

ARTICLE

# Abusing Constitutional Identity

Julian Scholtes\* 

Department of Law, European University Institute, Fiesole, Italy

\*Corresponding author: [julian.scholtes@eui.eu](mailto:julian.scholtes@eui.eu)

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## Abstract

Increasingly, populists and authoritarians have discovered for themselves the notion of constitutional identity as a practical excuse to sidestep transnational legal obligations, as well as to vindicate their constitutional projects on the whole from concerns about the rule of law and other shared European values. This has led some scholars to highlight the “dangers of constitutional identity,” brandishing it as an “inherently dangerous concept,” and suggesting that the concept ought to be abandoned. This Article argues that the anti-pluralist critiques of constitutional identity, while rightly criticizing the authoritarian appropriations of constitutional identity, ultimately go too far and draw the wrong conclusions. Simply dismissing the concept of constitutional identity will not lead to the disappearance of the meanings imparted through it. The authoritarian and populist appropriations of constitutional identity must be identified and understood as abuses of the concept. By eliding constitutional identity with its abuse, the anti-pluralist critique sacrifices a more intimate understanding of the realities of constitutional identity abuse to a likely unattainable normative vision of uncontested EU law primacy. In advancing this critique, I will further outline three potential avenues for understanding constitutional identity abuse, differentiating between its substantive, generative, and relational aspects. Constitutional identity claims can be abusive by virtue of their substantive content, how they have come about, as well as how they are advanced.

**Keywords:** Constitutional identity; constitutional pluralism; EU constitutionalism; illiberal constitutionalism; Hungary; Poland

## A. Introduction

The concept of constitutional identity nowadays finds particular practical relevance in its use by national constitutional courts and governments against supranational law and institutions.<sup>1</sup> Constitutional identity has become a conceptual vehicle for constitutional conflicts of authority in Europe’s constitutional pluralist landscape.<sup>2</sup> This constitutional pluralism is characterized by

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<sup>1</sup>Monica Claes, *The Validity and Primacy of EU Law and the ‘Cooperative Relationship’ Between National Constitutional Courts and the Court of Justice of the European Union*, 23 MAASTRICHT J. EUR. & COMP. L. 151 (2016); Theodoros Konstantinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order Within the Framework of National Constitutional Settlement*, 13 CAMBRIDGE Y.B. EUR. LEGAL STUD. 195 (2011); FRANÇOIS-XAVIER MILLET, *L’UNION EUROPÉENNE ET L’IDENTITÉ CONSTITUTIONNELLE DES ÉTATS MEMBRES* (2013); NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION (Alejandro Saiz-Arnaiz & Carina Alcobero Llivina eds., 2013).

<sup>2</sup>NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* (1999); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002) [hereinafter Walker 1]; Daniel Halberstam, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance*, in *CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND* (Matej Avbelj & Jan Komárek eds., 2012).

the lack—or, perhaps, the overabundance—of final authority as both national and transnational legal orders retain for themselves the final say on matters pertaining to their authority, while settling conflicts among each other through dialogue and mutual accommodation, rather than legal hierarchies.<sup>3</sup> In this context, national constitutional identity becomes a form of conceptual currency through which authority is claimed and negotiated.

The cogency and salience of such transnationally employed arguments from constitutional identity are very much disputed. On the one hand, one might find that European integration has fundamentally transformed the state. The question of how far this transformation might go and what it could encompass before the state stops being itself and becomes something rather different is one that, seemingly, poses itself to most constitutional orders nowadays—particularly those in Europe. Given the deep structural impact of European Union law and, for that matter, the European Convention on Human Rights on national constitutions, vigilance by national constitutional courts over their constitutional identities is an understandable reaction.

On the other hand, one might object that the big transformation of constitutional identities has already taken place. Public law and constitutionalism are ever more transcending the boundaries of the nation-state. Transnational legal regimes, over the past few decades, have gained momentum of their own. They no longer solely derive their legitimacy from states but also impart legitimacy onto them.<sup>4</sup> Constitutional law and thought have firmly moved from emphasizing the value and principle of sovereignty to the sovereignty of principles and values. Given the fundamental transformations of the state that global legal integration, particularly the European project, have already brought about, suddenly invoking the protection of constitutional identity against said project seems like a sloppy afterthought. In pursuit of judicial power politics, national courts are merely chasing dated ideas of sovereignty and statehood that are already lost.<sup>5</sup>

Regardless of the answer, national governments and constitutional courts in Europe have been asserting their national constitutional identity—especially, but not only, vis-à-vis the European Union. National constitutional identity has become a line in the sand for national courts, which a country's participation in regional and global integration projects must not cross. Where previously, conflict lines between the national and the European legal orders were drawn surrounding the concepts of democracy and sovereignty, states are now eager to “protect national identity by insisting on national constitutional specificity.”<sup>6</sup>

However, in recent years, the diffusion of constitutional identity discourses across constitutional jurisdictions has come under mounting criticism. Increasingly, populist and authoritarian governments have turned their platforms into constitutional projects.<sup>7</sup> In the process, they have discovered for themselves the notion of constitutional identity as a practical excuse to sidestep transnational legal obligations, as well as to vindicate their constitutional projects altogether from concerns about violations of the rule of law and other shared European values. This has led some scholars to highlight the “dangers of constitutional identity,”<sup>8</sup> brandishing it as an “inherently dangerous concept,”<sup>9</sup> and suggesting that the concept ought to be abandoned as its unintended

<sup>3</sup>Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 EUR. L.J. 262 (2005); Miguel Poiarés Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in SOVEREIGNTY IN TRANSITION (Neil Walker ed., 2003).

