European Law Open (2026), **5**, 172–195
doi:10.1017/elo.2025.10027

DIALOGUE AND DEBATE: SYMPOSIUM

Beyond constitutional identity: Thinking identity in constitutional law

Laurianne Allezard

Faculty of Law, Lund University, Lund, Sweden
Email: laurianne.allezard@gmail.com

(Received 10 February 2025; revised 7 June 2025; accepted 8 June 2025; first published online 28 October 2025)

Abstract

This paper explores the role of identity in constitutional law, moving beyond the dominant concept of constitutional identity. While many European constitutional texts reference various forms of identity – such as national, religious, or cultural – constitutional identity has been disproportionately emphasised in academic discourse. Through an empirical analysis of constitutional provisions and court rulings across 47 European states, this study demonstrates that identity plays a broader and more nuanced role in constitutional law than previously recognised. The paper categorises four types of relationships between identity and constitutional norms: identity as a right to protection, a basis for additional rights, a principle guiding constitutional interpretation, and an identity of the constitution itself. It highlights how constitutional courts interpret and balance competing identities, influencing the application of fundamental rights and constitutional principles. By highlighting examples that represent different models of identity systems, the paper reveals the necessity of giving scientific attention to the relationships between identities. Indeed, identities can undermine liberal constitutional values by privileging certain collective identities over individual identities and individual rights. Ultimately, the study argues that focusing solely on constitutional identity as an analytical concept to designate everything even remotely related to identity in constitutional law obscures the broader dynamics of identity within constitutional systems. It calls for a strict conceptual redefinition of constitutional identity in order to better understand how identity, in all its potential forms, continuously reshapes constitutional law and influences the evolution of democratic and human rights protections in European states.

Keywords: Comparative constitutional law; constitutional identity; identities; European constitutionalism; balancing rights; balancing identities

1. Introduction

In Europe, 22 out of the 47 – now 46 – Member States of the Council of Europe incorporate the word 'identity' into their constitutions, with only one explicitly mentioning 'constitutional identity'.[1] However, all constitutions address aspects of identity related to religion, language, minority rights, cultural heritage, traditions, values, or other fields.

This paper, based on the findings of my dissertation defended in 2021,[2] calls for a focus on these other forms of identity and seeks to demonstrate the hypothesis of their interconnections – a hypothesis that has never been explored and has been overlooked due to the doctrinal focus on

[1]Art E(2) and E(4), Hungarian Fundamental Law, 2011.

[2]L Allezard, *Identité(s) et Droit constitutionnel* (2021), forthcoming in a book in English. See also L Allezard, 'Constitutional Identity, Identities and Constitutionalism in Europe' 63 (2022) Hungarian Journal of Legal Studies 58–77.

© The Author(s), 2025. Published by Cambridge University Press. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

constitutional identity. Its aim is to reposition the notion of constitutional identity within the context of positive law, alongside other identities, and to call for a conceptual redefinition of constitutional identity by scholars.

This paper investigates an epistemological paradox. In positive law, constitutional identity is rare and is clearly distinguished from other forms of identity in the sense that, when it appears in constitutions or judicial decisions, it does so in addition to other identities but never substitutes for them. In contrast, at the analytical and doctrinal level, scholars tend to use the concept of constitutional identity in a way that incorporates these other identities, thereby conflating them. This article seeks to draw scholars' attention back to the distinctions that persist in positive law and to emphasise the importance of exploring and understanding them – something that the common analytical use of the concept of constitutional identity fails to achieve.

Indeed, the findings of this research show that identities, by virtue of being identities, have their own place and effects within constitutional law. Shifting the focus to identity in a more general sense allows for the analysis of phenomena that lie outside the scope of the concept of constitutional identity. To address certain questions, constitutional identity is unnecessary, and the scholarly focus on constitutional identity may even sidestep such questions regarding the effect on constitutional law. For example: how do different identities balance against each other? What is the relationship between the various identities present? What are the effects of a dominant identity? How does it become dominant? What is the impact of an identity on the protection of individual and collective rights? What exceptions does identity create?

Thus, this article poses a simple question: by answering 'What is identity in general in constitutional law?' we also answer the question: 'What is the actual presence of constitutional identity in positive law, and what lessons can be drawn from it for legal science?'

This research focused on mapping the concept of identity in the 47 Member States of the Council of Europe at the time, based on their constitutions and approximately 400 decisions from constitutional courts. Identity was identified through keyword searches (identity and its lexical field), as well as through communication with constitutional courts and national experts, and interviews. I chose to study Europe broadly, as it is involved both in an integration process (the EU) and in a constitutional harmonisation process (the ECHR). This research combines the doctrinal legal method, used to analyse legal texts and court decisions, with an empirical qualitative method to explore how identity is understood and operationalised in practice. Subsequently, I examined the overall comportment of identity to identify systematic patterns in its appearance and utilisation. The goal was to propose a framework for understanding identity in terms of both its manifestations and its effects. This theoretical foundation enabled the development of a conceptual tool with broader theoretical implications to better grasp the role of identity in driving the evolution of constitutional law. For this paper, I have selected the most illustrative examples, which form models of integration and interaction between identities.

To this end, after defining what is meant by identity in constitutional law (Section 2), my research provides a framework for analysing the various identities present in constitutional law, specifically in constitutional texts and constitutional court decisions of the Council of Europe Member States, as well as their common and specific effects (Section 3). The next step is to explore the structural system formed by the interactions among these identities in constitutional law through the analysis of several models (Section 4). Finally, it will be concluded that constitutional identity remains highly marginal in positive law and that refocusing on identity within constitutional law is necessary (Section 5).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

A. Defining identity and constitutional law

What is identity?

Identity, within and beyond constitutional law, is primarily a non-legal concept that has been a subject of debate since antiquity.[3] In everyday life, it remains a conventional tool for understanding, used to define who we are or what an object represents.[4] It allows us to distinguish our similarities and differences with others at a given moment, as well as our continuity or change over time – our sameness (*mêmeté*) or our continuous evolution – our selfhood (*ipséité*), which together form a constant dialectic.[5] Identity is thus narrative according to Ricoeur, and an ongoing, never-completed process according to Hall.[6] It is commonly perceived in diverse ways, as a 'stream of consciousness'[7]: a blend of emotions, memories, will, and beliefs, as a heritage inherited from a 'social imaginary',[8] as a choice, or as a gift. It has been described as both static and fluid – like the Ship of Theseus[9] or Descartes' piece of wax,[10] recalling the common saying that one never steps in the same river twice.[11] Identity may be particular or universal. Depending on the identity observed and the perspective of the observer, identity can be seen in multiple ways at once. Thus, several contradictory definitions coexist in the humanities.[12]

In a practical sense, despite the heterogeneous scientific opinions on the very existence of identity,[13] individuals throughout history have never fully escaped the categorisation of their characteristics by the concept of identity.[14] Naturally, people have also used the social contract to contemplate, protect, safeguard, and advance their individual and collective identities.[15] Collective identity, particularly, is therefore at the heart of the state and its people[16] – 'we the people',[17] justifying their existence in a globalised context, and is at the core of the struggles currently faced by European democracies engaged in divisive identity battles.[18] In summary, identity – regardless of how it is conceptualised – plays a crucial role in the construction and justification of any community, with the constitution, as a social contract, serving as its ultimate instrument. It is

[3]Y Battistini, *Trois présocratiques. Héraclite, Parménide, Empédocle* (Gallimard 1955).

[4]C Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press 1989).

[5]P Ricoeur, *Soi-même comme un autre* (Seuil 1990).

[6]See H Stuart, 'Cultural Identity and Diaspora' in J Rutherford (ed), *Identity: Community, Culture, Difference* (Lawrence & Wishart 1990) 222–37.

[7]W James, *The Principles of Psychology* (Henry Holt and Company 1890).

[8]C Castoriadis, *The Imaginary Institution of Society* (K Blamey and D Ames Curtis trs, MIT Press 1987).

[9]S Ferret, *Le Bateau de Thésée. Le problème de l'identité à travers le temps* (Éditions de Minuit 1996).

[10]R Descartes, *Méditations métaphysiques* (1641) 423–4.

[11]Despite changes to the Ship of Theseus over centuries such that none of the original parts remain, it still remains the Ship of Theseus. Similarly, despite the deformation of wax and how it changes with temperature when approaching fire, it still remains the same wax.

[12]R Baudry, J-P Juchs, 'Définir l'identité' 10 (2007) *Hypothèses* 155; A Bilgrami, 'Notes toward the definition of "identity"' (4) (2006) Daedalus 135.

[13]A Weir, 'Who Are We? Modern Identities Between Taylor and Foucault', in A Weir, *Identities and Freedom: Feminist Theory Between Power and Connection* (Oxford University Press 2013) 21.

[14]KC McLean and M Syed (eds), *The Oxford Handbook of Identity Development* (Oxford University Press 2014).

[15]GJ Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).

[16]A quote from Charles Taylor aptly summarises the focus of research on identity in political science: 'Every democratic country needs a common identity in the sense of a "form" in which citizens recognise themselves as connected, as belonging together in the same group. They recognise themselves as connected with their fellow citizens in the same project, a project that does not necessarily bind other human beings outside but binds them together as one unit, as a common agent'. C Taylor, 'Quel principe d'identité collective?' in J Lenoble and N Dewandre (eds), *L'Europe au soir du siècle, identité et démocratie* (Esprit 1992) 59.

[17]T Ginsburg, N Forti and D Rockmore, '"We the Peoples": The Global Origins of Constitutional Preambles', 46 (2014) George Washington International Law Review 305.

[18]F Fukuyama, 'Huntington's Legacy' *The American Interest* (27 August 2018) <https://www.the-american-interest.com/2018/08/27/huntingtons-legacy/>, accessed 15 September 2024.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

precisely the richness and diversity of its theoretical conceptualisations that grant identity a unique and elusive position in constitutional practice. The ambiguity of identity thus becomes a political opportunity.

