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DIALOGUE AND DEBATE: SYMPOSIUM

Identity and difference: distinct disciplinary views on constitutional identity

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Abstract
This article offers a critical literature review on the debate on constitutional identity, combining a synthesis of existing literature with a critical reframing of the concept's theoretical and methodological foundations. While constitutional identity has become increasingly prominent in legal and political debates – particularly within the European Union – its meanings and functions remain contested. The article develops a typology of approaches to constitutional identity, distinguishing two main strands. First, it examines constitutional identity as a legal doctrinal notion. In this sense, identity can function either as a static concept – anchored in an unchanging normative core that limits political or legal interference – or as a dynamic concept, shaped through interactions between domestic constitutional orders and external legal ideas and practices. Second, the article turns to the descriptive use of constitutional identity, understood as a way to explain how a political community understands itself through its constitution. This part surveys key philosophical debates, including how constitutional identity negotiates sameness and difference, how it evolves over time, how it relates to competing conceptions of the constitutional subject, and how it is constructed through narrative, symbolism, and social practice. The article concludes by arguing that if constitutional identity is not a fixed essence but a dialogical and constructed assemblage of identities, then its study must go beyond the legal domain. It calls for a deepening of the interdisciplinary research agenda that includes insights from philosophy, sociology, discourse theory, and literary studies.

Keywords: collective identity; constitution; constitutional identity; constitutional law; interdisciplinarity

1. Introduction

In times of diversity, globalisation, and supranational integration, it is increasingly believed that a constitutional document, and the values embedded in it, can create an inclusive collective identity. Politicians like to point to constitutional values as a potential anchoring point for social unity in contemporary circumstances. The same sentiment is voiced by academics. In past decades, philosophers, lawyers, political scientists, and historians alike have expressed the idea that attachment to constitutions and constitutional principles can nourish unity and integration, especially in societies that are divided along, for instance, ethnic or religious lines.[1]

[1]G Ariely, 'Constitutional Patriotism, Liberal Nationalism and Membership in the Nation: An Empirical Assessment' 46 (3) (2011) Acta Politica 294–319; J Habermas, *Faktizität und Geltung* (Suhrkamp 1992); F Fukuyma, *Identity* (Farrar, Straus & Giroux 2018); J-W Müller, *Constitutional Patriotism* (Princeton University Press 2007); C Taylor, 'Cross-Purposes: The Liberal-Communitarian Debate' in NL Rosenblum (ed), *Liberalism and the Moral Life* (Harvard University Press 1989) 159–82.

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Today, almost all countries in the world have a constitution that provides a basic framework for their common life. And as these countries are grappling with fractures old and new, constitutions naturally appear as part of the solution and as potential mediums of societal integration. In recent years, constitutions have played a role in dismantling ethnic conflicts in postcolonial societies and indigenous groups have received recognition through constitutional means. Many other social questions have proceeded through constitutional claims too: issues of gender or ecology, for instance, are regularly cast in constitutional terms. Moreover, new processes of participatory constitution-making try to give constitutions a larger democratic legitimacy and strengthen the citizens' attachment to their constitution.

This turn towards constitutions as vehicles for collective identity is most clearly visible in the legal sphere, in particular in EU law. The idea of constitutional identity was introduced in Article 4(2) of the Treaty on European Union (TEU; Maastricht Treaty of 1992). This disposition stipulates that the EU 'shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'.[2]

Remarkably, this clause does not use the term 'constitutional identity'. Yet it is generally read as a circumlocutory definition of the concept and is widely used as the legal basis for the EU's acknowledgment and respect of the Member States' constitutional identities when interpreting and enforcing EU law. As such, the identity clause is regularly used by both domestic and European courts and in political discourses to engage or dismiss EU law for the benefit of protecting either the Member States' identities or the identity of the EU.[3] This has made the notion of constitutional identity a focal point of legal-constitutional debates in the EU,[4] where it sometimes seems to function as a stand-in for more sensitive or objectionable notions like sovereignty or national identity.

Because of this connection with national and collective identities, the notion of constitutional identity has become intertwined with the political–philosophical debate on whether constitutions can be the source of a liberal collective identity. A normative approach to this question has been put forward by Jürgen Habermas, with his notion of constitutional patriotism, and continued by, among others, Jan-Werner Müller. In opposition to communitarian or nationalist proposals, they claim 'that political attachment ought to center on the norms, the values and, more indirectly, the procedures of a liberal democratic constitution'.[5] The recent debate on constitutional identity among legal scholars is not focused on distinguishing good from bad forms of 'civic identification'. Their emphasis is more on the descriptive question of how constitutions are linked to the collective identity of a people, how a set of constitutional principles receives acceptance and legitimacy, or how this set can conversely break down.

[2]The so-called 'identity clause' was introduced in Art F(1) of the Treaty of Maastricht. '*The Union shall respect the national identities of its Member States, whose system of government are founded on the principles of democracy*'. Next to the subsidiarity principle, this disposition was implemented as insurance for the Member States, limiting the EU's competence creep. With the 2009 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community the text of the disposition was reformulated to become the present Art 4(2) TEU.

[3]L Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' 12 (2016) European Constitutional Law Review 6–26; F Fabbrini and A Sájo, 'The Dangers of Constitutional Identity' 25 (2019) European Law Journal 457–73.

[4]For a brief historical overview of this evolution, see P Faraguna, 'Unconstitutional Constitutional Identities in The European Union' in R Hirschl & Y Roznai (eds), *Deciphering the Genome of Constitutionalism* (Cambridge University Press 2024) 300–11.

[5]J-W Müller, 'Seven Ways to Misunderstand Constitutional Patriotism' 96 (2009) *notizie di POLITEIA* 20–24, at 20.

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But coupling the notions of constitution and identity has still proven controversial. For some, the focus on constitutional identity is narrowly provincial. A constitution is typically anchored at the national level, while in a globalised world social integration happens at many different levels. Constitutional identity has also been criticised from a pluralist perspective, seeing in it a new isolationist tendency, as it enables national courts and authorities to disconnect domestic legal orders from broader legal frameworks through dissonant interpretations of the rule of law, democracy and human rights.[6] Advocates of indigenous peoples sometimes see constitutional recognition as a new form of assimilation and hence reject the idea of a constitution-centered collective identity.[7] Moreover, merely symbolic recognition in a constitutional text might be less important than solid rights that change the actual power relations.[8] Other critics think the concept is too empty and abstract. Constitutional principles are often the same across borders, so how could they provide a sense of identity? And are they not too dull or bland to really inspire people and create a sense of community?