<sup>4</sup>See e.g., Christopher Thornhill, *A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions*, 20 IND. J. GLOB. LEGAL STUD. 551 (2013).

<sup>5</sup>Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUR. L.J. 389, 407–08 (2008).

<sup>6</sup>J.H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 16 (Marlene Wind & J. H. H. Weiler eds., 2003).

<sup>7</sup>See generally Paul Blokker, *Populism as a Constitutional Project*, 17 INT'L J. CONST. L. 536 (2019).

<sup>8</sup>Federico Fabbrini & Andrés Sajó, *The Dangers of Constitutional Identity*, 25 EUR. L.J. 457 (2019).

<sup>9</sup>*Id.* at 473. See also R. Daniel Kelemen & Laurent Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, 21 CAMBRIDGE Y.B. EUR. LEGAL STUD. 59, 61 (2019).

consequences have proven potentially devastating for the future of the European legal order. The appropriation of constitutional identity arguments by authoritarian populists has thereby also given new impetus to critics of constitutional pluralism and advocates of the uncontested primacy of EU law.<sup>10</sup>

This Article argues that the critiques of constitutional identity, while rightly criticizing the authoritarian appropriations of constitutional identity, ultimately go too far and draw the wrong conclusions. Simply dismissing the concept of constitutional identity will not lead to the disappearance of the meanings imparted through it. As long as the root problem of illiberal authoritarianism in Europe persists, illiberals and authoritarians will abuse law—not just constitutional identity—to their own ends. The authoritarian and populist appropriations of constitutional identity must be identified and understood as abuses of the concept. Grouping constitutional identity together with its abuse, the critiques sacrifice a more intimate understanding of the realities of constitutional identity abuse to advance a probably unattainable conception of uncontested EU law primacy. In advancing this argument, I will outline potential avenues for understanding constitutional identity abuse.

Section B will provide a short overview of the history of constitutional identity as a transnational legal argument. Section C will then provide an analytical account of the structure of transnational constitutional identity arguments. This Article will argue that constitutional identity arguments are best understood as a form of metaconstitutional argument situating authority on certain issues in a lower rather than a higher constitutional site. Firstly, these arguments rely on extending or analogizing doctrines of constitutional unamendability to the transnational level; and secondly, appealing to the value of national constitutional culture and community.

Section D will outline the critiques of constitutional identity based on the abuse of the concept by authoritarians and populists. Subsequently, Section E will provide a modest defense of the concept of constitutional identity. Getting rid of the concept of constitutional identity will not stop bad-faith actors from colonizing and misusing constitutional discourses in search of legitimacy. The authoritarian and populist appropriations of constitutional identity must be understood as abuses of the concept that are identifiably distinct from other uses of constitutional identity.

Finally, Section F will provide a first attempt at classifying forms of constitutional identity abuse. Constitutional identity abuse can be substantive in that it is related to the substantive content of the respective identity claim, generative—related to how the claim has come about—or relational—pertaining to the ways in which the claim is being advanced.

## B. The Migration of Constitutional Identity

The conceptual history of the argument from constitutional identity in the European context is, at this point, a firm and well-known part of European law lore.

The first remote hints at today's notion of constitutional identity trace back to the German and Italian Constitutional Courts' reactions to the Court of Justice of the European Union's ("CJEU") doctrine of primacy of European Union ("EU") Law.<sup>11</sup> The Italian Constitutional Court, in its 1973 *Frontini* judgment, started developing its *controlimiti* doctrine, a version of which remains current to this day.<sup>12</sup> The Court reasoned that Italy's participation in European integration

<sup>10</sup>See, e.g., R. Daniel Kelemen, Piet Eeckhout, Federico Fabbrini, Laurent Pech & Renáta Uitz, *National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order*, VERFASSUNGSBLOG (May 26, 2020), <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>.

<sup>11</sup>Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Neth. Inland Revenue Admin.*, 1963 E.C.R. 00001; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 00629.

<sup>12</sup>*Corte costituzionale (Corte cost.) [Constitutional Court]*, 18 dicembre 1973, n. 183, G.U. 1973 (It.). The Court subsequently further developed its doctrine in the *Granital* and *FRAGD* cases. See *Corte costituzionale (Corte cost.) [Constitutional Court]*, 5 giugno 1984, n. 170, G.U. 1984 (It.); *Corte costituzionale (Corte cost.) [Constitutional Court]*,

brought about certain limitations of Italian sovereignty. However, these limitations themselves must find their limits within core principles of the Italian constitution. The transfer of sovereignty to the European Community (“EC”) does not “give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man.”<sup>13</sup> In the words of one commentator, the Italian Court’s judgment essentially found that “fundamental rights and other basic values of the constitutional system” can “neither be modified, nor amended, nor even derogated from in a single case because they are vested with a crucial importance for the polity as a whole.”<sup>14</sup> Accordingly, the Court reserved for itself the power to review EU law for compliance with these *controlimiti*. Even though the judgment does not use the term “constitutional identity” as such,<sup>15</sup> the idea of constitutional identity nonetheless seems to be at the core of the doctrine.<sup>16</sup>

The German Constitutional Court’s *Solange* case law provides another early trace of constitutional identity. In *Solange I*, the German Constitutional Court found itself competent to review EC measures for fundamental rights compliance “as long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights.”<sup>17</sup> The Court argued that this was required because the German constitution’s provision on regional integration “does not pave the way to change the fundamental structure of the constitution, on which its identity rests.”<sup>18</sup>