What is identity in constitutional law?

The expression of identity in constitutional law, in the sense of positive law, is diverse and variable, yet firmly rooted in the history of constitutionalism as a phenomenon that has shaped constitutions globally.[19] The reconciliation in the Constitution between religious identity and global constitutionalism[20] in Tunisia after the Arab Spring, the reliance on the 'basic structure' doctrine in India since 1973,[21] or the 'constitutional morality of the 21st century',[22] which in 2009 led to the repeal of a colonial law criminalising homosexuality[23] in India, are just a few examples that illustrate how identity is conceived as an inherent nature of constitutional law. It appears without precedent, without justification, self-sufficient and standing on its own.

In Europe, identity has been made particularly visible by so-called illiberal regimes. The constitutional reform that came into effect in Russia on 4 July 2020, introduced a guarantee of Russian cultural identity,[24] while Hungary's constitutional revision on 15 December 2020, added, among other provisions, Article XVI, which defines gender identity and protects family and education in line with constitutional identity and values based on Christian culture.[25] Russia's exit from the Council of Europe is multifactorial, certainly, but is also the culmination of a process of differentiation from the European Convention of Human Rights, in which identity in constitutional law has played a gradual and fundamental role.

Despite its common and often banal appearance, addressing identity in constitutional law is particularly challenging from a legal perspective. This is mainly due to two reasons: first, identity is a common, non-legal term with no consensus on its scientific definition, and everyone has a personal understanding of it;[26] second, it often appears in a negative context in political discourse.

In positive constitutional law, identity is what the constituent power – whether original or derived – and the constitutional judge declare it to be. They possess the authority to define, fix, or modify identity. What is particularly remarkable is that all actors authorised to introduce or articulate identity within constitutional law are confronted with the contradictions inherent in the non-legal concept of identity,[27] which broadens their discretion. The undefined and unverifiable nature of identity has specific consequences in constitutional law. The content of identity varies widely across states, not only in substance but also in the criteria used to define it (whether acquired, chosen, permanent, or essential), which become adjustable variables.

[19]A Llivina and A Saiz (eds), *National Constitutional Identity and European Integration* (Intersentia 2013).

[20]T Groppi, 'La Constitution tunisienne de 2014: illustration de la globalisation du droit constitutionnel?', (2018) *Revue française de droit constitutionnel* 343.

[21]Before the famous decision rendered by the German Constitutional Court, *BvL 57/71* BVerfGE 37, 271 (29 May 1974), known as *Solange I*.

[22]*Kesavananda Bharati v State of Kerala* SC 1461, 1492 (24 April 1973).

[23]Ibid., para 80, the Constitution must 'protect and celebrate diversity'.

[24]See J Sadowski, 'Amendments of 2020 to the Russian Constitution as an Update to Its Symbolic and Identity Programme' 35 (2022) International Journal for the Semiotics of Law 723.

[25]'Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. Hungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country'.

[26]'As common sense tends to consider identity as an essential, self-existing entity. But this orientation is far from being unanimously shared'. R Baudry and J-P Juchs, 'Définir l'identité' 10 (2007) Hypothèses 157.

[27]See E Erikson, *Identity and the Life Cycle* (Norton 1980); C Levi-Strauss (ed), Séminaire interdisciplinaire 1974–1975 'L'identité' (Grasset 1977).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

While it is impossible to conclusively prove the existence and accuracy of the content of identity, rational arguments fail to refute identity claims. Consequently, identity remains a matter of adherence and persuasion within constitutional law, a question of sentiment[28] in a world where identity and identity claims are increasingly prominent.[29] And as long as the social contract endures, it endures as well.

Identity is a 'factual truth',[30] as defined by Hanna Arendt, and therefore highly contestable, but once it is integrated into constitutional law, it becomes permanently established and enjoys the same status as 'scientific truth' or, in legal terms, as any other constitutional norm: it is no longer contestable. The particularity of identity is that, when invoked or enshrined in constitutional texts, it can function as an argument of authority. To be defended, it must be made visible, fixed and known at the moment of its defence. This explains the sudden emergence of constitutional identity out of nowhere, as observed in Europe. This happens regardless of its actual content or reality, but it carries significant weight due to its endorsement by an authoritative body. This assertion is particularly significant for all collective identities, which have the power to constrain individual and minority identities aw we will see.

Because constitutional law creates the belief that it embodies some aspect of what individuals who share it have in common, it is assumed that somewhere in its foundation, hidden but ready to emerge, lies the identity of the collective and those who comprise it.[31] Constitutional law is the ultimate supreme tool for implementing the politics of a given moment over the long term, supported by a fixed notion of collective identity, in an encompassing, comprehensive, and broad-spectrum manner.

Constitutional identity in relation to other forms of identity

The most well-known and extensively studied and conceptualised form of identity in constitutional law is constitutional identity itself. Over the past twenty years, legal scholarship has been particularly prolific in examining constitutional identity and its functions, regarded as a common positive notion in Europe.[32] Following the conceptualisation work on constitutional identity by American scholars Michel Rosenfeld[33] and Gary Jeffrey Jacobsohn,[34] in a context entirely different from the relationship between European and national legal orders, legal observers in Europe nonetheless use it as a functional concept to address all identity-related phenomena in law, indiscriminately and indistinctly. Most scholars refer to, or center their analysis on, forms of identity other than constitutional identity in its positive sense when discussing constitutional identity as a conceptual and analytical notion.[35] As a result, categories of

[28]C Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press 1989).

[29]F Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (Farrar, Straus and Giroux 2018).

[30]H Arendt, *La crise de la culture* (Gallimard 1972) 294.

[31]See A Harel, *Why Law Matters* (Oxford University Press 2014); M Tushnet, 'Constitution-Making: An Introduction' 91 (2013) Texas Law Review 1983.

[32]Eg GJ Jacobsohn, *Constitutional Identity* (Harvard University Press 2010); AS Arnaiz and CA Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia Ltd 2013); F-X Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (LGDJ 2013); C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020).

[33]M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2009); M Rosenfeld, 'Constitutional Identity' in A Sajó and M Rosenfeld (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 756; M Rosenfeld, 'L'égalité et la tension dialectique entre l'identité et la différence' (2010) *Constitutions* 177; M Rosenfeld, 'The Problem of Identity in Constitution Making and Constitutional Reform' (2005) *Cardozo Legal Studies Research Paper No 143*; M Rosenfeld, 'Identity of Its Own: A Reply to My Critics' 33 (5) (2012) Cardozo Law Review 1937–1969; M Rosenfeld (ed), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Duke University Press 1994).

[34]GJ Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).

[35]L Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford University Press 2015).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

constitutional identities emerge within constitutional identity itself: abusive,[36] dual,[37] hierarchical,[38] for example.

As a result of this focus, attention has shifted away from its positive origins, which lie in the relationship between legal orders, and has often overlooked the existence of other identities in constitutional law. Consequently, there remains a lack of precise and scientific understanding regarding what constitutes constitutional identity and what the exact role of identity is in the construction of constitutional identity. Yet constitutional identity is frequently utilised as if such understanding were clear.

2. Categorising identity

This section provides an overview of the empirical presence of 'identity' in constitutional law. It delves into the concept of identity within constitutional law, extending beyond the mere mention of the term 'identity'. It proposes a classification based on the role that identity plays and its position relative to the constitution. This section addresses the following questions: What kinds of identity exist? What forms do they take? What is their relationship to constitutional law? The aim is to catalogue identity based on what is empirically observable, without speculating on its content or what it might be in each state. This part of the research is limited to observing 'identity' – and its related lexical fields – in constitutional texts and in judicial interpretation. This paper presents only selected examples for illustrative purposes.

The categorisation highlights four types of relationships between identity and constitutional law. First (Section 2.A), identity could be included solely for the preservation of a particular identity. Second (Section 2.B), identity can serve as a basis for granting specific rights. Third (Section 2.C), identity can serve as a guiding principle for the creation and/or interpretation of norms – such as values, collective identity, traditions, etc. Fourth and lastly (Section 2.D), there is identity that is born from the norm itself, such as constitutional identity, or the essential core or identity of the constitution itself.

Identity can be considered as existing prior to and independent of the constitutional norm (A). Identity can also be considered as existing within the constitutional norm (B). This distinction allows us to establish a difference between the identity of a constitutional subject that is real and pre-existing outside the constitution (left column) and a constitutional subject created or maintained by the constitution (such as the people, the constitution, etc.) (right column).

A. Recognising and protecting identity: a right to identity

The enshrinement of a 'right to identity' in the Moldovan[39] and Romanian[40] constitutions is a formulation that fits this type of relationship between identity and the constitutional norm. It encompasses provisions whose sole purpose is to recognise identity. It can be seen as a claim-right available to the holders of recognised identities. Although the explicit enshrinement of the 'right to identity' is relatively rare, provisions of this type are the most common and widespread form of identity's presence in constitutional texts.

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

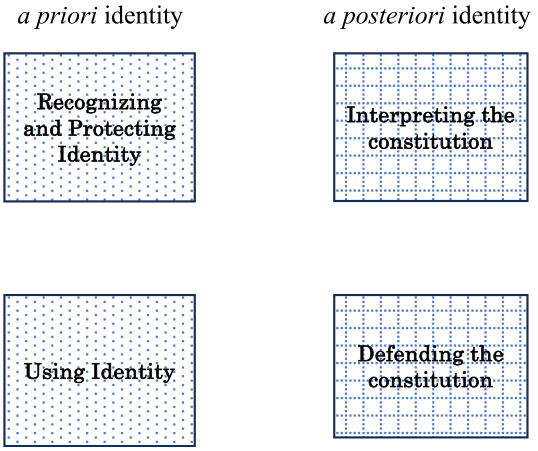
[37]JL Martí, 'Two Different Ideas of Constitutional Identity' in AS Arnaiz and CA Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) 17.