These critical questions are certainly valid and we will not decide here on the desirability of the concept of constitutional identity. However, worries concerning the vague or exclusionary nature of constitutional identity are amply answered in the debate itself. Moreover, the notions of identity and constitutional identity are effectively used in the legal context, and a lack of research will not change that. If the concept of 'identity' is indeed problematic, then we need more research into the relation between constitutions and identity. This is the task taken up in this symposium. We mobilise many different disciplines to address core questions concerning constitutional identity. Are constitutions indeed suited as a medium of collective identity? Can they foster a substantial collective identity that differs from, for instance, ethnocultural forms of collective identity? How does constitutional identity relate to other, kindred concepts, such as citizenship, constitutional patriotism, sovereignty, or constituent power? And what is the exact role of the constitutional text, as a genre, in identity issues?

There are good reasons to look at these questions from an interdisciplinary perspective. Legal scholars have studied the workings of constitutions for a long time, but they tend to focus on the legal-positivist features of constitutional identity, seeing it as a tool to accommodate diversity in the European Union. They rarely delve into more fundamental issues or problems that relate to other academic disciplines. Thus, next to legal scholarship, intellectual history, philosophy of law, or political philosophy can also weigh in, especially since the relation between written laws and communities has been fruitfully studied within these disciplines. The issue of constitutional identity can also be approached from an empirical and sociological perspective, or even from a literary perspective, as it is ultimately the agency of a text that is at stake here. By establishing an interdisciplinary dialogue about the connection between constitutions and identity, we hope to increase our understanding of the concept of constitutional identity. And we hope to show that the notion of constitutional identity is relevant beyond technical legal debates.

In the remainder of this introductory article, we want to give a brief overview of the many uses of the concept of constitutional identity. We start by looking at the use of constitutional identity as a legal doctrinal notion. In this sense, constitutional identity points at the fundamental norms and principles of a constitutional system.[9] Within this legal doctrinal notion, we distinguish between approaches that emphasise the need for stability that seems implied in the very word of identity,

[6]Note that this critique has not only been addressed to national courts but also to the CJEU. For a critical evaluation of the uncontested interpretive homogeneity of the values of Article 2 TEU in jurisprudence and legal doctrine, and the tendency to ostracise any reasonable and legitimate dispute about the concrete content of these principles, consult, eg, M Nettesheim, 'Die föderale Homogenitätsklausel des Art 2 EUV' 59 (3) (2024) *Europarecht* 269–99, at 279.

[7]I Watson, 'Aboriginal Recognition: Treaties and Colonial Constitutions, "We Have Been Here Forever . . ." 3 (2018) Bond Law Review 1.

[8]See B Harris, *Indigenous Peoples and Constitutional Reform in Australia. Beyond Mere Recognition.* (Springer 2024).

[9]C Calliess and G van der Schyff, 'Constitutional Identity Introduced' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2021) 3–8, at 7.

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and approaches that try to capture identity in movement and hence accept a more dynamic understanding of constitutional identity. Next to this doctrinal notion, we see a more descriptive use of the term constitutional identity in a political–philosophical inquiry into the relation between constitutions and collective identity. Scholars investigate the role of a constitutional document and order in a society's self-understanding, and the philosophical structures of constitutional selfhood and change.

2. Constitutional identity as a legal doctrinal notion

A. Constitutional identity as a static concept

In legal scholarship, constitutional identity is often associated with its capacity to substantively limit political, legal, and judicial powers. In this view, constitutional identity functions in a *static* manner, pointing at a stable, unchanging normative core that prevents political or legal interference by constituted powers. As such, it is capable of either prompting or binding various actors (lawmakers, governments, courts, supranational institutions, . . .).[10] Should these actors misinterpret or change elements that belong to the constitutional core, their actions are illegitimate. Changing them would essentially amount to adopting a new constitution, something that is beyond the pale of constituted powers.[11] Accordingly, legal doctrine has argued that the imposition of (explicit or implicit) substantive limitations on constitutional amendment powers constitutes one of the most important normative applications of the notion of constitutional identity.[12]

This static role of constitutional identity can be observed especially in domestic constitutional law. The German eternity clause is the most prominent example, with the very notion of 'eternity' clearly pointing to its stabilising purpose. Article 79 (3) German Basic Law protects the inviolability of human dignity and the character of the Federal Republic as a federal, social, and democratic state. The German Federal Constitutional Court (GFCC) considers these values an absolute limit for protecting German constitutional identity.[13] Similar eternity clauses, which limit even the constitutional legislator, can explicitly be found in the Italian, French, Turkish, and Brazilian constitutions.[14] In some constitutions, there exists a larger margin of interpretation, as the framers have prohibited amendments that violate 'the spirit of the Constitution'. For example, the Constitution of Norway prescribes in Article 121 that constitutional amendments 'must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution'. A similar provision can be found in the Constitution of Estonia.[15]

[10]J Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023) 3.

[11]Y Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Power* (Oxford University Press 2017) 141. More recently however, Gary Jacobsohn and Yaniv Roznai argued that a 'constitutional revolution' – ie, '*a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity*' does not necessarily change a constitutional identity. G Jacobsohn and Y Roznai, *Constitutional Revolution* (Yale University Press 2020), esp. at 19. On the relation between constitutional change and constitutional identity, and its complications, consult also S Gardbaum, 'Constitutional Identity and Constitutional Revolution', in R Hirschl and Y Roznai, *Decyphering the Genome of Constitutionalism: The Foundations and the Future of Constitutional Identity* (Cambridge University Press 2024) 56–62.

[12]M Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul' 18 (7) (2017) German Law Journal 1595–616, at 1597–8. J Scholtes, 'Abusing Constitutional Identity' 22 (2021) German Law Journal 534–56, at 541–2.

[13]Judgment of the Bundesverfassungsgericht of 30 July 2019, BVerfGE 2 BvR 1685/14, para 119.

[14]Both Article 139 Italian Constitution and Article 89 French Constitution prohibit explicitly the amendment of the republican form of government. Similarly, the Turkish Constitution provides in Article 4 that the republican form and its features cannot be subject to amendment. Article 60, § 4 of Brazil's Constitution precludes constitutional changes that abolish federalism, universal suffrage, the separation of powers, and individual rights and guarantees.

[15]Art 152 of the Constitution of Estonia stipulates that '*The Supreme Court declares invalid any law or other legislation or administrative decision that is in conflict with the letter and spirit of the Constitution*'.

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Whereas these limitations to amendability are explicit, there can also be implicit limitations, ie, limitations which cannot literally be found within legal provisions. Implicitly unamendable provisions can either be practically very difficult to amend (eg, because of the strict revision requirements or the political sensitivity of a revision) or structurally unamendable. The best-known example of implicit limitations to constitutional amendment is the Indian Supreme Court's 'basis structure' doctrine.[16] This doctrine holds that, even though India's Constitution allows for amendments,[17] features which the Court considers fundamental for the Constitution's basic structure and integrity cannot be altered. This confirms the control of the Indian Supreme Court on the democratic powers of the Indian Parliament. The idea of an immutable constitutional core clearly functions here as a counter-majoritarian legal instrument that allows courts to substantially limit democratic constitutional change. Constitutional courts in several other countries have followed in the footsteps of the Indian Supreme Court.[18]

Although the static functioning of constitutional identity is most visible at the internal constitutional level, it also plays out in the relation between legal orders. Here, constitutional norms and values can be used to justify the dismissal or enforcement of public international law. This is commonly argued on the basis of the democratic principle: constitutional identity is used to shield the choices of the national constituent power against transgressions of supranational institutions, which are often conceived (or framed) as democratically less legitimate.[19] This is precisely what has played out in various constitutional courts within the EU in the past years. National authorities have discovered constitutional identity as a useful concept to safeguard their legal autonomy.