These rather remote intimations aside, the concept of constitutional identity laid largely dormant until the mid-to-late 2000s. National constitutional courts preferred to give expression to constitutional limits to European integration through other conceptual vessels, such as sovereignty, democracy, and fundamental rights. The German Constitutional Court’s 1993 *Maastricht* judgment, for instance, framed national limitations to the reach of EU law as a matter of sovereignty as *Kompetenz-Kompetenz*, or the capacity to decide who is competent.<sup>19</sup>

Only in the mid-2000s, in the course of the drafting of the failed Constitutional Treaty, has constitutional identity started gaining traction in the EU. Article I-5 of the Constitutional Treaty—which has since become Article 4(2) of the Treaty on European Union (“TEU”)—stipulated that the Union shall respect the Member States’ “national identities, inherent in their fundamental structures, political and constitutional.”<sup>20</sup> Both the Spanish and the French Constitutional Courts read this clause as “containing an implicit limit to the primacy of European law whenever that law would affect national constitutions, or at least their fundamental structures.”<sup>21</sup> The Spanish Constitutional Tribunal, in the course of ratification of the Constitutional Treaty (“CT”), argued that Article I-5 directly incorporated into the Treaty the reservations to primacy that national constitutional courts had been making for years.<sup>22</sup>

21 aprile 1989, n. 232, G.U. 1989 (It.). See generally Marta Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, 12 MICH. J. INT’L L. 32 (1990).

<sup>13</sup>See Corte costituzionale (Corte cost.) [Constitutional Court], n. 183, at para. 21. For an English translation of the judgment see *Frontini v. Minister of Finance*, 93 I.L.R. 525 (It. Const. Ct. 1994).

<sup>14</sup>See generally Marta Cartabia, *The Legacy of Sovereignty in Italian Constitutional Debate*, in SOVEREIGNTY IN TRANSITION 315 (Neil Walker ed., 2006).

<sup>15</sup>The Italian Constitutional Court only recently used the words “constitutional identity” for the first time in its *Taricco* judgment. See Corte costituzionale (Corte cost.) [Constitutional Court], 23 novembre 2016, n. 24/2017, G.U. 2017 (It.).

<sup>16</sup>See Cartabia *supra* note 14, at 317.

<sup>17</sup>Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 2015, BVERFGE 37, 291 (Ger).

<sup>18</sup>*Id.* at 43.

<sup>19</sup>Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 12, 1993, BVERFGE 89, 155 (Ger). See generally J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995); Neil McCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L.J. 259 (1995).

<sup>20</sup>Treaty on European Union art. 4(2), Feb. 7, 1992, O.J. (C 326).

<sup>21</sup>Bruno de Witte, *The Lisbon Treaty and National Constitutions: More or Less Europeanisation?*, in THE LISBON TREATY AND NATIONAL CONSTITUTIONS: EUROPEANISATION AND DEMOCRATIC IMPLICATIONS? 35 (Carlos Closa ed., 2009).

The French *Conseil Constitutionnel* came to a similar conclusion. It found that, despite the express inclusion of a primacy clause in the CT, because Article I-5 shows that the Treaty “has no effect upon . . . the place of [the French Constitution] at the summit of the domestic order.”<sup>23</sup> In 2006, the Conseil went further in practically developing a constitutional identity doctrine for the first time. It found that the transposition of European directives must not run counter to principles of French constitutional identity “unless the constituent [power] has agreed to this.”<sup>24</sup> From this, the Conseil effectively developed a doctrine of constitutional identity that must prevail over community law.<sup>25</sup>

Article I-5 eventually became Article 4(2) TEU with the ratification of the Treaty of Lisbon. In the course of this, several constitutional courts, seemingly inspired by the clause in Article 4(2), began fleshing out their own doctrines of constitutional identity as a way of asserting the primacy of their national constitutions.

The German Constitutional Court was the most direct in its judgment, instituting an identity review (*Identitätskontrolle*) against EU law. In the judgment, the Court declared itself competent to review European Union legislation, including any new treaties, for compliance with German constitutional identity.<sup>26</sup> An anchor for the Court’s conception of constitutional identity was the “eternity clause” in Article 79(3) of the German Constitution. The clause precludes the constitutional legislator from changing certain essential provisions of the constitution, namely Article 1<sup>27</sup>—which enshrines the inviolability of human dignity and mandating respect for human rights—and Article 20<sup>28</sup>—which, among other things, establishes the federal, democratic, and social nature of the German state, as well as the principles of popular sovereignty and the rule of law. The German Constitution thus binds even the constitution-amending power to the constitution’s fundamental principles.<sup>29</sup> By extension, the inviolable core content of the constitution, protected by the eternity clause, must be equally protected against encroachment through European Union law. The identity of the Grundgesetz is thus “integration-proof.”<sup>30</sup> Any change of constitutional identity through European integration must be legitimated through an act of the constituent power, i.e. through the enactment of a new constitution in a referendum.

The Czech Constitutional Court went down a similar route, using the eternity clause in Article 9 of the Czech Constitution as the starting point for staking out a “material core” of the Constitution. In the case of a conflict between EU Law and the Czech Constitution, the Court upheld that “the constitutional order of the Czech Republic, in particular its material core, must take precedence.”<sup>31</sup>

<sup>22</sup>Tribunal Constitucional [Constitutional Tribunal] [TC], Dec. 13, 2004 (Declaración 1/2004) (Spain). See also Barbara Guastaferró, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, 31 Y.B. Eur. L. 263, 267–68 (2012).