[38]A Śledzińska-Simon, 'Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and its Application in Poland' 13 (1) (2015) International Journal of Constitutional Law 124.

[39]Constitution of the Republic of Moldova, Art 10: 'Unity of the people and the right to national identity'.

[40]Constitution of Romania 1991, Art 6: 'Dreptul la identitate'. The article is divided into two paragraphs: '1. The state recognizes and guarantees for members of the national minorities the right to preserve, develop, and express their ethnic, cultural, linguistic, and religious identity. 2. The protective measures taken by the state to preserve, develop, and express the identity of the members of the national minorities shall be in accordance with the principles of equality and nondiscrimination in relation to the other Romanian citizens'.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press



Depending on the wording used,[41] we observe a range of state obligations and, therefore, the *a priori* normative force of these provisions or their potential counterjudicial or incentivising effects. These obligations range from mere recognition to promotion. Identity can be recognised, respected,[42] protected,[43] guaranteed,[44] promoted,[45] developed,[46] and encouraged[47] – either cumulatively or exclusively.

Among constitutional rights, there is also a right to non-identity or non-identification, either explicitly stated or deduced from enshrined provisions. Indeed, some constitutions explicitly provide for the possibility that individuals may choose their identity, or even choose not to have one. For example, the Slovak Constitution grants everyone the right to freely decide which national group they belong to.[48] Likewise, the German Constitutional Court – not alone in this – has recognised the right to the negative expression of identity, notably in its famous ruling concerning the presence of crucifixes in classrooms.[49]

This short overview of the right to identity forms a pluralistic foundation, the general consequences of which for the law remain unknown and dependent on constitutional and

[41]This is because observable variations exist depending on whether the provision is phrased in the affirmative form or in the imperative form, particularly with the addition of a duty (eg, 'the State must . . . ')

[42]Eg, Constitution of Austria, Art 8.

[43]Eg, Constitution of North Macedonia, art 48: 'Members of nationalities have a right freely to express, foster and develop their identity and national attributes. The Republic guarantees the protection of the ethnic, cultural, linguistic and religious identity of the nationalities. Members of the nationalities have the right to establish institutions for culture and art, as well as scholarly and other associations for the expression, fostering and development of their identity. Members of the nationalities have the right to instruction in their language in primary and secondary education, as determined by law. In schools where education is carried out in the language of a nationality, the Macedonian language is also studied'.

[44]Eg, Constitution of Finland, Art 17.

[45]Eg, Constitution of Slovakia, Art 34.

[46]Eg, Constitution of Latvia, Art 114.

[47]Eg, Constitution of Romania, Art 7: 'The state supports the strengthening of links with Romanians outside the country's borders and works for the preservation, development, and expression of their ethnic, cultural, linguistic, and religious identity, by respecting the legislation of the state of which they are citizens'. Or Constitution of Lithuania, Art 45: 'Ethnic communities of citizens shall independently manage the affairs of their ethnic culture, education, charity, and mutual assistance. Ethnic communities shall be provided support by the State'.

[48]Constitution of Slovakia, Art 12 sec 3.

[49]German Constitutional Court, *Kruzifix-Urteil*, 32 BVerfGE (10 August 1995), see LE Alloway, 'The Crucifix Case: Germany's Everson v. Board of Education?' 15 (2) (1997) Penn State International Law Review 361–83: The Court ruled that the mandatory presence of crucifixes in classrooms was unconstitutional, as it infringed upon the 'negative freedom of religion' – the right of individuals not to be confronted with religious symbols that they do not identify with or which contradict their beliefs.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

legislative practice. The *right to identity* can then evolve into a *right of identity*, which acknowledges the existence of identities to provide additional guarantees, and whose impact on constitutional law thus becomes more significant.

B. Using identity: a right of identity

The *right of identity* suggests the possibility of going beyond the mere recognition of the existence of identity. The explicit enshrinement of identity can serve as a means to achieve a purpose other than simple recognition or promotion. Individually, the expression of identity, through 'distinctive identity claims'[50] may involve granting additional or differentiated rights to those who share a common identity, compared to the rest of the population who do not share that identity.

Very close to the right to identity, this may first involve provisions allowing the holders of an identity to obtain rights in order to exercise the right to identity in the private sphere – a sort of right to assert one's identity in everyday life. Examples include the right to receive education in one's native language in Ukraine[51] or the right to practice reindeer herding in Sweden for the Sami people.[52]

But in a more impactful way, it can also involve shaping the democratic form and process by allowing, for example, voting rights and representation that highlight a group's identity. Facilitating access to representation is a compelling example of this granting of additional rights conditioned by the possession of a particular identity.[53] Legislative power can be structured in a way that favours the expression of identities. For instance, Cyprus,[54] Denmark,[55] and Spain[56] establish a ratio of seats for communities based on their demographic weight. Similarly, Romania[57] and Slovenia[58] systematically reserve parliamentary seats for representatives of specific communities, and they have lowered the electoral threshold to allow more deputies to be seated in favour of these communities.

Moreover, special bodies outside of traditional constitutional institutions can be created, as has been done in North Macedonia with the establishment of a Committee for Inter-Community Relations that plays a significant role in the legislative process.[59] The question of 'vital interests' in Bosnia and Herzegovina[60] is another example of this normative bias, which allows identity to potentially be invoked in the legislative or constitutional process by one of the nation's three constituent peoples.

Furthermore, in a more structural way, executive and legislative powers can also adapt to the plurality of identities within the electorate. The Belgian representative system, for example, is based on territorial division according to linguistic identity, particularly with the third

[50]A Abat i Ninet and JA Gardner, 'Distinctive Identity Claims in Federal Systems: Judicial Policing of Subnational Variance' 14 (2016) International Journal of Constitutional Law 395.

[51]Constitution of Ukraine, Art 53.

[52]Basic Laws of Sweden, Art 17.

[53]As in the Constitution of Montenegro, where the measures are not explicit in the Constitution but the intent is established, Art 79, para 9: 'the right to authentic representation in the Parliament of the Republic of Montenegro and in the assemblies of the local self-government units in which they represent a significant share in the population, according to the principle of affirmative action'.

[54]Constitution of Cyprus, Arts 46,48, 49, 53, 62, 63, 109.

[55]Constitution of Denmark, Art 28: 'The Folketing shall consist of one assembly of not more than one hundred and seventy-nine Members, of whom two Members shall be elected on the Faeroe Islands, and two Members in Greenland'.

[56]Constitution of Spain, Art 68.

[57]Constitution of Romania, Art 62, sec 2: 'Organizations of citizens belonging to national minorities which fail to obtain the number of votes necessary to be represented in Parliament have the right to one deputy seat each, in accordance with the electoral law. Citizens of an ethnic minority may be represented by only one organization'.

[58]Constitution of Slovenia, Arts 80 and 96.

[59]Constitution of North Macedonia, Art 78.

[60]Constitution of Bosnia-Herzegovina, Art IV, 3, e and Art V, 2, d.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

constitutional revision in 1970.[61] Similarly, Switzerland grants a wide margin of manoeuvre to the cantons based on their specific characteristics.[62] In this spirit, the Swiss Federal Tribunal recognised as early as 1965 the country's quadrilingualism and the principle of linguistic territorialisation it entails, which the courts now take into account in their rulings.[63] Thus, certain provisions make territorial organisation an aspect aligned with identity as it is perceived.

In a more subdued way, identity is also respected in the administrative structures implemented in different nations. For instance, a German constitutional provision recommends considering regional particularities in state organisation.[64] Similarly, administrative divisions must respect specific identity characteristics, as in Albania[65] or Ukraine.[66] In Russia, administrative organisations must also take into account historical and local traditions.[67]

C. Interpreting the constitution

An identity that exists prior to the legal norm can also permeate it, beyond the individual or community rights associated with identities as previously mentioned. In such cases, an identity that is understood as existing outside of the constitution can see its substance reflected in constitutional provisions, either through a straightforward reading or by judicial interpretation. In the latter case, the judge confirms the embedding of identity in the constitutional norm by offering various interpretations.

Such identity results in an explicit obligation for constitutional interpreters to respect it. Certain provisions expressly serve as interpretive guidelines for the judge. The identity in question, generally established by the text as collective, may have a more exogenous or more endogenous and specific tone. Article 3 of the Croatian Constitution, for instance, provides a list with a universal tone that must serve as the basis for constitutional interpretation.[68] In Turkey, Article 2 of the constitution enshrines Atatürk's nationalism and secularism as guiding principles,[69] and the Constitutional Court has already used these principles to invalidate constitutional amendments.[70] Similarly, since 2012, Hungary's new Fundamental Law, Article R §3,[71] strengthened by the seventh amendment in 2018, includes paragraph 4, which mandates all state organs to protect Hungary's constitutional identity and Christian culture. As a result of these provisions, constitutional judges are tasked with infusing identity into their interpretations of all constitutional provisions.

[61]Constitution of Belgium, Art 4.

[62]Constitution of Switzerland, Art 46 al. 3.

[63]Swiss Federal Tribunal, *Association école française de Zurich*, RO 91 I 480, 485 (31 March 1965).

[64]Basic Law of Germany, Art 29 al.1 (1): 'The federal territory may be restructured in order to ensure that the Länder can effectively perform the tasks incumbent upon them according to their size and capacity. In doing so, account shall be taken of regional particularities, historical and cultural ties, economic expediency, as well as the requirements of spatial planning and regional development'.

[65]Constitution of Albania, Art. 108 al. 2: according to 'the historical tradition'.

[66]Constitution of Ukraine, Art 132.

[67]Constitution of Russia, Art 131.

[68]As in the Constitution of Croatia, Art 3: 'Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution'.

[69]'The Republic of Turkey is a democratic, secular, and social state governed by the rule of law, respectful of human rights, in a spirit of social peace, national solidarity, and justice, attached to Atatürk's nationalism and based on the fundamental principles expressed in the preamble'.