Inversely, the EU's legal order itself has been said to contain a stable, substantial core that ought to be immune to change.[20] Although Article 4(2) TEU does not acknowledge this explicitly, legal scholarship and the CJEU seem to accept the existence of the EU's constitutional identity.[21] They base this identity on the values of the EU, which in turn stem from the common constitutional values of the EU's Member States. These values are to be found in Article 2 TEU, which proclaims respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. Recently, Advocate General Szpunar identified this list as 'a common core of values shared, respected and protected by the Member States, which define the very identity of the European Union as a common legal order'.[22]

[16]Supreme Court of India, judgement of 24 April 1973, *Kesavananda Bharati Sripadagalvaru and Ors. V. State of Kerala and Anr*, (1973) 4 SCC 225.

[17]Art 368 of the Indian Constitution attributes wide amendment powers to Parliament.

[18]For other examples, consult, eg, M F Mohallem, 'Immutable Clauses and Judicial Review in India, Brazil and South Africa. Expanding Constitutional Courts' Authority' 15 (5) (2011) The International Journal of Human Rights 756–86, at 765–6.

[19]M Kumm, 'Un-European Identity Claims: On the Relationship between Constituent Power, Constitutional Identity and its Implications for Interpreting Art 4(2) TEU' in K Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe*, (Hart Publishing 2023) 173–86, at 175–6.

[20]T Drinóczi and P Faraguna, 'The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States' in J de Poorter, G van der Schyff, M Stremler, M de Visser, I Leijten and C van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?* (Asser Press 2023) 77 with references in fn. 86–9, 78–80 (57–87).

[21]L Besselink, 'The Bite, the Bark, and the Howl. Article 7 TEU and the Rule of Law Initiatives' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance* (Oxford University Press 2017) 128–44, at 128–9 and 142–3. More recently: Drinóczi and Faraguna (n 20), 77. For the CJEU cases, see CJEU case *Hungary v Parliament and Council* (16 February 2022), C-156/21, EU:C:2022:97, esp. at para 127; CJEU case *Poland v Parliament and Council* (16 February 2022), C-157/21, EU:C:2022:98, esp. at para 234.

[22]Opinion of Advocate General Szpunar of 8 February 2024 in case *Real Madrid de Fútbol,* C-633/22, ECLI:EU:C:2024:127, para 101, with reference to the CJEU Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97.

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This core must therefore be considered legally binding on the Member States.[23] Parallel to Article 2 TEU, Article 6 TEU recognizes the rights, freedoms, and values set out in the Charter of Fundamental Rights of the European Union which, resulting from the constitutional traditions common to the Member States, as general standards of Union law.[24] Although various interpretations may exist and the Member States dispose of a relatively large margin of interpretation, the national constitutional actors should respect the EU's values and bring their national legal values in conformity with them.[25] In other words, EU law allows for diversity in the institutional and constitutional structure of the Member States (Article 4(2) TEU), but only insofar as the Member States respect the foundational EU values (Article 2 TEU) and EU rights (Article 6 TEU).[26] Consequently, just as the basic structure has been conceived as a counter-majoritarian tool in India, the constitutional identity of the EU has been deployed to protect its key values.[27]

However, the stand-alone (ie, direct) use of Article 2 TEU before the CJEU has been criticised. In combination with the sanctioning mechanism of Article 7 TEU for violations committed by the Member States, the CJEU's interpretation of Article 2 TEU could turn Article 2 TEU into a 'federal homogeneity clause', granting the EU institutions constitutional control over constitutional development in the Member States.[28] Nor Article 2 TEU, nor the Treaty on European Union as a whole, were conceived as such. Thus, deriving binding norms from the values set out in Article 2 TEU may pose difficulties. This is especially true for the values of 'democracy' and the 'rule of law', where the divergence between EU law and national law, and among national laws themselves, can be profound.[29] Moreover, it turns legal and political conflicts over values and interests into identity conflicts, pitting EU constitutional identity and national constitutional identities against each other.[30] Especially in the EU context, defined by a myriad of partly overlapping constitutional identities including its own, the identity language has the potential to amplify conflicts as both the EU and its constituent parts can claim some form of identity and, as a result, define themselves to some extent against each other.[31] Buttressing the EU with a set of common values and using this as a 'nuclear weapon' to enforce Union law's primacy at the expense of domestic constitutional law, risks cutting the ties with the Member States and discarding their constitutional identities.

[23]Judgment of the Court of Justice of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, para 232; judgment of the Court of Justice of 16 February 2022, *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, para 234.

[24]On the emergence of the wordings 'common constitutional traditions': J Ziller, 'Common Constitutional Traditions' (2023), accessible at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404157> accessed 9 August 2025.

[25]A Madeja, 'European Values and the Rule of Law' in T Drinóczi and A Bień-Kacała (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union* (Routledge 2021) 45–76, at 64–5.

[26]M Claes, 'How Common are the Values of the European Union?' 15 (1) 2019 Croatian Yearbook of European Law & Policy XV–XVI (VII–XVI); Drinóczi and Faraguna (n 20), 76.

[27]Although scholarly literature remains scarce on this topic, the EU's constitutional identity has been linked to the protection of an untouchable core of the EU. Consult on this Drinóczi and Faraguna (n 20), 77 with references in fn. 86–9, 78–80 (57–87).

[28]Nettesheim (n 6), at 293–4.

[29]Since the CJEU's *Melloni* judgment, but also through the CJEU's increased use of general principles of Union law inspired by common constitutional traditions, the homogenising impact of Union law on the interpretation of fundamental rights is more difficult to relativise. G Delledonne, 'Homogénéité constitutionnelle et protection des droits fondamentaux et de l'État de droit dans l'ordre juridique européen' 53 (3) (2016) *Politique européenne* 86–109, at 99–100; M Fichera and O Pollicino, 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?' 20 (2019) German Law Journal 1097–118, at 1105 et seq.

[30]Nettesheim (n 6), at 280–1.

[31]It has been pointed out that, contrary to the language of 'common constitutional tradition' references to constitutional identity are – by design – not pluralistic in nature. M Fichera & O Pollicino, 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?' 20 (2019) German Law Journal 1097–118, at 1100–101 and 1113.