<sup>23</sup>Conseil Constitutionnel [CC] [Constitutional Court], decision No.2004-505DC, Nov. 19, 2004, para. 10 (Fr.).

<sup>24</sup>Conseil Constitutionnel [CC] [Constitutional Court], decision No. 2006-540DC, Jan. 27, 2006, para. 19 (Fr.).

<sup>25</sup>See Michel Troper, *Identité constitutionnelle, in 1958–2008: CINQUANTIÈME ANNIVERSAIRE DE LA CONSTITUTION FRANÇAISE* (Bertrand Mathieu ed., 2008).

<sup>26</sup>Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 30, 2009, 267 BVERFG 123 (Ger.).

<sup>27</sup>Grundgesetz [GG] [Basic Law], art. 1, translation at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0019](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019).

<sup>28</sup>*Id.* at art. 2.

<sup>29</sup>Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 30, 2009, 267 BVERFG 123 (Ger.).

<sup>30</sup>*Id.* at para. 235.

<sup>31</sup>Ústavní soud České republiky (ÚS) [Decision of the Constitutional Court of Nov. 26, 2008], sp. zn. 19/08, para. 85 (Czech), abbreviated citation: Lisbon I; Ústavní soud České republiky (ÚS) [Decision of the Constitutional Court of Nov. 3, 2009], sp. zn. 29/09 (Czech), abbreviated citation: Lisbon II. See generally David Kosař & Ladislav Vyhnánek, *Constitutional Identity in the Czech Republic: A New Twist on an Old-Fashioned Idea?*, in CONSTITUTIONAL IDENTITY IN A EUROPE OF MULTILEVEL CONSTITUTIONALISM (Christian Calliess & Gerhard van der Schyff eds., 2019); Jiří Přibán, *The Semantics of Constitutional Sovereignty in Post-Sovereign “New” Europe: A Case Study of the Czech Constitutional Court’s Jurisprudence*, 13 INT’L J. CONST. L. 180 (2015).

The Polish Constitutional Court, in its judgment, referred extensively to the German Constitutional Court's precedent<sup>32</sup> and similarly invoked Article 4(2) of the TEU. In developing its conception of constitutional identity, it argues that the latter is the "normative manifestation" of Polish sovereignty, and as such, it expresses the "matters which constitute 'the heart of the matter' i.e. are fundamental to the basis of the political system of a given state."<sup>33</sup>

Besides Poland and the Czech Republic, other countries like Hungary<sup>34</sup> and Belgium<sup>35</sup> have all adopted their own forms of constitutional identity discourse to protect from European encroachment. With some variation, constitutional identity now is a common standard for national constitutional review of EU law, a red line of sorts.<sup>36</sup> Constitutional identity has remained relevant as a limit to EU law, not merely as a hypothetical counterfactual, but as an actual standard of review. The German Constitutional Court has invoked constitutional identity in its scrutiny of the European Central Bank's Outright Monetary Transactions Programme,<sup>37</sup> as well as in the context of the European Arrest Warrant.<sup>38</sup> The Czech Constitutional Court invoked constitutional identity while declaring a CJEU judgment unconstitutional,<sup>39</sup> and the Italian Constitutional Court recently invoked constitutional identity in its *Taricco* judgment.<sup>40</sup> Finally, the more abusive invocation of constitutional identity by the packed Hungarian Constitutional Court in the course of the refugee crisis needs to be mentioned—though this will be dealt with in further detail below.

Over the past twenty years, constitutional identity has become a staple in national constitutional reasoning as a way to bolster the authority of the domestic constitution over that of EU law. But how exactly are we to understand constitutional identity? How is it that several national constitutional courts have started converging on seemingly similar jurisprudence on the limits of the EU legal order? How can we give the idea some contours in order to be able to better grasp it?

It is tempting for courts and scholars alike to try to fully subsume the constitutional identity concept under the doctrinal umbrella of EU law, and thus, to understand national reservations to the primacy of EU law as a matter of EU law itself. The German Constitutional Court, for instance, claimed in its Lisbon judgment that the institution of identity review was the only way to ensure compliance of EU institutions with Article 4(2) of the TEU.<sup>41</sup> The Polish Constitutional Tribunal similarly argued that constitutional identity was the equivalent to the concept of national identity

<sup>32</sup>Wyrok [Judgment] Trybunał Konstytucyjny (TK) [Constitutional Tribunal] z [of] Nov. 24, 2010, III K-32/09 (OTK ZU 2010, z. 3.3, poz. 40) (Pol.).

<sup>33</sup>*Id.* at z. 2.1, poz. 22. See generally Anna Śledzińska-Simon & Michał Ziółkowski, *Constitutional Identity of Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?*, in CONSTITUTIONAL IDENTITY IN A EUROPE OF MULTILEVEL CONSTITUTIONALISM (Christian Calliess & Gerhard van der Schyff eds., 2019); Anna Śledzińska-Simon, *Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and Its Application in Poland*, 13 INT'L J. CONST. L. 124 (2015).

<sup>34</sup>Alkotmánybíróság (AB) [Constitutional Court], Nov. 30, 2016, MK.22/2016 (Hung.).

<sup>35</sup>Cour Constitutionnelle (C.C.) [Constitutional Court] (Belg.), Apr. 28, 2016, nr 62/2016.

<sup>36</sup>See, e.g., Stefan Theil, *What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration?*, 15 GERMAN L.J. 599 (2014).

<sup>37</sup>Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 14, 2014, BVERFGE 134, 366 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 21, 2016, BVERFGE 142, 134 (Ger.).