[70]Turkish Constitutional Court, *E. 1989/1, K. 1989/12* (7 March 1989), declared the law of 10 December 1988 regarding the authorisation of wearing the veil at university unconstitutional.

[71]'The provisions of the Basic Law must be interpreted in accordance with their purposes, the national creed, and the achievements of our historical Constitution'.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

However, the influence of identity outside of the norm also manifests itself through the interpretations made by constitutional judges, even without explicit binding provisions. Some constitutional courts have affirmed that the influence of identity on the content of constitutional norms permeates the entire legal and judicial system.[72] For example, the Karlsruhe Constitutional Court in Germany has recognised the existence of an 'objective system of values' outside of the norm but supported by the Basic law.[73] In its famous Lüth ruling of 15 January 1958, the Constitutional Court declared itself competent to review the conformity of ordinary court decisions with the 'values inherent in constitutional legal principles'.[74] Since then, the German Constitution has been regarded as non-neutral from an axiological perspective, as it also represents a 'context of meaning'[75] necessary for interpretation. In fact, as early as 1951, the court had already reiterated this idea of the anteriority of identity to the norm, ruling that constituent power 'was bound by fundamental legal principles that predate and are superior to any written law'.[76] Similarly, the preamble[77] of the Polish Constitution has been interpreted by the Constitutional Tribunal as defining the axiological identity of constitutional democracy and identifying the principles underpinning the system.[78] As a result, laws must comply with the preamble,[79] as must the entire constitutional text. According to former Constitutional Judge Lech Garlicki, the preamble is an 'important axiological indicator in the process of interpreting other constitutional provisions, as phrased in individual articles'.[80]

D. Protecting the constitution

This section focuses on instances of formalising an identity of a constitutional text and that is interpreted as such by constitutional judges, particularly for argumentative purposes,[81] especially to protect the constitution from external influences, including the application of EU law. By making this identity visible, by naming or highlighting it, the goal is often to protect the constitution as a whole, and its interpretation.

It is, of course, within the notion of constitutional identity that the defensive identity produced by norms is most conspicuously manifested. The identity test[82] carried out by constitutional courts, which have embraced the concept of constitutional identity, reveals that a constitutional text reflects a global identity that cannot be altered, either because it is inherited[83] or because the constituent power has not consented to its modification.[84]

[72]Another example: Czech Constitutional Court, *PL ÚS 19/93* (21 December 1993), the Court's first decision: 'Our Constitution is not based on value neutrality… It incorporates into its text certain governing ideas, expressing the fundamental, inviolable values of a democratic society… The interpretation and application of legal norms are subordinated to their substantive purpose. Law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values'.

[73]See E Zoller, *Droit constitutionnel* (2nd edn, PUF 1999) 175.

[74]German Constitutional Court, *BVerfGE 7, 198*, Lüth (15 January 1958).

[75]T Rambaud, 'Das Volk en droit constitutionnel allemand' (2007) *Sens public* 8.

[76]German Constitutional Court, *BVerfGE 1, 18* (23 October 1951).

[77]On the function of preambles see eg L Orgad, 'The Preamble in Constitutional Interpretation' 8 (4) (2010) International Journal of Constitutional Law 714; A Rinella, 'The Irish Constitutional Preamble in a Comparative Perspective' in GF Ferrari and J O'Dowd (eds), 75 Years of The Constitution of Ireland, An Irish–Italian Dialogue (Clarus Press 2014) 119.

[78]R Piotrowski, 'The Importance of Preamble in Constitutional Court Jurisprudence' 52 (1) (2011) Acta Juridica Hungarica 29; see also E Popławska, 'Preamble to the Constitution as an Expression of the New Axiology of the Republic of Poland' 52 (1) (2011) Acta Juridica Hungarica 40.

[79]Ibid., 32

[80]Ibid., 37 and see L Garlicki, *Polskie prawo konstytucyjne* (Warszawa 2009) 42.

[81]M Troper, 'L'identité constitutionnelle: la fonction d'un argument' in M Fatin-Rouge Stefanini, A Levade, V Michel and R Mehdi (eds), *L'identité à la croisée des États et de l'Europe, quel sens ? Quelles fonctions?* (Bruylant 2015) 263.

[82]To refer to the well-known formula of the German Constitutional Court.

[83]Hungarian Constitutional Court, 22/2016 (XII. 5.) AB, 30 November 2016.

[84]French Constitutional Council, Decision No. 2006-540 DC, 27 July 2006.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

Nevertheless, other judicial formulas encourage making the identity emanating from the constitutional text visible and actionable. The Czech[85] and Slovak[86] Constitutional Courts have both recognised the existence of a 'material core' of their constitutions, which is also composed of norms and principles. Similarly, the Italian Constitutional Court explains that certain supreme principles, which are exempt from constitutional revision, represent the translation of the supreme values upon which the constitution was founded.[87] These supreme principles are protected by the mechanism of counter-limits established by the Constitutional Court in 1973,[88] which, like the mechanism of constitutional identity, serves as a safeguard against the integration of European law into the domestic legal order.

Other examples exist beyond the relationship between legal orders. These other formulations of the general identity of a constitution also aim to protect the constitution as a whole, as a harmonious unit reflecting a unified identity, from a national perspective. This is the case with the fundamental values in Macedonia,[89] where the free expression of national identity is considered alongside the principles of European constitutionalism, or with the 'spirit of the Constitution' in Moldova[90] and Estonia,[91] which have been used defensively by the judiciary.

This reveals marked differences between states, yet four types of identity consistently emerge, with varying degrees of prevalence. This provides a foundation for understanding the relationships among them and the structuring impact of their system on constitutional law.

3. The system of identities

Identities are not understood by the constituent power and the judiciary as independent from one another. On the contrary, they form a closed system in which judges, at opportune moments and following the constituent power, ensure collective harmony and even the conformity of identities with one another.

To understand this mechanism, before discussing examples that illustrate different models of interaction between identities, it is necessary to consider the various levels of identity: personal or individual, community or minority, and collective, common, or national.[92] The four types of identities included in constitutional law correspond to these three degrees.

This interconnection implies a hierarchical relationship between the identities. The hierarchy between identities is based on the priority given through the constitution to an identity of one degree over an identity of another degree. In this sense, the identity that is perceived and defined as collective, is more fictitious,[93] so the most malleable, the most abstract, and the one with the greatest potential for impact.

[85]Czech Constitutional Court, *Pl. ÚS 19/08* (26 November 2008).

[86]Slovak Constitutional Court, *PL. ÚS 21/2014* (30 January 2019). The Court's reasoning unfolded in three stages, answering the following questions: (1) Does the Constitution contain an implicit material core? (2) Can a constitutional amendment violate this core? (3) Does the Court have the competence to review a constitutional amendment? The Court acknowledged the possibility of invalidating a constitutional revision for violating the material core of the Constitution. See also S Drugda, 'Slovak Constitutional Court Strikes Down a Constitutional Amendment – But the Amendment Remains Valid', Blog of the International Journal of Constitutional Law (25 April 2019).

[87]Italian Constitutional Court, Decision No. 1146/88 (29 December 1988).

[88]Italian Constitutional Court, Decision No. 183/73 (27 December 1973, *Frontini and Pozzani*).

[89]The North Macedonian Constitution, Art 8, establishes an exhaustive list of the 'fundamental values of the constitutional order of the Republic' which includes 'the free expression of national identity'.

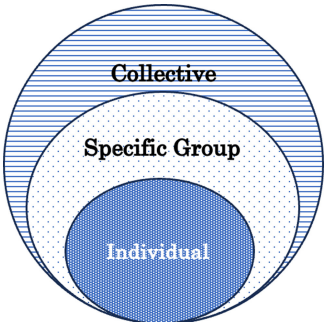
[90]Moldovan Constitutional Court, Decision No. 4/2013 (22 April 2013)

[91]Estonian Supreme Court, Decision No. 3-4-1-2-01 (5 March 2001) §16; Decision No. III-4/A-11/94 (21 December 1994) point VII.

[92]This interconnection echoes Castoriadis's conception of individual, group, and collective identities as realities interconnected through the social imaginary. In this paper, the Constitution serves to crystallise this social imaginary.

[93]B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1991).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press



The inclusion of identity in constitutional texts results from a choice among the identities available within the social imaginary. During the constituent process, a decision is made regarding which identities to defend or not, to recognise or not, and the scope and constraints to assign to them. The constituent power thus makes a choice between identities of the same degree, for example, prioritising between individual identities or between collective identities when they are mutually exclusive – religious versus secular, for instance. Sometimes, the constituent chooses to make one collective identity predominant over other types of identities.

Nevertheless, as the study of constitutional transitions makes clear,[94] this choice between sometimes competing identities results from a compromise – what Carl Schmitt referred to as a 'formal dilatory compromise'[95] – which is therefore subject to evolving interpretation and can even collapse without any formal constitutional change.[96] Observations of constitutional justice show this evolution, depending on whether the judge chooses to maintain or to adapt this compromise, varying the constraints placed on one identity in relation to another.

The change in the importance of one identity relative to another is particularly evident through its degree of constraint or restriction during proportionality review. This shift in constraint, which remains at the judge's discretion becomes the turning point for identity. Ultimately, it is the interpretation of constitutional norms and principles, particularly fundamental rights, that is impacted by this change.

A focus on five different examples reveals four models of relationships between identities. Returning to constitutional identity, we will see that when it is mentioned, it is merely the result of the interaction between other identities, which are the identities with real impact.

A. Hungary

Constitutional identity in Hungary conceals a deeper process of reconfiguring other identities within the country. This example clearly shows how identities can be interconnected by the judge and how they are made strongly dependent on each other through the increased emphasis on supposed collective identity. It also highlights how constitutional identity merely reinforces a reasoning already established and serves only as an argumentative manifestation of it.

In November 2016, the Hungarian Constitutional Court rendered a decision in response to the European Commission's 2015 initiative on the compulsory relocation of asylum seekers, asserting explicitly Hungarian constitutional identity.[97] After a positive referendum on 2 October 2016,

[94]JJ Linz and A Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe* (Johns Hopkins University Press 1996).