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As a political entity that oscillates between traditional Nation States on the one hand, and supranational organisations on the other, the EU is supposed to address the problem of distinct national identities.[32] European integration is not intended to constitute a singular collective identity, but rather to create the right conditions for transnational cooperation between distinct peoples.[33] This presupposes mutual trust and recognition among distinct national identities. It also entails incorporating practices and interests of these identities into the collective decision making process and into adjudication.[34] In this regard, instead of considering constitutional identity as a concept that differentiates a constitutional order from another, the EU's constitutional identity stresses what is common in a 'shared dimension of the European constitutional heritage', allowing it to focus on European standards, rather than on the specific features of a domestic legal order.[35] Invoking the EU's constitutional identity, informed by the national constitutional traditions, can prevent the Member States from wielding their constitutional identity to roll back values and rights protected by the EU.[36] Consequently, some scholars conclude that the coexistence between the national and translational levels of integration can only be assured by complementing identity-based claims with the language of common constitutional traditions.[37]

B. Constitutional identity as a dynamic concept

In the discussions above, constitutional identity is deployed to protect the normative core of a constitution or legal order in an ever-changing context and hence to provide *stability*.[38] However, the concept of constitutional identity can also be interpreted as 'a lens through which to understand the relative applicability and possible embeddedness of foreign jurisprudence in a

[32]As Justine Lacroix points out, the EU would break with this premise, were it to adopt a ''*normal polity' based on a 'single' demos and a widespread emotional attachment to the 'values' encapsulated in the federal constitution*'. J Lacroix, 'Does Europe Need Common Values? Habermas vs Habermas' 8 (2) (2009) European Journal of Political Theory 141–56, at 149.

[33]Ibid.

[34]Ibid., 152–3.

[35]N Lupo, 'The Advantage of Having the "First Word" in the Composite European Constitution' 10 (2) (2018) Italian Journal of Public Law 186–204, at 196.

[36]P Faraguna and T Drinóczi, 'Constitutional Identity in and on EU Terms', Verfassungsblog <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/> accessed 20 October 2024; K Lenaerts, 'The Rule of Law and the Constitutional Identity of the European Union', speech delivered by the CJEU's President on 17 February 2023 at the conference organised by the Bulgarian Association for European Law in Sofia <https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/> accessed 20 October 2024. See also the CJEU on the principle of non-regression: judgment of the Court of Justice of 20 April 2021, *Repubblika v Il-Prim Ministru*, C-896/19, ECLI:EU:C:2021:311, para 61.

[37]A majority in legal scholarship acknowledges that Art 4(2) TEU should be read in this sense, as this disposition '*calls on a multinational polity to pay heed to the identity of its constituent national communities*'. E Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU', Netherlands Journal for Legal Philosophy 45 (2016) 82–98, at 97. See also C Calliess and A Schnettger, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism', in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2021) 348–71; F-X Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' 27 (3) (2021) European Public Law 571–96.

[38]It has been argued that the connection between the basic structure doctrine and a nation's constitutional identity puts a strain on the idea of substantive limits to constitutional change, as a constitutional identity can be subject to development, either incrementally or through a radical transformation at a revolutionary moment. M Tushnet, 'Amendment Theory and Constituent Power', in G Jacobsohn and M Schor, *Comparative Constitutional Theory* (Edward Elgar 2018) 317–33, at 332. Gary Jacobsohn, however, argues that although '*A constitution is a large piece of a nation's constitutional identity,* [. . .] *it is not coterminous with it. In most cases it lays down key markers of that identity, then to be adapted to changing political and social realities in ways that modify, clarify or reinforce it through the dialogical engagement of various public and private sources of influence and power*'. G Jacobsohn, 'Anchoring and sailing: contrasting imperatives of constitutional revolution' in G Jacobsohn and M Schor, *Comparative Constitutional Theory* (Edward Elgar 2018) 334–53, at 351. For the changing nature of constitutional identity, see also M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010).

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particular jurisdiction'.[39] More specifically, one can use the concept of constitutional identity in the interaction between legal orders and external legal values, norms, and systems. These interactions are always a dynamic affair, as these external elements come to interchange with existent domestic norms and both sides of the equation come out differently. This migration and translation of foreign constitutional ideas and interpretations in different constitutional settings entail a possible 'hybridization' of a nation's constitutional identity. Constitutional identity, then, lies in how constitutional actors recognise the particularity or uniqueness of their constitutional system vis-à-vis these external elements and how they include them, without ever hoping for a perfectly stable situation.

Such a dynamic process can be officially sanctioned. The preamble to the Charter acknowledges respect for the diversity of cultures and traditions of the peoples of Europe. Yet, simultaneously it states that these cultures and traditions are not static givens. The EU, it is said, recognizes divergent interpretations of legal concepts and values that reflect 'national sensitivities and traditions that vary considerably not only as between Member States but also over time in tandem with societal change'.[40] This approach not only matches the EU's fundamental principle of 'diversity within unity', but also asserts that the CJEU's views on European integration are dynamic, leaving room for the transfer and reception of constitutional ideas and interpretations within the EU and for substantial change over time.[41]

This dynamic view can be welcomed as a possible solution to the delicate issue that the identity clause poses for EU integration. Engrafting the EU's constitutional identity on the fundamental principles of the EU means that the respect for constitutional identities provided for by Article 4(2) TEU shall be balanced with the former.[42] But it also entails a recognition that this balancing, which can be thought of not just as a legal process but also as a political and even as a society-wide process, will inevitably change the things that are being balanced. It follows that no constitutional actor can claim absolute authority in interpreting and applying constitutional identity, leaving the question of the final interpretative authority open.[43] Reflexive dialogue and mutual cooperation between the constitutional actors of the EU sphere are maintained through cross-references, preliminary questions, (re-)interpretation, and (implicit) acknowledgment of national and European concerns. At the same time, the contestation and feedback that emerges between the domestic and EU levels, as well as evolving insights in constitutional law, can lead constitutional actors to auto-correct themselves or to develop new and possibly more demanding constitutional standards.[44]

Ana Bobić, for instance, proposed to invert the logic of the CJEU's *Melloni* judgement. In that judgement, the Court had asserted that national authorities and courts may apply national standards of fundamental rights protection only to the extent that the application of these standards would not curb the primacy, unity, and effectiveness of EU law.[45] Inspired by a decision

[39]H Klug, 'Reception, context and identity: a theory of cross-national jurisprudence' in Jacobsohn and Schor (n 38), at 282.

[40]Opinion of Advocate General Collins of 8 June 2023 in case *Procura della Repubblica presso il Tribunale di Bolzano,* C-178/22, ECLI:EU:C:2024:127, para 28 (on the definition of 'serious criminal offences and penalties').

[41]See in this vein also Opinion of Advocate General Sharpston of 8 March 20211 in case *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, C-34/09, ECLI:EU:C:2011:124, paras 171–3.

