing, to the discernment of personal identity. To borrow from one of them, Thomas Reid, it connotes a "continued uninterrupted existence," which, elevated to the national level, brings us to Burke's prescriptive constitution. Specific constitutional provisions, such as those in Articles 40 and 41, are in themselves not as important as the larger phenomenon they call to our attention: an inheritance embodying a unique history

¹⁰⁹*McGee v. Attorney General*, IR 284 (1974), 318.

that over time shapes the constitutional aspirations of a people. Seen in this light, the theological underpinnings of the law's antiabortion policy are perhaps better conceptualized as an expression of the "prejudices of the community" that happen to be rooted in religion. These prejudices are distinguishable from public opinion, which is not to say that they are immutable or that they guarantee particular legal and constitutional outcomes. They establish, in other words, a strong presumption in favor of practices deeply engrained in constitutional experience that ought not to be overcome by a simple showing of present popular inclination. In the Irish abortion rights narrative, they establish a presumption (even before the 1983 amendment) in favor of fetal protection, but not one as impervious to shifting currents of public opinion as to remain untouched by them.¹¹⁰

IV

Stated otherwise, they embody, in Jed Rubenfeld's apt formulation, "temporally extended obligations in the form of commitments over time."¹¹¹ Presented as a solution to the "paradox of commitment" in American constitutionalism—why should we submit to governance by the dead hand of the past?—Rubenfeld's argument that freedom and self-government require adherence to enduring commitments rather than slavish response to immediate desires also applies to the subject of this article, constitutional identity. Emphasizing the "autonomous agents" whose self-governance is attained through faithful compliance with commitments made in the (often distant) past, Rubenfeld rightly concludes, "Ignoring our commitments may make us rational, in the standard sense, but it cannot make us free."¹¹²

It also cannot maintain our constitutional identity. Adherence to these commitments may be expressive of our standing as autonomous self-governing agents. But in addition, if freedom is impossible without autonomy, so, too, is identity. Imagining a polity in which the live hand of the present was the sole source of direction for its collective choices is to imagine a polity without a constitutional identity. More accurately, its identity would be contingently changeable, which is the same as not having an identity at all. On the other hand, while continuity and stability are critical to any coherent understanding of constitutional identity, so, too, is change. Constitutional identity is, thus, not like mathematical identity. An identity in mathematics is an element of a set which, when combined with another

¹¹⁰As seen in the nonlinear progression of post-*McGee* policy development, the result is to change things at the margins of what is allowable and what is not; important, too, but more difficult to determine, is the cumulative effect that the experience has had on the texture and substance of constitutional identity.

¹¹¹Rubenfeld, *Revolution by Judiciary*, 93.

¹¹²*Ibid.*, 95.

in a binary operation, leaves the second unchanged.¹¹³ But as we have seen, identity in the constitutional domain, however elusive a concept it may be, is best comprehended within a dialogical or transactional operation in which all elements, including identity itself, are at least potentially modifiable through their engagement with one another.

Elusive as the idea of constitutional identity is, constitutional theorists will be the primary beneficiaries of its further exploration. The distinction between commitments and intentions—the centerpiece of Rubenfeld’s ambitious rethinking of constitutional theory¹¹⁴—must rely for its explanatory power on our ability to determine whether a particular constitutional preference is so essential to the issue of how a people has been constituted as to warrant placement under the more protected rubric. Such a determination is vital to the success of constitutional theories—Ackerman’s for example—that seek to comprehend the dynamic of legal transformation. Consider again the basic structure doctrine in India. The Indian Court’s designation of certain features of the constitution as falling under this heading, thereby extending to them heightened judicial protection, is an illustration of the invocation of commitmentarian considerations in constitutional jurisprudence. The challenge for the Court was not only to specify which attributes so qualified, but also to assign meanings to them that were sure to be vigorously contested. It could affirm that secularism was a basic structure (i.e., a fundamental commitment) under the constitution, but the question remained: what was secularism and how was it to be defined?