[95]C Schmitt, *Théorie de la Constitution*, trad. Julien Freund (PUF 1993).

[96]O Beaud, 'Les mutations de la Ve République, ou comment se modifie une Constitution écrite' 99 (2001) *Pouvoirs* 19.

[97]Hungarian Constitutional Court, Decision No. 22/2016 (XII. 5.) AB (30 November 2016).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

which was invalidated due to low participation, and a 7th constitutional amendment dedicated to constitutional identity that was aborted shortly afterward, it was ultimately the Constitutional Court that had the final say in validating the government's anti-migration policy. The Constitutional Court addressed open questions posed by the ombudsman regarding the general meaning of the fundamental law, particularly the EU clause, in light of the EU Council's decision.[98] In doing so, and following the model of Germany's identity review, the court laid the groundwork for using this notion in future concrete cases. It provided an open but undefined substance to constitutional identity, considering that its use in specific cases could effectively ensure the protection of Hungarian linguistic, historical, and cultural traditions.[99]

On the one hand, the judge understands constitutional identity as a tool – now a common one within the EU – for limiting the application of European decisions. On the other hand, such decisions open the door for the use of constitutional identity within a strictly national framework.

This trend in Hungary, this vision of dominant collective identity at the national level, has since been confirmed. Openly Christian constitutional identity was explicitly incorporated into the text in May 2018. By the end of 2021, constitutional identity alone was no longer sufficient for the judge, who now also seeks justification in another type of identity, namely 'the identity of community members', to establish a new limit on the application of EU law, particularly decisions of the Court of Justice of the European Union concerning immigration and asylum requests.[100] According to the Constitutional Court, when the joint exercise of competences with the EU is incomplete and leads to a violation of the identity of individuals living in a territory, the state must ensure the protection of this territorial right. This assertion is notably based on the preamble of the constitution, which explicitly defines the 'natural ties, determined by birth, which shape the identity of community members' of the Hungarian people.[101] It further emphasises that this identity is unchangeable and constitutes an integral part of human dignity.[102] For the Constitutional Court, changes resulting from societal evolution can only occur without significant harm to these defining elements of identity. Without state protection, individuals would be forced to change this identity, which would go against the principle of popular sovereignty and would lack democratic legitimacy.[103] In short, according to the Constitutional Court, massive and permanent settlement on Hungarian territory without democratic authorisation would violate the right to identity and self-determination of the people living in Hungary.[104]

This shift from constitutional identity to another formulation of collective identity demonstrates that the former served merely as a Trojan horse, cloaked in a European appearance legitimised by practice. At the national level, however, the transition to national collective identity represents a purely domestic form of legitimation. This transition, which has now been transformed into doctrine, was initiated, developed, and promoted by the former president of the Constitutional Court (2015–2024), Tamás Sulyok, who is currently the President of Hungary since March 2024. In a speech widely shared with neighbouring constitutional courts during his tenure, he explained how human dignity, in particular, is inextricably linked to 'national identity' and other identities at play.[105] He argued that dignity cannot be protected without safeguarding

[98]Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L239/146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

[99]Ibid., §66.

[100]Hungarian Constitutional Court, Decision No. 32/2021 (10 December 2021), on the joint exercise of powers.

[101]Ibid., §32.

[102]Ibid., §33.

[103]Ibid., §35.

[104]Ibid., §51.

[105]T Sulyok, 'Universal Human Rights and National Identity', *Constitutional Justice – Challenges and Perspectives*, International Conference commemorating the 25th Anniversary of the Slovak Constitutional Court, Košice, 10 April 2018 (PowerPoint provided by Gergely Deli, former 1st assistant to the President of the Court).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

specific national identity, emphasising how universal human rights and national identity are not contradictory because national identity and human rights share the same foundation – they both serves as means to connect the individualism on which human dignity is based with the idea of collectivity. However, he noted that at times, individual rights and national identity must be hierarchised. He also, of course, reminded how the 20th century demonstrated that the idea of collectivity could undermine the protection of human rights. But for him, when individual identity, protected by national identity, may be affected, it must always take precedence because it is an unchangeable reality that must be accepted and guaranteed. In doing so, he finally argued that national identity is a truth safeguarded by constitutional identity in the context of the EU.

Here, the immutable link between collective and individual identities strengthens the collective identity and justifies any interpretation made by the judge. Of course, not all EU Member States have used identity in such a manner, but nothing prevents them from doing so. The following examples illustrate how, in a less overarching manner, a new ascendancy of collective identity over lower-level identities naturally becomes possible.

B. Latvia

Another example, that of Latvia, shows how the chosen history integrated into constitutional law can serve as a collective identity-based argument with its own normative force, driving a particular policy. In Latvia, in 2019, the President of the Constitutional Court defended a similar stance, positioning identity as a mechanism of resistance for the court, not only against supranational law but particularly against Russian influence.[106] Latvia adopted a constitutional preamble in 2014 containing strong identity markers, referring to Latvian identity through Latvian traditions, the Latvian language, Christian values, and universal values.[107] This amendment secured the supremacy of the Latvian language. It followed the attempted constitutional revision in 2012, which sought to make Russian a second official language but was rejected in a referendum.[108]

Even before that,[109] the judge had already established the Latvian language as a constitutional value since 2001,[110] enabling it to have its own scope and influence in reconciling national constitutional norms during proportionality tests. The new preamble, however, strengthened the effects of linguistic identity. In 2018, the legislature reformed the law, reducing the prevalence of Russian as the language of instruction in schools compared to Latvian, with the consent of the Constitutional Court.[111] Today, the international political context favours stronger protection of 'national identity' as a 'legitimate goal'. For instance, on 9 February 2023,[112] the Latvian Constitutional Court barred universities and private schools from teaching in any language other than Latvian or another official European language – a trend that has been confirmed by the

[106]I Ziemele, speech at the conference 'How Can We Protect Rule of Law in Europe', 26 February 2019, as President of the Constitutional Court of Latvia <https://www.satv.tiesa.gov.lv/en/runas-un-raksti/speech-by-the-president-of-the-constitutional-court-ineta-ziemele-at-the-conference-how-can-we-protect-rule-of-law-in-europe/> accessed 20 September 2024.

[107]English version provided by the Latvian Constitutional Court: 'Since ancient times, the identity of Latvia in the European cultural space has been shaped by Latvian and Liv traditions, Latvian folk wisdom, the Latvian language, universal human and Christian values. Loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society. Each individual takes care of oneself, one's relatives and the common good of society by acting responsibly toward other people, future generations, the environment and nature'.

[108]Ibid.

[109]1998 Constitutional Amendment incorporating the Latvian language into the Constitution; 2002 Constitutional Amendment designating Latvian as the official language; 2014 Constitutional Amendment adding the preamble. See J Pleps, 'Fundamental Values of the Latvian Constitutional Order: Some Thoughts About the Intentions of the Constitutional Legislator', International Association of Constitutional Law Blog (21 January 2006).

[110]Eg, Latvian Constitutional Court, Decision No. 2001-04-0103 (21 December 2001); Decision No. 2004-18-0106 (13 May 2005); Decision No. 2003-02-0106 (5 June 2003); Decision No. 2005-02-0106 (14 September 2005).

[111]Constitutional Court of Latvia, Judgment in Case No. 2018-12-01 (23 April 2019).

[112]Latvian Constitutional Court, Decision No. 2020-33-01 (9 February 2023).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

European Court of Human Rights in 2023 following the 2018 reform.[113] However, some members of the Saeima (the Latvian parliament) argue that imposing such restrictions on fundamental rights is unjustifiable, suggesting that the goal of promoting the use of the national language and preserving national identity could be achieved through less stringent measures that allow greater use of foreign languages.

Indeed, this ruling contrasts with the linguistic and national diversity among Latvian citizens and occurs amid a complex diplomatic situation and ongoing war. However, despite failing to reflect or conform to the country's sociological reality, it reflects Latvia's historical relationship with Russia and its concerns about the situation in Ukraine, despite the fact that Russian-speaking individuals have lived in Latvia for a century, with most lacking Russian citizenship. It reflects the choice of collective identity and the necessity to restrict other rights and identities in order to assert the former.

Another example, outside of language, illustrates how the judge can use identity in the proportionality test to validate a restriction of individual rights. In 2015, the Latvian Constitutional Court, in a decision regarding the national flag, established the historical significance of the flag and reaffirmed its alignment with the state's historical identity.[114] The plaintiff contested the official version of history – which was anti-Soviet – and used it as the main argument for refusing to display the flag on her property on certain public holidays, which commemorate the deportation of over 15,000 Latvian citizens to the Gulags in 1941. The court chose not to delve deeper into the verification of historical events on 14 June 1941, but recognised the importance of the flag's symbolism as an element of the state's constitutional and international identity. It considered that the chosen dates marked significant collective historical events and justified the restriction of the expression of individual identities. Here, constitutional identity as defined is the result of a selection among potentially collective identities.

In this example, the first key observation is how the 'dérivé' constituent power chose to favour endogenous identity against Russian influence by introducing a constitutional preamble. The second observation is the multitude of identities prioritised in the preamble: by incorporating identities of different, and at times contradictory, origins, the constituent power gives the judge the flexibility to choose between these identities depending on the case. For example, if the judge allows themselves to draw from the preamble, any interpretation of identity becomes possible – whether universal or Christian, endogenous or otherwise. The judge also has the discretion to determine the extent of the constraint imposed by the selected identity, as they are ultimately the one to validate the significance of that identity over individual freedom, or of individual identity disconnected from collective identity.

C. France

France provides another example that demonstrates how collective identity, even when not initially exclusive and indeed aiming for the opposite – through an assimilation policy that is certainly debatable in terms of its effectiveness and legitimacy – can nonetheless foster certain exclusions of identities from the public sphere. In essence, the French example illustrates how the explicit denial of collective identity recognition hinges on the judge's interpretation of its substance and relevance.