<sup>38</sup>Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 15, 2015, 2 BvR 2735/14 [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215\\_2bvr273514en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html). See generally Mathias Hong, *Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi*, 12 EUR. CONST. L. REV. 549 (2016).

<sup>39</sup>Ústavní soud České republiky (ÚS) [Decision of the Constitutional Court of Jan. 31, 2012], sp. zn. 6/12 (Czech).

<sup>40</sup>See Corte costituzionale (Corte cost.) [Constitutional Court], 23 novembre 2016, n. 24/2017, G.U. 2017 (It.).

<sup>41</sup>BVerfG, 267 BVERFGE at headnote 5 ("[T]he fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way.").

in Article 4(2) of the TEU.<sup>42</sup> In doing so, the courts get to endow their, more or less, principled resistance against EU law with a veneer of legitimacy not just on the terms of their national constitutions but also in terms of the very legal order they are resisting.

Scholars have similarly tried to subsume constitutional identity defenses under the categories of EU law, for instance, by tying them to Article 4(2) TEU as a formula that qualifies the primacy of EU law.<sup>43</sup> As will be seen, however, the formulation of a doctrinal response to constitutional identity challenges from within the perspective of EU law should not be mistaken for the actual capacity to contain these conflicts within EU law's own scope.

There are many reasons to not conflate the constitutional identity advanced by the Member States with the national identity of Article 4(2). First, there is the obvious semantic disjunction. National identity is not constitutional identity, even if the former can be inherent in a state's fundamental constitutional structures, and ultimately "an inquiry into national or constitutional identity is an inquiry into different subjects [i.e.] a national group versus a constitution."<sup>44</sup> Second, the drafting history of Article 4(2) suggests that the article was not intended to qualify the primacy of EU law, but rather as a discreet way of preventing competence creep on the part of the EU institutions.<sup>45</sup> Third, in practice, the Court of Justice's interpretation of Article 4(2) has strayed far from suggesting a relative primacy of EU law.<sup>46</sup> The practical significance of the article has been reduced to little more than a generalized public policy clause.<sup>47</sup> Rather than categorical limits to the primacy of EU law, identity concerns under Article 4(2) TEU are merely another aspect to be weighed as part of a proportionality test.<sup>48</sup> Fourth, even the German Constitutional Court has strayed from its argument about the equivalence with Article 4(2) of the TEU. In *OMT*, it argued that the identity review conducted by the Constitutional Court is "essentially different" from a review under Article 4(2).<sup>49</sup>

### C. Constitutional Identity as a Metaconstitutional Argument

Instead of wedding ourselves to a doctrinal understanding of constitutional identity, I suggest we try to understand the contours of constitutional identity from a metaconstitutional perspective.<sup>50</sup> What I mean by this is that we ought to understand constitutional identity as a form of argument that occupies the interstitial space between national and European constitutional orders, and thus helps negotiate the allocation of authority between them. As Neil Walker argues, we ought to understand national and European constitutional claims as originating from fundamentally different perspectives that cannot be conclusively subsumed under or measured against one another.<sup>51</sup>

<sup>42</sup>Wyrok [Judgment] Trybunał Konstytucyjny (TK) [Constitutional Tribunal] z [of] Nov. 24, 2010, II K-32/09 (OTK ZU 2010, z. 3.3, poz. 1) (Pol.).

<sup>43</sup>For examples, see generally Mattias Kumm & Victor Ferreres Comella, *The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union*, 3 INT'L J. CONST. L. 473 (2015); Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

<sup>44</sup>ELKE CLOOTS, NATIONAL IDENTITY IN EU LAW 167 (2015).

<sup>45</sup>Guastaferrero, *supra* note 22.

<sup>46</sup>See, e.g., Case C-208/09, Sayn-Wittgenstein v. Landeshauptmann von Wien, 2010 E.C.R. I-13693; Case C-391/09, Runevič-Vardyn v. Vilniaus miesto savivaldybės administracija 2011 E.C.R. I-03787.

<sup>47</sup>See generally Konstantinides, *supra* note 1.

<sup>48</sup>See Opinion of Advocate General Maduro at para. 33, Case C-213/07, Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias, ECLI:EU:C:2008:544 (Oct. 8, 2008), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CC0213>.

<sup>49</sup>BVerfG, 134, 366 at para. 29.

<sup>50</sup>See generally Neil Walker, *Flexibility Within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe, in CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY?* (Grainne de Burca & Joanne Scott eds., 2000) [hereinafter Walker 2].

<sup>51</sup>See generally Walker 1, *supra* note 2. See also KAARLO TUORI, EUROPEAN CONSTITUTIONALISM ch. 3 (2015).

Negotiating authority between the two requires going beyond self-contained constitutional perspectives and towards a more general engagement with the shared conceptual universe of constitutionalism that both inhabit. In the context of constitutional pluralism and increasing judicial engagement across legal orders, simple constitutional arguments just do not have the same authoritative and persuasive force they would have in an internal context. In such a context, constitutional actors seek, and arguably require, a deeper set of normative arguments for their position than would be required if, “as in the one-dimensional state world, their constitutional constituency and mandate was purely self-contained.”<sup>52</sup>

Metaconstitutional argument thus seeks a source of normativity and legitimacy that goes beyond the national constitution. Accordingly, metaconstitutionalism may make claims about the state, the polity contained therein, or its constitution. Still, the constitution remains the subject rather than the object of a metaconstitutional claim. Thereby, metaconstitutional discourse “may purport to authorise, instruct, influence, supplement or supplant state law, or any combination of these.”<sup>53</sup>

Ultimately, the justifications for asserting constitutional identity are not found within any single constitution, but rather on this metaconstitutional plane. Constitutional identity needs to be understood as an argument concerning the allocation of authority between competing constitutional sites. It gives a reason to locate authority in one constitutional site rather than another. The foundations of the argument from constitutional identity are thus metaconstitutional rather than doctrinal.