[42]I Pernice, 'Der Schutz nationaler Identitat in der EU', 136 (2011) *Archiv des öffentlichen Rechts* 185–221; LD Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts' 57 (2020) Common Market Law Review 361–98.

[43]A Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 76–7 and 263; J Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023) 169–99.

[44]Bobić (n 43), 228–9, 235–7 and 263; D Fromage and B De Witte, 'Guest Editors' Introduction. National Constitutional Identity Ten Years on: State of Play and Future Perspectives' 27 (3) (2021) European Public Law 411–24, at 424; A Schnettger, 'Art 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2021) 9–37.

[45]Judgment of the Court of Justice of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, esp. paras 55–64.

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in the Austrian Constitutional Court,[46] Bobić suggests that when numerous Member States uphold a higher standard of constitutional protection, this standard could displace the EU's existent standard of protection.[47] In other words, starting from the idea of 'shared constitutional traditions' could possibly allow domestic constitutional law to change the interpretation of fundamental rights in EU law.

Of course, such a dynamic process can also move in a problematic direction. Illiberal or populist constitutional imaginaries can subvert legal concepts, the rule of law and fundamental rights. As recent research in law and discourse studies shows, illiberal regimes sometimes realize their agendas through the selective appropriation of constitutional terminology.[48] They can reconfigure and displace the constitutional narrative, for instance by historicising identity narratives (eg, by connecting values relating to national constitutional identities to the achievements of a 'Historical Constitution' or to the defence of a Christian Europe), by collectivising EU values (eg, by discarding the universal feature of the right to human dignity and attributing it exclusively to the members of a defined community), or by inverting the latter (eg, impairing the idea of reciprocity within the principle of 'sincere cooperation' to justify unilateral action on the domestic level).[49] Consequently, legal scholars have pointed out the need for a context-sensitive interpretation of constitutional identity, justifying an increased intensity of judicial review when identity-based claims lack historical narratives of struggle and progress for the realisation of constitutional principles.[50]

It is important that judicial reviewers are aware of the dynamic nature of constitutional identity. And they should know that this dynamic does not only play out in the courtroom. As the case of illiberal regimes shows, debates and struggles over the meaning of constitutional identity are deeply political in nature. Hence, it is not just the interpretive work done by judges and legal scholars that is controlling. Ultimately, judges will have to look beyond the courtroom and the legal documents. They have to survey a much broader and very dynamic field of political decisions and societal debates and strive for *integrity*, to use Ronald Dworkin's term, as they construct a coherent, but never entirely stable, interpretation of this field.

3. Constitutional identity as a descriptive concept

Related to the use of constitutional identity as a legal doctrinal notion, in recent years the concept has also been used descriptively by scholars who study the manifold relations between constitutions and collective identity, history and culture. Scholars have addressed how law (and constitutional law in particular) can determine a community's collective identity and how, inversely, collective identities can determine the uniqueness of its written laws and constitutional system.

This philosophical inquiry into constitutional identity can be traced back to the 'Comparative Constitutionalism' conference at the Cardozo Law school in 1991, organized by Michel Rosenfeld. This conference, which focused on the role of constitutions in the interplay between identity and

[46]Decision of the Verfassungsgerichtshof of 28 November 2012, cases G 47/12-11, G 59/12-10, G 62,70,71/12-11 (28 November 2012), 5.2.

[47]Bobić (n 43), 229 and 232.

[48]M Luining and T Van Hout, 'Subverting EU Legal Concepts: How Hungary Enacts Illiberalism in Constitutional Discourse' 23 (5) (2024) Journal of Language and Politics 747–69.

[49]On the historicisation of legal concepts, consult, eg, S Bennet, 'Mythopoetic Legitimation and the Recontextualisation of Europe's Foundational Myth' 21 (2) (2022) Journal of Language and Politics 370–89; M Luining and A Kubinska, 'Law is trapped in history, and history is trapped in law: Historical narratives in illiberal legal practices in Hungary and Poland' 3 (1) (2024) Comparative Law and Language 60–79.

[50]M Kumm, 'Un-European Identity Claims: On the Relationship between Constituent Power, Constitutional Identity and its Implications for Interpreting Art 4(2) TEU' in K Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart Publishing 2023) 184 (173–86); Scholtes (n 43), 204.

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difference, resulted in the seminal volume *Constitutionalism, Identity, Difference and Legitimacy*.[51] The debate was further stimulated by two books, both published in 2010, by respectively Michel Rosenfeld and Gary Jacobsohn. Both authors emphasise the dynamic nature of constitutional identity, as it is shaped by legal decisions, historical developments, political processes, inherited values, etc. Rosenfeld, in *The Identity of the Constitutional Subject*, sees the formation of identity as a dialectical process: the various influences are forged together into a coherent whole. He analyses this process as an interplay between negation (denying preconstitutional elements), metaphor (establishing similarities with the tradition) and metonymy (analysing constitutional elements within a specific context).[52] Jacobsohn, in *Constitutional Identity*, stresses the dialogical nature of constitutional identity: it is shaped and reshaped through an ongoing dialogue between a nation's historical experience, its constitutional framework, and social, political, and cultural dynamics. The Constitution, in his view, is not the expression of a stable or unified identity. Rather constitutional identity construction is a process driven by disharmony, that is, by the tensions inherent in the constitutional system and society and the ever-present gaps between constitutional text and practice.[53]

The concept of constitutional identity is not clear-cut in the literature. It is an 'essentially contested concept',[54] as Rosenfeld has stated, with a broad variation of definitions and approaches. Besides the normative use explained above (as a legal doctrinal notion designing the core norms of a constitutional system), it can refer to a collective identity that is 'expressed, determined and shaped by the constitution'[55] or to the identity of the constitution and constitutional principles in relation to a collective identity. Many definitions remain somewhat vague, such as Rosenfeld's characterisation of constitutional identity as a 'meaning-endowing construct',[56] Monika Polzin's depiction of it as 'a state's restless soul'[57] or Jacobsohn's complex definition of constitutional identity as 'a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past'.[58] This vagueness has maybe to do with an ambiguity in the concept of constitution itself. There is the big 'C' Constitution, a written text functioning as the fundamental law. And then there is the (semantically older) small 'c' constitution, which is not so much a text as a system or a set of constituent rules and basic norms. In this way, one can speak of constitutional identity without a Constitution.

Vagueness and complexity are not necessarily problematic: there are so many elements involved in the concept of constitutional identity (as regards history, values, and differences along lines such as class, age, gender, ethnicity, etc.) that different emphases lead to different conceptions of constitutional identity itself. We will, however, use constitutional identity in what follows in a descriptive use (which seems to be consistent across different approaches), namely 'to explain how a collectivity understands itself through a constitutional document or order'.[59] Below, we outline the lines of inquiry that have surfaced in this analytical debate in recent years.