The French Constitutional Council systematically reaffirms its usual ruling on equality,[115] the only revolutionary principle that has never been questioned since 1789,[116] particularly to explain its

[113]EctHR, Fifth Section, *Valiullina and Others v Latvia* (Applications Nos. 56928/19 and 2 others, 14 September 2023).

[114]Latvian Constitutional Court, Decision No. 2015-01-01 (2 July 2015) para 15.2.

[115]'Considérant de principe' established by French Constitutional Council Decision No. 87-232 DC (7 January 1988, *Mutualisation de la Caisse nationale de crédit agricole*): 'The principle of equality does not preclude the legislator from treating different situations differently, nor from departing from equality for reasons of general interest, provided that, in either case, the resulting difference in treatment is related to the purpose of the law that establishes it' (Consideration No. 10).

[116]A Levade, 'Discrimination positive et principe d'égalité en droit français' 111 (2004) Pouvoirs 56 (Le Seuil).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

long-standing reluctance to accept positive discrimination.[117] For example, in 1999, in a decision regarding the *European Charter for Regional or Minority Languages*, the Council confirmed the impossibility of recognising 'collective rights for any group defined by common origin, culture, language, or belief'.[118] The constitutional recognition of the French language, although late – in 1992[119,120] allowed the Constitutional Council, to rule out the promotion of regional languages. The decision was based on the reasoning that the charter would grant rights to groups, which would thus infringe upon the constitutional principles of the indivisibility of the Republic, equality before the law, and the unity of the French people.[121] The official and exclusive status of the French language is considered essential to the indivisibility of sovereignty, and thus ensures the continued interpretation of the concept of the people.[122]

However, other examples are also noteworthy. The opposition of the Constitutional Council to changing the concept of the people when reconsidering identities in constitutional law was also demonstrated in the famous decision invalidating the law establishing the status of the territorial collectivity of Corsica.[123] The law in question, in its first article, stated: 'The French Republic guarantees to the living historical and cultural community that constitutes the Corsican people, a component of the French people, the rights to preserve its cultural identity and defend its specific economic and social interests. These rights linked to insularity are exercised in respect of national unity, within the framework of the Constitution, the laws of the Republic, and this statute'.[124] On this occasion, the judge, in defence of the principles of the indivisibility of the Republic[125] and the unity of the French people,[126] firmly affirmed the existence of the concept of the French people to invalidate the recognition of the Corsican people through the proposed law. In doing so, the Constitutional Council limited the expression of a minority, a regional identity that would alter the concept of the French people,[127] making it composite.[128]

Here, the Constitutional Council defines the concept of the people and, importantly, the rights associated with individuals. No additional rights are granted to an individual based on their

[117]See French Constitutional Council, Decision No. 91-290 DC (9 May 1991, *Loi portant statut de la collectivité territoriale de Corse*).

[118]See French Constitutional Council, Decision No. 99-412 DC (15 June 1999, *Charte européenne des langues régionales ou minoritaires*) cons 6.

[119]Loi constitutionnelle n°92-554 of 25 June 1992 inserting Article 2 on the French language into the Constitution [1992] JO 8802.

[120]M Quesnel, *La protection de l'identité constitutionnelle de la France* (Dalloz 2015) 196.

[121]Ibid., para 10.

[122]See also French Constitutional Council, Decision No. 2000-428 DC (4 May 2000) cons 10: 'Considering that the 1958 Constitution distinguished the French people from the peoples of the overseas territories, to whom the right to self-determination and the free expression of their will is recognized; it follows that these grievances must be dismissed as irrelevant'.

[123]French Constitutional Council, Decision No. 91-290 DC (9 May 1991, *Loi portant statut de la collectivité territoriale de Corse*).

[124]Loi No. 91-428 of 13 May 1991.

[125]French Constitution, Article 2.

[126]Deduced from the Preamble.

[127]French Constitutional Council, Decision No. 91-290 DC (9 May 1991) cons 12: 'Considering that under the first paragraph of the preamble of the 1958 Constitution, "the French people solemnly proclaim their attachment to human rights and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and supplemented by the preamble to the 1946 Constitution"; that the Declaration of the Rights of Man and of the Citizen referred to here emanated from the representatives "of the French people"; that the preamble to the 1946 Constitution, reaffirmed by the preamble to the 1958 Constitution, states that "the French people again proclaim that every human being, without distinction of race, religion, or belief, possesses inalienable and sacred rights"; that the 1958 Constitution distinguishes the French people from the peoples of overseas territories who are granted the right to self-determination; that the reference to the "French people" has appeared in many constitutional texts for two centuries; thus, the legal concept of "the French people" has constitutional value'.

[128]Ibid., cons. 13: French Constitutional Council, Decision No. 91-290 DC (9 May 1991): 'Considering that France is, as proclaimed by article 2 of the 1958 Constitution, an indivisible, secular, democratic, and social Republic which ensures equality before the law for all citizens regardless of their origin; consequently, the reference made by the legislator to the "Corsican people, a component of the French people" is contrary to the Constitution, which recognises only the French people, composed of all French citizens without distinction of origin, race, or religion'.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

membership in a community. This also establishes a unique mode of citizen participation in democratic life, excluding consociational democracy and ruling out the possibility of benefiting from other rights linked to specific characteristics. While this case may not directly impact compliance with European values as the Hungarian example potentially does, it illustrates the underlying mechanism of differentiating rights, and the supremacy of the constitutional judge in deciding how far to go in preserving collective identity.

It also demonstrates the temptation to use identity as a last-resort argument to justify restrictions on fundamental rights, or for not developing them in any national system. Moreover, it raises serious questions about the potentially unlimited scope of such justifications for restricting rights. It should be noted here that this does not concern constitutional identity in the sense of positive law, as the judge made no connection between the people and constitutional identity.

D. Croatia and Ireland

When it comes to the interpretation of individual and fundamental rights, the choice of collective identity by the constituent power – 'originaire' and 'dérivé', – and subsequent choices by the judge regarding the constraints imposed by that identity on other identities, are decisive. The dialogue between identities serves the judge's reasoning.

The Croatian example on the issue of abortion provides an illustration of this. In 2017, the Croatian Constitutional Court became one of the last European courts[129] to rule on the matter.[130] Its jurisprudence shows that, beyond reconciling norms and principles required to either permit or prohibit abortion, there is also an underlying balance between identities. To interpret Article 21 of the Croatian Constitution, which protects the right to life of all human beings, the Constitutional Court had to weigh the rights of women to privacy (Article 35), the freedom to develop one's personality (Article 22), and the 'constitutional value' as well as the 'public interest' in preserving unborn life.[131] After consulting medical experts and Catholic theologians and dedicating several paragraphs to discussing the 'moral aspect' of the issue – which it deemed the 'core of the problem'[132] and central to the public interest invoked – the court ultimately allowed women to terminate a pregnancy within the first twelve weeks.

The Croatian example can be compared with the Irish one, which shows how the balance between identities can evolve over time and how deeply political anchoring can make the interpretation of fundamental rights subject to societal changes, depending on whether the judge chooses to follow them or not. Thus, the Irish example demonstrates a process of identity rebalancing over time.

The Irish Constitution explicitly carries a collective Catholic religious identity,[133] but it is juxtaposed with classical liberal principles, such as the principle of non-discrimination,[134] which

[129]The last one is from Polish Constitutional Tribunal, *K1/20* (22 October 2020)

[130]Croatian Constitutional Court, Decision No. U-I-60/1991 (21 February 2017).

[131]Ana Horvat Vuković, 'Symposium–The Croatian Constitutional Court's Abortion Decision: A Nominal Win for Reproductive Freedom', *International Journal of Constitutional Law Blog* (16 June 2016) <–'http://www.iconnectblog.com/2019/06/symposium–the-croatian-constitutional-court's-abortion-decision:-a-nominal-win-for-reproductive-freedom> accessed 14 September 2024.

[132]Croatian Constitutional Court, Decision No. U-I-60/1991 (21 February 2017) § 22 et seq: 'The "core of the problem", especially if observed primarily from the legislative aspect, is that the idea is to "break down" an issue that is primally moral and based on one's worldview by regulating it via a (coercive) legal norm. However, moral positions (especially if connected with one's religious convictions) can be in mutual conflict, and can even exclude one another. It is a question of morals, ethics, and faith, the way it is understood and embraced by each individual, in line with his or her right to self-determination. It is, therefore, illusory to expect that its legal regulation will resolve all dilemmas and divisions that the question provokes in society. The complexity and sensitivity of the relationship between law and morals reflect and burden the resolution of the issue of termination of pregnancy'.

[133]Preamble to the Constitution of Ireland 1937.

[134]Constitution of Ireland, Art 40 (right of association) and Art 44 (obligation of the State not to create disabilities or discrimination on the basis of religion).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

allows for the maintenance of collective identity while also, to a certain extent, protecting individual identity. When seized, the Supreme Court becomes the guarantor of this compromise and the balance between the two types of identities.

History shows that the court has oscillated between the religious Christian values enshrined in the constitution and the gradual rise of universalism within the constitution,[135] culminating in the constitutional revision regarding the liberalisation of abortion in 2018.[136] More specifically, while the Supreme Court in 1974 allowed for a recognition of the right to contraception by interpreting the preamble in favour of a more universalised identity,[137] the constitution, through a 1983 amendment, introduced the right to life of the unborn child,[138] and the court reverted to a religious interpretation of the constitution, ruling against homosexual relations in the same year.[139] In this particular case, despite earlier liberalisation, the balance clearly tipped back in favour of the collective Catholic identity and against the non-religious individual identity and its expression. Since then, Irish law has been able to liberalise both on abortion and on other fronts such as sexual orientation, by allowing same-sex marriage,[140] even though the Catholic religion could not accept it. In summary, in this case, the influence and legislative prominence of the Catholic collective identity enshrined in the constitutional text diminished as individual identity gained prominence. To quote Chief Justice Finlay from the 1974 McGee case of the Irish Supreme Court, 'No interpretation can be valid for all time'. But if the constraint of an exclusive collective identity is weakening due to societal changes, it could re-emerge, as it has in the past, as the Irish experience demonstrates.