Let me give this argument a bit more substance. What exactly does it mean to invoke constitutional identity? Arguably, there are two metaconstitutional claims between which the argument from constitutional identity oscillates: Unamendability and constitutional culture. First, the unamendability argument extends the domestic logic of constitutional unamendability to the transnational level. Certain features within a constitution need to remain untouched—if this restriction binds the constitutional legislator, it binds supranational constitutional orders all the more. Second, the constitutional culture argument invokes the value of constitutional culture and community, appealing to the importance of communal meaning in constitutional law. Constitutional identity has normative value because, by refracting the values of constitutionalism through a local lens, it renders the latter concrete and tangible.

### I. Unamendability

One of the core normative uses of the concept of constitutional identity is in relation to the limitation of constitutional amendment powers. Where the legislative’s power to amend the constitution is restricted, this restriction is often legitimized with reference to an identity core of the constitution.<sup>54</sup> Amending this identity core cannot be done without producing a fundamentally new constitution.<sup>55</sup> Supporters of the latter idea argue that the identity core of a constitution must be protected from amendments. On a holistic reading, any constitution stands on a foundational structure that cannot be amended without destroying the constitution’s *raison d’être*.<sup>56</sup> Any such amendment would, in fact, be a transgression because “the power to ‘amend’ the Constitution was not intended to include the power to destroy it.”<sup>57</sup> Constitutional identity is thus

<sup>52</sup>Walker 1, *supra* note 2, at 356.

<sup>53</sup>Walker 2, *supra* note 50, at 15.

<sup>54</sup>CARL SCHMITT, *CONSTITUTIONAL THEORY* 150–51 (Jeffrey Seitzer trans., 2008).

<sup>55</sup>See YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* (2017). See also Gábor Halmai, *Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective The Role of Constitutional Courts in Constitutional Design*, 50 *WAKE FOREST L. REV.* 951 (2015).

<sup>56</sup>ROZNAI, *supra* note 55, at 141.

<sup>57</sup>William L. Marbury, *The Limitations upon the Amending Power*, 33 *HARV. L. REV.* 223, 225 (1919). See also SCHMITT, *supra* note 54, at 77.



seen as a reason for restricting the power to amend the constitution: Constitutional politics ought to be constrained by what is at the very core of the constitution. Constitutional identity serves to explicate the limits of constitutional amendment and draw the boundary between amending and breaching the constitution.<sup>58</sup>

One approach to justifying the argument from constitutional identity against transnational law then extends—or, at least, analogizes—this domestic claim to explicit or organic unamendability to the transnational level. The German and Czech Constitutional Court's approaches are exemplary for this, as they make an explicit link between limits to European integration and unamendable constitutional provisions.<sup>59</sup> The logic behind this, at least at first sight, is sound: If there is something about a constitution that domestic actors must never change, it would seem inconsequential not to extend the same logic to, say, the European Union.

However, reducing constitutional identity arguments to arguments from unamendability is bound to fall short of providing a sufficient justification. One can reasonably conceive of an argument defending constitutional identity against transnational law that does not reference eternity clauses or doctrines of unamendability. A change in constitutional identity through transnational legal integration involves different, and arguably more wide-ranging, normative considerations than a change brought about by simple constitutional amendment. The former calls to task problems of democratic legitimacy that are absent from the latter. The main normative critique of unamendability—that it counterproductively elevates and essentializes parts of the constitution at the expense of the democratic space<sup>60</sup>—is considerably weakened when the amendment, or other form of constitutional change, does not come from within that democratic space, but from the wider transnational polity beyond the boundaries of the specific constitutional community. Whereas domestically, unamendability serves to secure constitutional pre-commitment against rash democratic decisions, the transnational argument from constitutional identity seems to aim rather at securing the domestic democratic space.

The jurisprudence of the French Conseil Constitutionnel seems to provide further confirmation that the concept of constitutional identity should not be hastily elided with constitutional unamendability. The Conseil developed a conception of constitutional identity fully detached from any doctrine of unamendability. In fact, French constitutional identity is subject to amendment through the ordinary amendment process.<sup>61</sup> It only gets its identity status vis-à-vis the European level. Domestically, these norms appear on the same level as the rest of the constitution.

## II. (Constitutional) Culture

Looking to constitutional unamendability, it seems, can only take us so far. Constitutional identity extends beyond constitutional text. It only makes sense because it presents constitutional texts as informed by, originated from, or somehow otherwise interwoven with a given constitutional community's social facts. Why, for instance, is the German Constitutional Court so insistent upon protecting the value of human dignity against European Union Law?<sup>62</sup> Human dignity, after all, is equally protected by the Charter of Fundamental Rights and Article 2 TEU. If the German Constitutional Court is asserting the value of human dignity against a transnational

<sup>58</sup>PAUL KIRCHHOF, *Die Identität der Verfassung*, in 2 HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND 261, 284 (Paul Kirchhof & Josef Isensee eds., 3d ed. 2005).

<sup>59</sup>On the German doctrine and its link to unconstitutional amendments, see Monika Polzin, *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law*, 14 INT'L J. CONST. L. 411 (2016).

<sup>60</sup>See Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. STATE L.J. 664 (2010).

<sup>61</sup>Polzin, *supra* note 59, at 435.