[51]H Irving, 'Constitutional Identity Theory and Gender: The Missing Referent' (11 July 2017), Sydney Law School Research Paper No. 17/56, 9. M Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press 1994).

[52]M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2009).

[53]G Jacobsohn, *Constitutional Identity* (Harvard University Press 2022).

[54]M Rosenfeld, 'Constitutional Identity' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

[55]M Polzin (n 12), 1598.

[56]M Rosenfeld, 'Deconstructing Constitutional Identity in Light of the Turn to Populism' in R Hirschl and Y Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024) 286, 287.

[57]Polzin (n 12) 1595.

[58]Jacobsohn (n 53) 7.

[59]C Maes, 'The notion of constitutional identity and its role in European integration', European Union 2024 <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2024)760344> accessed 9 August 2025.

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A. Negotiating sameness and difference

Constitutional identity involves a negotiation between sameness and difference. It is always the product of the interaction between general principles, such as the rule of law, democracy and equality, and, on the other hand, particular contextual elements that define a community, such as institutional design, traditions, heritage, practices, self-understanding, and so on. The embedding of universal principles in different contexts can result in a particular constitutional identity. Often, constitutional identity is a protection of particular identities against the imposition of more universal values, and in that respect, is grounded in diversity as opposed to legal homogenisation. This helps to explain why, recently, the notion of constitutional identity has been activated not only in the European sphere (which legally incorporates many different cultures, languages, and peoples), but also in postcolonial and indigenous constitutional communities. There, it is used to underscore the uniqueness of principles and traditions in the face of external and internal hegemonic groups.[60] The identity that a constitution protects, however, can also be exclusionary, for example in emphasizing the Christian heritage as a way to ban divergent practices. This is the paradox at the heart of constitutional identity: a mechanism for accommodating and valuing difference, can also be used (and has been used) to undermine tolerance by privileging a homogeneous identity.[61] Partly because a focus on identity can morph into identitarian ideology, some have argued that the concept of constitutional identity itself is problematic or misleading. To move away from identity-based analyses and to do justice to the dialogical nature of constitutional culture, alternative notions have been proposed such as 'common constitutional traditions',[62] 'constitutional communities'[63] or 'constitutional identity narratives'.[64]

Since the question of identity is also the question of sameness or selfhood over time, the identity of a constitution is always linked to a temporal dimension and closely related to the question of constitutional change. Thus, according to Rosenfeld, the same constitutional identity can persist across different constitutions (as in the French succession of constitutions). On the other hand, under the same written constitution, different constitutional identities may succeed one another (as some have argued for pre versus post civil war American constitutional identity). A constitution, in Jacobsohn's oft-quoted characterization, 'acquires an identity through experience'[65] and this experience develops over time.

The way constitutional identity develops over time has been an important research topic in the literature. There is the Rosenfeld tradition, stressing the integration of existing identities and differences in an overarching story. Constitutional identity is conceived here as an ongoing dialectical process where competing differences are reordered to maintain the integrity of the constitutional order.[66] Socio-legal scholars have stressed the reciprocal social basis of constitutional identity.[67] Kim Lane Scheppele has emphasised the need for education in this

[60]See CM Fombad and N Steytler (eds), *Constitutional Identity and Constitutionalism in Africa* (Oxford University Press 2024) and H Klug, 'Clashing Identities? Traditional Authority and Constitutionalism in Africa' in R Hirschl and Y Roznai, *Deciphering the Genome of Constitutionalism* (Cambridge University Press 2024) 138–49.

[61]At the root of this can be seen the central dilemma of liberalism as described by Helen Irving: 'it rests on an idea of human universalism at the same time as it accords value to human difference'. H Irving, 'Constitutional Identity Theory and Gender: The Missing Referent' (11 July 2017). Sydney Law School Research Paper No. 17/56, 3.

[62]Eg, F Fabbrini and O Polliccino, 'Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change', in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) 201–21.

[63]"Conference Constitutional Communities" (Institute of Philosophy/Faculty of Law Leuven <https://hiw.kuleuven.be/nl/nieuws-agenda/evenementen/Conference_Constitutional_Communities> accessed 22 December 2024.

[64]M Gutan, 'Constitutional Identity as Competing Historically Driven Narratives: Central and Eastern European Perspectives' in C Cercel, A Mercescu, M Michał Sadowski (eds), *Law, Culture and Identity in Central and Eastern Europe, A Comparative Engagement* (Routledge 2023) 137–64.

[65]Jacobsohn (n 53), 7.

[66]M Rosenfeld, *The Identity of the Constitutional Subject* (Routledge 2009) 10.

[67]P Blokker and C Thornhill, *Sociological Constitutionalism* (Cambridge University Press 2017).

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regard to reproduce the constitutional order as a reality.[68] Following Jacobsohn's concept of constitutional disharmony, authors have emphasised 'contestation rather than consensus' as driving constitutional identity development.[69] According to Jaclyn Neo, changes happen on the one hand through 'misidentity' – where a more authentic understanding of identity is proclaimed – and on the other hand through a more disruptive 'disidentity' – where new values are put forward.[70]

B. Constitutional selves

The dynamics of constitutional identity is also largely determined by the debate on the 'self' underlying it. Who exactly is the constitutional subject? Is constitutional identity the identity of the framers, of the constituent power underlying the constitution, the subjected people . . . ? Rosenfeld, in his influential study on the topic, argues that in any case constitutions presuppose a situation of pluralism: a homogeneous society does not need a social pact. He distinguishes three facets of the constitutional subject: 'the subject as constitution-maker or as pouvoir constituant; the subject as the collectivity that is bound by the constitution; and the subject as interpreter, elaborator and custodian of the constitution'.[71] Subsequent studies focused on how these different roles coincide and thus sustain a constitutional regime. We abide by the contract only as long as we sufficiently identify ourselves with the collectivity. In a successful constitutional regime, there is a collective sense of ownership or authorship of the constitutional order, rather than the people just being a passive recipient of constitutional norms. Political leaders can appeal to the established conception of ourselves as constitutional subjects to dismiss crises as exceptions, or to push forward alternative constitutional identities. Sanford Levinson gives the example of American president Barack Obama, who regularly used the phrase 'This is not who we are' to condemn antidemocratic or cruel practices, as if they were not part of the constitutional DNA of the American people.