The Irish example also demonstrates the freedom the judge has to interpret the reality of collective identity as the final authority, or, if not seized, the constituent's ability to enshrine it or the legislator's ability to follow it as they wish. It also shows how no argument is sufficient to contradict this vision of collective identity. On this last point, the European Court of Human Rights (ECtHR) in *A, B and C v. Ireland*[141] admitted its lack of competence to judge the sociological reality and collective Catholic identity of the Irish people, and, therefore, to rule on the possible lack of real basis for the abortion ban challenged by the applicants. The applicants argued that the 1983 referendum against abortion no longer reflected the will of the Irish people in 2010.[142] The ECtHR followed the same realistic reasoning to refute the applicants' argument and declare its lack of competence. According to the ECtHR, the opinion polls cited by the applicants 'do not sufficiently demonstrate a change in the Irish people's opinion regarding the legal grounds for abortion in Ireland to invalidate the view presented by the State to the Court concerning the exact content of moral requirements in Ireland'.[143] The ECtHR concluded that it is not possible to quantify the evolution of 'deep moral values concerning the nature of life'[144] in such a manner. It upheld the contested restrictions as they pursued a legitimate aim: the protection of morals.

Thus, the ECtHR did not rule on the reality of these morals, and consequently the reality of this so-called collective identity, but noted that the inability to prove that it no longer exists sufficiently in society justifies the margin of appreciation left to the state. This clearly shows that the national

[135]GJ Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 191–4.

[136]Thirty-Sixth Amendment of the Constitution of Ireland, Constitutional Law No. 29-2018 (18 September 2018), which repealed the Eighth Amendment 1983.

[137]Irish Supreme Court, *McGee v The Attorney General* [1974] IR 284. In this case, the judge provided a new interpretation of the preamble, moving away from Catholic principles. The court upheld the legalisation of contraception.

[138]Introduction of Art 40.3.3 of the Constitution of Ireland by referendum on 7 September 1983, amended by the Thirteenth Amendment of the Constitution, No. 25 of 1992.

[139]Irish Supreme Court, *Norris v Attorney General* [1983] IR 197.

[140]The first state to legalise same-sex marriage through a referendum by adopting the Thirty-Fourth Amendment of the Constitution of Ireland on 22 May 2015.

[141]A, B and C v Ireland, [GC] App No. 25579/05 (ECtHR, 16 December 2010).

[142]Ibid., para 223.

[143]Ibid., para 226.

[144]Ibid.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

judge, as the interpreter of the constitution, is the sole and final arbiter of identity in all its forms, as well as its constraint on other identities, their expression, and their guarantee. This occurs, even though, by its nature, there is no certain way to verify the reality of collective identity enshrined in the constitution, either for the European judge, or for the constitutional judge. And this impossibility has no impact on the normativity of the identity chosen as dominant.

To conclude this section, these examples highlight the urgent need to examine the influence of identity in all its forms within constitutional law, and they underscore the importance of not underestimating its effects and potential scope. They also demonstrate the discretion judges have in determining and utilising identity. What we must remember is that it is not the rights enshrined in constitutional law that will prevent an identity shift or a change in values. Instead, identity has effects on rights, and when identity is used by the judge, it reigns.

Indeed, these examples show that the shifting balance between identities – where the compromise is constantly evolving – is what gives rise to specific interpretations of fundamental rights and, more broadly, constitutional principles. Observing these relationships between identities, and how one identity can overshadow others, helps us to understand how liberalism, which prioritises the individual over the collective, can be overturned. Collective identity serves as a justification for the existence of the community and can be reactivated to reinforce the importance of the collective and its holistic and exclusive vision, independent of constitutional identity. This reactivation is easy because every constitution is theoretically based on the idea of a collective sharing a common identity.

4. Moving beyond constitutional identity: A necessary strict redefinition of the analytical concept

Constitutional identity plays a very limited role in the examples cited, which instead reflect the broader reality of identity in constitutional law. Constitutional identity is more anecdotal, and its positive manifestations could be listed exhaustively.

Yet, recent works show how constitutional identity is still used to discuss everything related to identity in constitutional law. Each new publication[145] is, of course, an opportunity to update the developments in the positive use of this notion, to observe its expansion to other states around the world, to criticise the constitutional identity in question, but also – on the flip side – to extend the use of constitutional identity even further, making it more commonplace and, therefore, increasingly legitimate. Scholars tend to overlook identity in general, preferring constitutional identity as if the term 'constitutional' somehow grants them the legitimacy to discuss it while ignoring other forms of identity that are very much present in constitutional law. Thus, identity in general is not considered a subject of study in itself, and we don't know the comportment of each kind of identity in constitutional law. However, unless we consider all different forms of identity, we will neither fully understand the roots of the argument of constitutional identity nor the reason and the scope of its potential impact on the protection – or even distortion – of fundamental rights, or more broadly, its influence on the core principles of constitutionalism in each state.

Indeed, as we saw in the previous section, constitutional identity does not provide insight into the tipping point where one identity overtakes others within a given state, for example. Constitutional identity is not a tool that reveals the threshold at which collective identity becomes 'too' restrictive within the national system in relation to other identities. It only comes into play *a posteriori*, as the result of a process that cannot be precisely dated, involving dynamics that go beyond legal dimensions. It is not, in itself, an explanatory element of the effects of identity on the law but rather a tool to justify these effects in the eyes of observers.

[145]J Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023) or H Ran and Y Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

For two reasons, constitutional identity, while certainly a convenient concept, is both insufficient and inaccurate: 1) Constitutional identity says nothing about the identity struggles occurring within each state, and their evolution through the daily actions of legislators and constitutional judges. 2) Constitutional identity is not a turning point or a decisive element that makes collective identity more important than others. Instead, it is a tool used to secure that turning point – especially in relation to the EU – while the shift occurs much earlier in national law. Focusing on constitutional identity to explain every identity-related event in constitutional law is misguided. It legitimises and obscures a daily phenomenon that affects all states in a much more subtle way.

A. Constitutional identity as main analytical concept obscures the role of other identities

Identity only came into play four years after the new fundamental law took effect in Hungary in 2012 and has been used exclusively by the constitutional judge in relation to European Union law. Whereas constitutional identity has directly and potentially only affected the relationship between legal systems, the Christian identity enshrined in the constitutional text has had real consequences for individuals.[146] For example, beyond constitutional identity, the 2018 constitutionalisation of the idea that the family is based on marriage between a man and a woman reinforced a conception of marriage already upheld by the Constitutional Court in 1995, which stated that the institution of marriage between a man and a woman has 'traditionally developed in our culture and law'.[147] Commenting on the Hungarian constitutional changes of the past fifteen years, Balázs Schanda, judge at the Constitutional Court and professor at the Catholic University of Pázmány, summarises his article on the Christian roots of the Fundamental Law with these questions and answer: 'Is it possible to preserve a vision of man based upon the harmony between individual freedom and responsibility for the community; and the commitment to the identity of the state and nation, the matters of the state, and marriage and the institution of family?'[148]; 'Is the Fundamental Law equal to the Christian heritage we have inherited? The Fundamental Law took on this challenge, but does not try to do the impossible. It reflects the given social values from which the law is not capable of deviating in serious issues over the long term'. In this article, he briefly mentions constitutional identity only once.

Why this absence of commentary? Because in daily life and for the national and internal policies led by Viktor Orbán, constitutional identity does not matter – it is neither useful nor necessary. Constitutional identity matters only to those outsiders to whom justification must be provided. Thus, the policy led by Lázslo Trócsányi to integrate constitutional identity,[149] and the discourse, already mentioned, by Tamás Sulyok[150] about what he considers the inextricable link between fundamental rights and national identity, aims to demonstrate how constitutional identity can be used to legitimise the weight given to national identity. He adds to this an explicit plea for a composite constitutionalism, following the ideas of Von Bogdandy and Schill in the context of the EU.[151] This is where constitutional identity finds its utility and reason for being.

[146]See as example Act LXXIX of 2021 on taking more severe action against paedophile offenders and amending certain Acts for the protection of children (Hungary) [2021] Magyar Közlöny 118/4942.

[147]Hungarian Constitutional Court, Decision 14/1995 (13 March 1995).

[148]B Schanda, 'The Christian Roots of Hungary's Fundamental Law' 3 (2022) Central European Journal of Comparative Law 195.

[149]Own interview with the Hungarian Minister of Justice Laszlo Trocsanyi (Budapest, 2 February 2016) and László Trócsányi, *Constitutions nationales et intégration européenne : L'exemple de la Hongrie* (Bruylant 2013).

[150]T Sulyok, 'Universal Human Rights and National Identity', *Constitutional Justice – Challenges and Perspectives*, International Conference commemorating the 25th Anniversary of the Slovak Constitutional Court, Košice, 10 April 2018 (PowerPoint provided by Gergely Deli, former 1st assistant to the President of the Court).

[151]A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' 48 (2011) Common Market Law Review 1417.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

Constitutional identity is an external argument used to justify the dominance of collective identity over other identities. What is really at stake, however, is a potential, deep, and internal shift in the protection of certain fundamental rights in light of the collective identity that has been chosen and made dominant.