<sup>62</sup>Even more illuminating than the German Lisbon judgment is the Court's 2015 decision on the European Arrest Warrant: BVerfG, 2 BvR 2735/14. See also Mathias Hong, *Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi*, 12 EUR. CONST. L. REV. 549 (2016).

community that equally upholds the value of human dignity, how is it then not just tilting at windmills?

The German Constitutional Court, it seems, is not defending the value of human dignity at large, *in abstracto*, as the eternity clause does. Rather, it is defending a German conception of human dignity specifically. As part of German constitutional identity, the claim to human dignity is a claim to a specific conception of human dignity. The Court “protects its own vision of dignity not because it may be mind-independently true but because of the promise of the German constitution that people would never again be ‘treated as objects and . . . deprived of their rights.’”<sup>63</sup> Accordingly, constitutional identity arguments “cannot be taken to entail something more than a contingent constitutional vision . . . [and] it is difficult to see how they could be understood as expressions of mind-independent, timeless, and universal values.”<sup>64</sup>

The Italian *controlimiti* approach seems to be driven by similar concerns about the deep value of constitutional culture. According to Marta Cartabia, the argument motivating the doctrine was that “fundamental rights and fundamental constitutional values reflect, to an extent, the identity, political culture and self-understanding of a society,” and that “preserving these values . . . means preserving the identity of the polity, an identity rooted in the history and culture of the people and expressed . . . within the Constitution.”<sup>65</sup>

The deeper justifications for defending one’s constitutional identity cannot be found on the abacus of unamendability. The unamendability argument only thinly covers a deeper argument about the importance of constitutional community. National political and constitutional culture matters because “where two constitutions say the same thing, that thing is not the same.”<sup>66</sup> Culture creates the prism through which constitutions are refracted and gain their actual meaning. And so, the argument from national constitutional identity is only superficially based upon constitutional unamendability. The deeper justification pertains to the deep value of culture, of national particularities that create the coordinate system through which constitutions acquire their meaning in the first place. Constitutions, it can be argued, have “social lives.” They do not exist *in abstracto*; in order to constitute, they have to be grounded in lived world of experience.<sup>67</sup> Joseph Weiler argues that the differences in the way different polities conceptualize fundamental and human rights “reflect fundamental social choices and form an important part in the different identities of polities and societies.”<sup>68</sup> Drawing fundamental boundaries around these communities-of-value becomes a counterpoint against the prevailing atomistic view of society—a “guarantee against existential aloneness . . . the protection of the *Gemeinschaft* against the *Gesellschaft*.”<sup>69</sup>

### III. Problems with Both Arguments

The two arguments stand in an odd relationship to one another. On the one hand, the culture justification fills some of the gaps that the unamendability argument leaves. It explains how constitutional identity arguments can also reasonably operate in constitutional orders without unamendability. There is another gap that the culture argument fills: Why should a specific norm interpretation be taken as part of constitutional identity, rather than just the text of the norm

<sup>63</sup>BOSKO TRIPKOVIC, THE METAETHICS OF CONSTITUTIONAL ADJUDICATION 51 (2017).

<sup>64</sup>*Id.*

<sup>65</sup>CARTABIA, *supra* note 14, 317.

<sup>66</sup>To paraphrase Rudolf Smend, as cited in PETER HÄBERLE, VERFASSUNGSLEHRE ALS KULTURWISSENSCHAFT (1982).

<sup>67</sup>Kim Lane Scheppele, *The Social Lives of Constitutions*, in SOCIOLOGICAL CONSTITUTIONALISM (Paul Blokker & Chris Thornhill eds., 1st ed. 2017).

<sup>68</sup>Joseph H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, in THE CONSTITUTION OF EUROPE: “DO THE CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION (1999) 102.

<sup>69</sup>*Id.* 104.

itself? The importance of national constitutional culture supplements and instructs how a constitutional norm should be interpreted and, thus, fills in the blanks that the argument from unamendability leaves.

On the other hand, the cultural justification of its own leaves the content of constitutional identity underdetermined—without a theory of what norms or parts of the constitution the essence of the constitution entails, there is no content to be informed by constitutional culture.

Neither of the two arguments are beyond reproach or unproblematic by any means. Particularly, both arguments can potentially pave the way for strident, intransigent foundationalism that is bound to exacerbate existing pathologies of judicial dialogue. The argument from unamendability does not seem to match the wider normative considerations underlying transnational arguments from constitutional identity. Identifying the latter with the former would be overly reductive. Therefore, one ought to carefully question the extent to which unamendability justifications are merely offered to absolutize substantive identity claims.

The unamendability argument finds a further challenge in the underdetermination of the content of the unamendable norms. Even if certain norms can be found to be explicitly or organically unamendable, this does not erase their contingency upon an inherently changeable interpretation. To pretend otherwise opens not only the trap of false necessity but also amounts to the quasi-metaphysical inflation of the often merely symbolic<sup>70</sup> importance of doctrines of unamendability.