However, when a singular constitutional identity is put forward in this way, it might mask fundamental splits of the constitutional subject.[72] Indeed, in pluralistic societies there are always different, intersecting and competing conceptions of the constitutional self. Polzin gives the example of the headscarf, which for many French people clashes with the image of the constitutional French self as 'free and equal citoyen'.[73] There is currently a strong ethno-cultural divide in Europe, with liberals or Christians often contrasting their constitutional 'we' with practices of migrant groups. Scheppele has launched the term 'counter-constitutions' to point to narratives that challenge the existing constitutional order.[74] But there are many axes of difference other than ethnocultural, such as gender, class, ability, or age. Helen Irving has argued that it is important to see constitutional identity as related to all these aspects, so as not to confuse pluralism with disruption. In this regard it is important to keep Laurianne Allezard's observation in mind, that constitutional identity never operates in isolation; it is always in dialogue with other identities such as national, ethnic and linguistic identities. As Allezard has argued, constitutional identity is a composite concept, 'a system between identities', that builds on all these selves.[75] If

[68]K Lane Scheppele, 'The Life and Death of Constitutions' 57 (2023) Law & Society Review 423.

[69]J Neo, 'Constitutional Identity as Discourse: Mis-identity and Dis-identity', in R Hirschl and Y Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024).

[70]Ibid.

[71]M Rosenfeld, *The Identity of the Constitutional Subject* (Routledge 2009) 26.

[72]S Levinson 'This Is (Not) Who We Are': Reflections on 1619 and the Search for a Singular Constitutional Identity' in R Hirschl and Y Roznai (eds), *Deciphering the Genome of Constitutionalism* (Cambridge University Press 2024) 179–92.

[73]Polzin (n 12), 1612.

[74]K Lane Scheppele, 'The Life and Death of Constitutions' 57 (2023) Law and Society Review 423–43.

[75]L Allezard, 'Constitutional identity, identities and constitutionalism in Europe' 63 (1) (2023) Hungarian Journal of Legal Studies 58–77.

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disharmony is crucial to constitutional identity, it is not just because there are always differences within the presumed constitutional subject, but also because reality has a way of falling short of constitutional norms. So, there is always a gap between 'constitutional ideals' and 'constitutional practice'. This can be a powerful source of conflict, but also of progress.[76]

C. Identity as construction

The dialogical conception of constitutional identity contradicts a naïve conception of the constitutional subject as the basis of legitimate constitutional order. It presupposes no pre-established self to build upon, no 'we' preceding the act of promulgating the constitution. The debate about constitutional identity is therefore entangled with the modern 'paradox of constitutionalism' (as it has been discussed by Jacques Derrida, Hannah Arendt, and many others): the self that authorizes the writing and enacting of the constitution is itself a product of that constitution.[77] In absence of natural or transcendent guarantees about the collective identity of the people, acts of self-representation, for instance in the form of a constitutional document, should be seen as acts of construction in which that identity takes shape.

Constitutional identity theory has largely adopted this conception of constitutional identity as construction. Navigating the many constitutive differences of society and giving meaning to them, can only be done by constructing a narrative arc. Rosenfeld argues that constitutional identity is an 'imagined identity', along the lines of Benedict Anderson's imagined communities.[78] Monika Polzin speaks of 'a constructed, simplified, imagined reality'.[79] Consistent with this constructivist approach, some authors have analysed the constitution as a 'web of ideas',[80] determining how we understand and represent ourselves. Martin Loughlin writes about the constitutional imagination that causes constitutional principles to become part of our collective consciousness through stories and symbols.[81] Scheppele has called this the 'social life of constitutions': constitutional ideas in successful constitutional regimes are not limited to legal texts, but determine our expectations and behavior, and are accepted as obvious. By acting 'as if constitutions are real', we create the intersubjective building blocks of our social world and make it real. In this way, constitutional identity can provide a sense of 'ontological security'.[82]

Because the construction of constitutional identity is always a choice among many possibilities and because it is bound to particular values, beliefs, goals and experiences, it is necessarily of a political nature. If constitutional identity is not an essence to be dug up from constitutional history and interpretation but rather a dialogical assemblage of different existing identities,[83] then the study of constitutional identity also goes far beyond the constitution as a legal instrument. It requires a grasp of the constitution as a symbol and an investigation into all the processes by which

[76]See G Thomas, 'The Constitution at War with Itself. Race, Citizenship, and the Forging of American Constitutional Identity', The Bulwark, 25 March 2022 <https://www.thebulwark.com/p/the-constitution-at-war-with-itself> accessed 9 August 2025.

[77]J Derrida, 'Déclarations d'Indépendance', in *Otobiographies: L'enseignement de Nietzsche et la politique du nom propre* (Galilée 1984) 13–32; B Honig, 'Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic' 85 (1) (1991) The American Political Science Review 97–11. See also R Geenens, T Decreus, F Thewissen, A Braeckman and M Resmini, 'The "Co-Originality" of Constituent Power and Representation' 22 (4) (2015) Constellations 514–22.

[78]M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010).

[79]Polzin (n 12), 1604'.

[80]K Lane Scheppele, 'The Social Lives of Constitutions' in P Blokker and C Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017) 35–66.

[81]M Loughlin, 'The constitutional imagination' 78 (1) (2015) The Modern Law Review 1–25.

[82]J Wallis, 'Constitutional Identity as a Source of Ontological Security' in R Hirschl and Y Roznai (eds), *Deciphering the Genome of Constitutionalism* (Cambridge University Press 2024) 76–88.

[83]See G Jacobsohn: the identity of the constitution, in his view, 'exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered'. Jacobsohn (n 53), 7.

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constitutions become 'a creation of the mass mind'.[84] It is this symbolic dimension which makes the intersection of constitutions and identity so crucial a topic for understanding the political functioning of modern societies.

D. Towards an interdisciplinary study of constitutional identity

As already stated above (and as others have stated before),[85] this requires a disciplinary lens broader than the legal one. The building blocks are there. Rosenfeld already incorporated ideas borrowed from psychoanalysis. Several authors, in order to highlight the narrative nature of constitutional identity, have incorporated literary theory.[86] Many authors have used historical and philosophical input to trace the intellectual sources of constitutional identities. People like Scheppele and Blokker have called for phenomenological and sociological perspectives to reframe constitutionalism as a 'field of knowledge' that constitutes a broader social world. And Lukáš Lev Červinka recently demonstrated how a 'social systems approach' can reveal the dynamic interplay between constitution and collective self-representation.[87] Yet we believe the lens can be broadened still. Much of the current work is strongly rooted in EU debate. And it is sometimes surprising how little the debate engages with the philosophical and psychological traditions surrounding identity. Rather than exhausting the research, existing approaches show the broad scope of relevant research paths. The purpose of this symposium is to highlight the richness of all these avenues and to encourage further research across disciplines.

It is important to do this kind of research now given the increasing political importance of constitutions. Think for instance of the constitutional recognition of underrepresented groups or think of processes of democratic constitution-making. Indigenous communities are engaged in debates on constitutional recognition, sometimes arguing for a separate constitutional identity outside the dominant constitution.[88] There is the debate over the inclusion of animals and plants as subjects with rights, arguably attributing them a form of constitutional subjecthood. Democratic constitution-making, in which citizens actively participate in the (re)writing of constitutions, embodies the promises of liberal constitutionalism and deliberative politics: the people become the actual author of its constitution. There is also a need to understand the effects of linking constitutionalism and identity politics. The worldwide phenomenon of 'illiberal constitutionalism', with authoritarian regimes coming into place with constitutional means, heavily relies on (re)constructions of constitutional identity to legitimate exclusionary practices.