Tellingly, the Court’s answer emerged out of an inquiry into constitutional identity, the kind of inquiry that had earlier been legitimated in the struggle over unconstitutional amendments. If not so explicitly, the Irish Court pursued a similar route in its task of establishing what the constitutional commitment to certain imprescriptible rights entailed. The justices situated this commitment within the prescriptive constitution’s incorporation of a moral order reflective of Catholicism’s prominent (yet limited) presence in Irish political and constitutional development. In both instances, there was an identifiable constitutional core to draw upon in orienting the Court’s

¹¹³For the operation of addition, zero is the only identity, since $0 + 1 = 1$, $0 + 2 = 2$, ... $0 + x = x$ for every number x . Thus, combining 0 with any other number by the binary operation of addition leaves that other number unchanged. Similarly, for the binary operation of multiplication, one is the only identity, since $1 * 0 = 0$, $1 * 1 = 1$, $1 * 2 = 2$, ... $1 * x = x$ for every number x . So, combining 1 with any other number by the binary operation of multiplication leaves that other number unchanged.

¹¹⁴“Commitments differ from mere intentions. Commitments create obligations. Mere intentions do not. To commit oneself is to engage in a special normative operation that goes beyond intending, through which one imposes obligations on oneself over time.” Rubenfeld, *Revolution by Judiciary*, 99.

thinking. The orientation did not mandate a particular result, but it did clarify the ways in which the issues under consideration fit within the broader constitutional culture.

Indeed, the question of fit is very familiar in constitutional theory, especially through Ronald Dworkin's writings, where it is emphasized in connection with the virtue of integrity. Integrity is also prominently featured in nonjurisprudential literatures on identity—mainly the psychological and philosophical—where, by providing meanings accessible to the psyche, it plays a role not dissimilar to its functioning in constitutional identity. As Dworkin insists, it allows us to explain “features of our constitutional structure and practice that are otherwise puzzling.”¹¹⁵ It supports Rubenfeld's commitment-based ideal of self-government, “for a citizen cannot treat himself as the author of a collection of laws that are inconsistent in principle. . . .”¹¹⁶ It makes possible “fidelity to a scheme of principles each citizen has a responsibility to identify . . . as his community's scheme.”¹¹⁷

But for Dworkin, “Law and integrity . . . begins in the present and pursues the past only so far as and in the way its contemporary focus dictates.”¹¹⁸ Integrity in law, he maintains,¹¹⁹ “does not require consistency in principle over all historical stages of a community's law. . . .”¹²⁰ In commanding a “horizontal rather than vertical consistency of principle,”¹²¹ Dworkin's understanding of integrity differs from the account of constitutional identity presented in this article. Here the relevant community is, as Burke described it, “an idea of continuity” that “disclose[s] [itself] only in a long space of time.”¹²² This continuity, necessary, too, in many philosophical treatments of personal identity, makes possible the coherence and fit that integrity—as in an integrated constitution (and personality)—facilitates.

In the end, then, the future of constitutional identity is inscribed in its past. Recall the first part of the Indian jurist's injunction: “[T]he Constitution is a

¹¹⁵Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 215.

¹¹⁶*Ibid.*, 189.

¹¹⁷*Ibid.*, 190.

¹¹⁸*Ibid.*, 227.

¹¹⁹*Ibid.*, 227.

¹²⁰*Ibid.*

¹²¹*Ibid.*

¹²²Burke's friend Samuel Johnson made a similar observation when speaking of the human need, in Jeff McMahon's words, to “transcend the temporally and spatially local.” Jeff McMahon, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002), 82. Said Johnson: “Whatever withdraws us from the power of our senses; whatever makes the past, the distant, or the future predominate over the present, advances us in the dignity of thinking beings.” Quoted in *Ibid.*, 82. This is what distinguishes human identity from animal identity; as a uniquely human activity, constitutional practice can, as Burke clearly believed, be thought of in the same way.

precious heritage; therefore you cannot destroy its identity." For others, of course, the constitution need not be viewed in this way at all. In their opinion, it is the constitution's deplorable heritage that stands out, in which case its identity perhaps should be destroyed. Or, as is likely the case for most people, the constitution's heritage is, in the cold light of political and social transformation, a mixed blessing, leaving open the question of how and whether its identity might be changed.