Another example that highlights the urgency of examining identity mechanisms and anticipating their evolution, which the focus on constitutional identity obscures, is that of Russia. In 2014, in one of its most controversial rulings, concerning the 'ban on homosexual propaganda' near schools, the Russian Constitutional Court explained that the unrestricted expression of a freedom could endanger important moral values – constitutional and predetermined by the history, culture, and other traditions of the multinational Russian people.[152] The court left it to the legislature to coordinate these values and their expression in light of fundamental rights, particularly with respect to the human dignity of all. The court intertwined arguments of specific identity with principles of universal scope, asserting their fundamental compatibility. Nevertheless, it is clear that, beyond a certain argumentative value of this syncretism, the Court primarily interpreted so-called universal values through the lens of values it considers intrinsic to Russia.[153] Once again, in this episode, with undeniable real-world consequences, the notion of constitutional identity was absent – because it was unnecessary. However, we can observe interactions with the identities identified in Section 3, and the increasing integration of a dominant collective identity through constitutional change. This same rebalancing between collective identity and individual identities is at the root of a complete shift away from the liberal dynamic that was once initiated in Russia after the democratic transition.[154]

What is particularly interesting here is observing the strength of identity in all its forms and how the judge prioritises the one he considers collective and endogenous, with the freedom to define and give it the weight he deems necessary to validate the policies pursued. And constitutional identity has nothing to do with it.

While these are extreme and well-known examples of a judge rebalancing identities in such a way, no system is immune to this. On 26 October 2021, the Bulgarian Constitutional Court similarly defined sex as a traditional biological fact, only binary, acquired at birth, by invoking collective identity arguments.[155] The court based its decision on 'values established in society' derived from 'other normative systems, such as religion, morality, and custom', and on the examination of 'Bulgarian cultural, spiritual, and value identity'. Using the same reasoning as the Irish government in the previously cited case before the ECtHR, the Court stated that it could revisit this definition if there were sufficient 'social need and social justification'.[156]

But as we saw in Section 3, beyond these morally significant examples, there are more restrictive, less moral examples that show how any collective identity has the power to restrict other identities and the rights of individuals who hold those identities, as well as the power to distort the concepts of democracy and the rule of law. These examples reinforce the idea that rebalancing between identities is always possible and that constitutional identity says nothing about it, but is merely the final messenger.

[152]Russian Constitutional Court, Decision No. 24-P/2014 (23 September 2014).

[153]Art 14, Section 4 of the Constitution 'is based on traditional ideas of humanism in the context of the national and confessional particularities specific to the composition of Russian society, to its socio-cultural characteristics and other historical traits, recognised as universal in Russian society (and shared by all traditional religious confessions), upon which marriage (. . .) is founded and which receive a consecration in the Constitution and its particular values' Ibid., §2.2.

[154]Own interview with A Kovler (former judge at the European Court of Human Rights, Professor of Law at the Institute of State and Law of the Russian Academy of Sciences) (Moscow, 7 June 2018).

[155]Bulgarian Constitutional Court, Decision No. 6/2021 (26 October 2021)

[156]T Petrova, 'Value Judgments: The Dangers of the "Traditionalist" Rhetoric of the Bulgarian Constitutional Court' *VerfBlog* (5 November 2021) <https://verfassungsblog.de/value-judgments/> accessed 5 September 2024.

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

B. Beyond the doctrine of constitutional identity

Doctrinal use of constitutional identity is as abusive as its judicial use among European states, and the feedback effect between the two legitimises its increasingly inaccurate and expansive use by both scholars and judges. It also emboldens judges to use it in purely national cases. The abusive use of constitutional identity by scholars thus leads also to a legitimisation of its function, independent of its content. There is a sort of vicious circle between the scholarly use of constitutional identity and its application in positive law and politics. Indeed, it is also used as a normative concept capable of binding and motivating constituents, governments, and legislators.[157] It can be used as a reinforcement – an argument to support the dominance of collective identity over lesser identities. The legitimisation of constitutional identity goes hand in hand with its total freedom of definition and use by national courts, which have the final say. As seen in the Hungarian example, other cases can be cited where collective identity, once elevated to the status of constitutional identity, gains a sort of aura or added significance.

For instance, in a 2013 decision by the Moldovan Constitutional Court,[158] which had purely national consequences and aims, the court ruled on the constitutionality of designating Romanian as the state language and defined constitutional identity, reminding that linguistic identity is part of it.[159] Similarly, as previously mentioned, the Latvian Constitutional Court declared that the national flag is an integral part of Latvia's constitutional identity and the state itself, in a decision concerning the constitutionality of the national flag law, which compels every citizen to adhere – or at least to ostentatiously show their adherence – to a national version of history.[160]

Beyond abuse that leads to further abuse, the concept of constitutional identity causes us to miss the subtleties that occur beforehand. For example, whether constitutional identity is considered by the judge to be transcendent and revealed or constructed by the constituent makes no difference in its impact, nor in the judge's actions and their effect on the guarantee of constitutional norms and principles. The difference of nature between constitutional identities is not explained by the concept of constitutional identity. It is because constitutional identity is *constitutional identity* that it has a common effect across states. As we already saw, in Hungary, constitutional identity is exclusive, inherited, and not created – Christian – unlike in France, where it exists 'as long as the constituent consents', although it is unclear how consent could be withdrawn or what might oppose this constitutional identity, given that no decision by the Constitutional Council has ever excluded any element from constitutional identity.

Thus, the distinction between constitutional identities is irrelevant in terms of their effects and is more a matter of political rhetoric between states, which, however, the concept of constitutional identity alone cannot explain or detail. The distinction between 'abusive' constitutional identity and constitutional identity is useful and relevant in comparing constitutional identities, but it is not sufficient to explain differences between states. This distinction merely shows and classifies differences, whereas a broader study of identity offers explanations for the formation of a constitutional identity's content. Moreover, labelling an identity as 'abusive' can only be done retrospectively, based on observable failures in the protection of liberal constitutionalism. In contrast, examining identity within constitutional law provides tools to identify early signs or pivotal points that lead to shifts in interpretation and why constitutional identity sometimes becomes abusive.

As we have already said, focusing on constitutional identity also means overlooking other identity as the pivotal factor in the shift from liberalism to illiberalism as in Hungary or Russia. It bypasses the study of a mechanism common to all states which could be used differently. It is not

[157]J Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023) 3.
[158]Another example: Croatian Constitutional Court, Decision No. Sus-1/2013 (14 November 2013) on same-sex marriage.
[159]Moldovan Constitutional Court, Decisions No. 8b/2013 and 41b/2013 (5 December 2013) §86.
[160]Latvian Constitutional Court, Decision No. 2015-01-01 (2 July 2015).

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

the use of constitutional identity that provides insight into this transition. Instead, it is how identities within the state condition, limit, and hierarchise one another that reveals the turning point. When individual identities remain dominant over collective identity, liberalism persists. However, when collective identity begins to restrict individual identities – their protection, expression and role in the public sphere – illiberalism is activated.

Focusing on constitutional identity also means missing the impact of identity's presence in constitutional law at a theoretical level. Constitutional identity is a notion that does not challenge the way we perceive the constitution. However, identity, in contrast, involves a shift in the theoretical understanding of the constitution. Observing identity in its various forms allows us to see how the constitution, in its theoretical DNA, carries its own risks and the potential loss of constitutionalism. It also broadens and supports studies on topics such as the hierarchy between constitutional provisions, the unity of the constitution, material constitutions, the globalisation of constitutions, and even the question of the constitution's relationship with time.

5. Conclusion

The scientific comfort provided by the study of constitutional identity undermines scientific accuracy on one hand, and narrows theoretical development perspectives on the other, by ignoring the role of other identities in constitutional law. Constitutional identity is merely an empty shell into which doctrine places anything it deems related to identity or that is labelled as identity, whether found in the constitution or in the interpretation of the constitutional judge. But relying on this shell obscures the fact that identity is a factor that drives the daily reinterpretation of norms, outside the notion of constitutional identity. It also ignores how the balance between identities is a fragile, evolving compromise that varies from state to state.

The judge has considerable discretion since identity is considered as a fact that, when seized upon, takes on the appearance and power of a norm. Focusing on constitutional identity neglects the history of each state and its importance, the political and historical construction of the national narrative, and the long-standing societal struggles that are reflected in the law. It would be naïve to think that these elements do not have a daily impact on both law and politics, or to assume that the constitution is impermeable to politics on these points.

Where the interaction of identities becomes particularly interesting to observe, and where the concept of identity in constitutional law finds its meaning while the concept of constitutional identity loses its utility, is when a shift in dominance of one identity over another leads to a change in the application and interpretation of European constitutionalism principles on a daily basis, at the national level. This mechanism that is common to states can be understood as occurring in two stages: 1) By choosing to prioritise one identity over another of the same degree – for example, privileging an endogenous collective identity (such as historical and particular) over an exogenous collective identity (with a universal scope), then 2) by the choices made by the legislator and, ultimately, the constitutional judge when called upon to decide the extent of the constraint that this collective identity imposes on other identities of different degrees.

It would be damaging if academia continued to overlook this structuring phenomenon of the law and instead reinforced the doctrinal populism of constitutional identity – a concept that is appealing and rallying, but vague. Scientific rigor requires only that we examine constitutional identity in its positive expression – through the explicit use of the term 'constitutional identity' in the law, or through functional equivalence, which has already been the subject of several books and theses. However, identity in constitutional law is a distinct subject that must now be considered. It could be a concept that explains what constitutional identity obscures. It emerges at a time when specialised studies on minorities, the integration of religion, or the protection of languages, for example, are highly specialised but not interconnected. Studying identity in constitutional law allows for the linking of these studies, revealing their interdependencies, and

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press

provides a global view of a mechanism common to all states – one that is intrinsic to constitutional law from a theoretical perspective. Because indeed, all states are confronted with this mechanism of balancing and shifting between identities, and none are immune from a shift in equilibrium in favour of a more restrictive collective identity.

Competing interests. The author has no conflicts of interest to declare.

Cite this article: L Allezard, 'Beyond constitutional identity: Thinking identity in constitutional law' (2026) *European Law Open* **5**, 172–195. https://doi.org/10.1017/elo.2025.10027

https://doi.org/10.1017/elo.2025.10027 Published online by Cambridge University Press