Of course, one symposium cannot cover all the aforementioned approaches and themes, or even sketch an overview. But we hope to make explicit the interdisciplinary dimensions implicit in the existing literature, to take them further, and to stimulate more dialogue between the disciplines. We strongly believe that it is necessary to go beyond understanding constitutions as legal instruments and, instead, study them in depth as objects within our broader social world, with all their psychological, sociological, linguistic, and historical implications.

[84]E Corwin, 'The Constitution as Instrument and as Symbol' 30 (6) (1936) The American Political Science Review 1074.

[85]'An interdisciplinary approach is needed to overcome the shortcomings of the legal concept'. (Gutan (n 64)); 'A sociological approach points to the need to go beyond a mere formal-rational and functional understanding of constitutions' (P Blokker, 'The Imaginary Constitution of Constitutions' 3 (1) (2017) Social Imaginaries 167–93); 'The scholarly development of constitutional identity has been a distinctly interdisciplinary and multi-method enterprise' (C Bambrick and CM Ewing, 'The Past, Present, and Future of Constitutional Identity', in R Hirschl and Y Roznai (eds), *Deciphering the Genome of Constitutionalism* (Cambridge University Press 2024) 347).

[86]M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2009); Gutan (n 64).

[87]L Lev Červinka, 'Constitutions as Mediums of Collective Identities' 25 (3) (2024) German Law Journal 351–67.

[88]Watson (n 7).

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4. Overview of contributions

The first section of the symposium explores constitutional identity as a concept within constitutional theory. Through empirical, philosophical, and discourse-based lenses, these chapters situate constitutional identity in dialogue with other collective and preconstitutional identities and power structures. They also offer new conceptualisations, for example by reconstructing constitutional identity as narrative identity or by establishing an integral link with fundamental rights.

Laurianne Allezard demonstrates that constitutional identity represents only the tip of the iceberg of the many identities that populate and influence constitutional law. In *Beyond Constitutional Identity: Thinking Identity in Constitutional Law*, she presents the findings of her analysis of identity in European constitutions and constitutional court decisions. She provides an overview of the different types of identities in constitutional law: identity may manifest through a right to identity, in granting differentiated rights to groups, as a norm for constitutional interpretation, or as a formalised core of the constitutional text. She further illustrates how these identities influence one another in constitutional law and how judicial interpretations depend on these interactions. Instead of focusing on the 'final messenger' of constitutional identity, she suggests analysing the broader range of identities within constitutional law to uncover hierarchies and interpretative shifts that may lead to illiberalism.

Christophe Maes and Ana Van Liedekerke delve into the narrative construction of constitutional identity in *Ghost in the Shell- The Narrative Entanglement of Constitutional and Preconstitutional Identity*. They observe that the distinction between preconstitutional and constitutional identity in the literature often parallels the relationship between ethnos and demos. Preconstitutional identity is associated with ethnocultural elements, while constitutional identity is confined to the visible, fundamental elements of positive constitutional law. They challenge this distinction, arguing that preconstitutional identity is always the 'ghost in the shell' of constitutional identity. By rethinking constitutional identity as narrative identity, they show how the (preconstitutional) past is always necessary to give meaning to the (constitutional) present, while emphasizing that this is a construction that requires further exploration through a narrative lens.

Closing the first section, Bosko Tripkovic, in *Constitutional Identity vs Fundamental Rights: A False Tension?*, proposes understanding constitutional identity as the normative commitment of a community that reflects its collective experience of creating and living under a constitutional framework. He argues that constitutional identity presupposes respect for fundamental rights, not merely as external boundaries but as internal requirements. On the one hand, constitutional identity demands authenticity, requiring that the constitution reflects the community's common commitments, with fundamental rights ensuring mechanisms for establishing these. On the other hand, the community must also serve as the foundation of the constitutional order, necessitating individual agency and guarantees of equality to exercise this collective agency.

After the conceptual section, a second set of articles focuses on constitutional identity in practice, employing various methodological approaches to concretely examine constitutional origins and identities.

In *Constitutional Subjects: The Formation and Fracture of Constitutional Legitimacy*, Christopher Thornhill reconstructs the subjects underlying constitutions through a historical–sociological approach. He demonstrates that collective experiences of violence often shape constitutional subjects. This is the case for the normative concepts of constituent power and basic rights underlying the legitimation of modern constitutions. On the one hand, constituent power as a norm resulted from military integration due to external security threats. On the other hand, the norm of basic rights was devised for the organisation of military force. Thornhill shows how, after 1945, international law and the social welfare state helped pacify constitutional subjects. He applies this framework to analyse contemporary instances of constitutional weakening, which are

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rooted in attributing strong constitutional identities to subjects. This process is accompanied by partial remilitarization, because actual legitimation is not acquired by enactment, but rather by the displacement of constitutional subjectivity.

Ilenia Ruggiu addresses the oppressive dimensions of constitutional identity, not through its often-discussed abuses in appeals to exclusionary identities but within two recurring elements of democratic constitutional identity: gender equality and the separation of church and state. In *Constitutional Identity and Patriarchy: the Exclusion of the Women from the Priesthood as a Constitutional Problem*, she argues that patriarchal exclusion in religion, and particularly the barring of women from the priesthood, represents a constitutional issue that undermines gender equality. However, the deeply entrenched separation of church and state prevents this oppression from being legally addressed. By pointing to historical precedents of female priestesses and the tangible effects of exclusion on women, she proposes strategies for a different balance of gender equality and church-state separation. By revealing how foundational elements of constitutional identity indirectly protect patriarchy, she shows how pre- and extraconstitutional elements might still be embedded in constitutional systems.

Finally, François-Xavier Millet examines how European integration has reshaped France's constitutional identity in *From Messianic Republicanism to Global Constitutionalism: The Paradigmatic Changes of French Public Law through European Integration*. Taking a philosophical and law-as-culture methodological approach, he shows how France's traditional republican identity, rooted in Rousseau, Montesquieu, and the French Revolution, eroded under European law's influence. This identity, centered on *légicentrisme* – the supremacy of *la loi* as the general will – has been challenged by a shift towards *le droit* (rights and courts) and judicial review. Millet highlights how public law institutions, once central to preserving the republican order by safeguarding political liberty and implementing *la loi*, have been transformed by European legal frameworks. These institutions now navigate the transition from political to legal constitutions and from public sovereignty to individual rights. He observes that the discourse of constitutional identity is in line with the persisting resistance to abandoning the republican roots of French constitutionalism, but it remains uncertain whether this resistance can withstand the structural and normative pressures of transnational legal integration.

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