This latter challenge to the unamendability justification finds some degree of remedy in the culture argument, which proves to be just as problematic. The constitutional culture argument invokes the centrality of local constitutional culture to constitutionalism as such. Accepting the constitutional culture argument, however, often draws along with it a set of deeper, foundational claims about the possibility of public law and constitutionalism beyond the state.<sup>71</sup> Courts will claim to speak on behalf of the only true vessel of communal constitutional culture or chart a landscape that negates the possibility of overlapping and competing communities and meanings. These quasi-ontological claims are all too obvious in the German Constitutional Court's theoretical musings,<sup>72</sup> while elsewhere, they remain tacit. These claims are already problematic because they amount to little more than a fallacious catch-22-type situation, challenged by the very phenomenon that the constitutional identity argument is pushing back against. It is somewhat recursive to challenge transnational democracy with an argument based on the impossibility of transnational democracy; to challenge harmonizing interpretations of fundamental rights norms with the claim that the significance of national constitutional culture renders such convergence or harmonization impossible. Thereby, courts retreat into existential theorizing under the cloak of constitutional law.<sup>73</sup> Such epistemic closure of national constitutions, which often by their very own explicit indications, are committed to transnational legal integration, at best amounts to stubborn sabotage, as in the German case. At worst, it is a Trojan horse for illiberal authoritarianism – as in the Hungarian and Polish cases.

<sup>70</sup>ROZNAI, *supra* note 55, at 26.

<sup>71</sup>See Neil Walker, *The Post-National Horizon of Constitutionalism and Public Law: Paradigm Extension or Paradigm Exhaustion?*, in *AFTER PUBLIC LAW* (Cormac Mac Amhlaigh & Claudio Michelon eds., 2013).

<sup>72</sup>Consider the reasoning of the German Constitutional Court in the *Maastricht* judgment, where the court argued that “the States need sufficiently important spheres of activity of their own . . . in order to give legal expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically” Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 12, 1993, BVERFGE 89, 155 (Ger), *supra* note 19, para 101. At the foundation of the Court's argument was an ultimately pre-constitutional ontology of statehood and collective selfhood as a people. See also Hans Lindahl, *The Purposiveness of Law: Two Concepts of Representation in The European Union*, 17 *LAW & PHIL.* 481 (1998).

<sup>73</sup>Lars Vinx, *The Incoherence of Strong Popular Sovereignty*, 11 *INT'L J. CONST. L.* 101 (2013).

#### D. The Abuse of Constitutional Identity Arguments

This is where the many justified anxieties surrounding the use of constitutional identity arguments begin. Those who are critical of constitutional identity have drawn attention to the destructive potential of constitutional identity arguments.<sup>74</sup> Fabbrini and Sajó, for instance, argue that the notion of constitutional identity is too vague to satisfy the requirements of the rule of law.<sup>75</sup> They maintain that constitutional identity is too vague and indeterminate to present a viable constitutional concept. It is problematic that “there is no obvious source for the identification of identity at all. Depending on where a court will look, including its own case law, different identities may emerge.”<sup>76</sup> This vagueness effectively builds an arbitrary “escape hatch”<sup>77</sup> into transnational law. The concept also accommodates abusive claims corrosive of transnational legal integration and will merely serve to fragment and ultimately destroy European law.<sup>78</sup> Effectively, the use of constitutional identity arguments in judicial discourse “will contribute to European disintegration.”<sup>79</sup> Similarly, Renáta Uitz expressed the concern that “it may well be that what we are witnessing is a moment of calm before stronger than ever national constitutional identity claims take the European constitutional project by a storm to shatter its very foundations.”<sup>80</sup>

Particularly worrying to some is that the language of identity appears especially appealing to populists and authoritarians on the right. Because the concept argues with considerations of culture—constitutional or otherwise—it is easily “embedded in a nationalist and even nativist soil.”<sup>81</sup> Constitutional identity enables courts and governments to introduce through the backdoor unduly constitutionalized aspects of national identity, religion, and culture that serve to entrench ideological standpoints that run counter to the ideals of European integration.<sup>82</sup> Ultimately, a notion so “tainted with nationalist and nativist ideas” should not be relied upon by responsible courts, because doing so “runs the risk of making constitutional adjudication open to nativist populist considerations.”<sup>83</sup>

These points find confirmation in the way illiberal and authoritarian governments have already abused constitutional identity in Europe to justify eroding transnational legality and divorcing their polity from the requirements of constitutionalism altogether.<sup>84</sup> Hungary’s packed constitutional court recently passed down its own constitutional identity judgment, claiming that it is entitled to review EU law for conformity with Hungary’s constitutional identity.

The Court engages in a somewhat idiosyncratic construction of constitutional identity, defining “the concept of constitutional identity as Hungary’s self-identity,”<sup>85</sup> yet refusing to identify any specific constitutional provisions that ought to be especially protected. Instead, it claims that “the constitutional self-identity of Hungary is not a list of static and closed values,”<sup>86</sup> while invoking the importance of the constitutional preamble and the notoriously vague notion of the historical constitution of Hungary. Despite these idiosyncrasies, the judgment, on its face, ties very well into

<sup>74</sup>Fabbrini & Sajó, *supra* note 8, at 468.

<sup>75</sup>*Id.* at 472.

<sup>76</sup>*Id.*

<sup>77</sup>ANDRÁS SAJÓ & RENÁTA UITZ, *THE CONSTITUTION OF FREEDOM: AN INTRODUCTION TO LEGAL CONSTITUTIONALISM* 470 (2017).

<sup>78</sup>Fabbrini & Sajó, *supra* note 8.

<sup>79</sup>*Id.* at 467.

<sup>80</sup>Renáta Uitz, *National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades*, VERFASSUNGSBLOG (Nov. 11 2016), <https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/>.

<sup>81</sup>Fabbrini & Sajó, *supra* note 8, at 471.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.* at 472.

<sup>84</sup>Kelemen & Pech, *supra* note 9; Uitz, *supra* note 80.

<sup>85</sup>Alkotmánybíróság (AB) [Constitutional Court], Dec. 5, 2016, Judgment 22/2016 (XII. 5.) para. 64 (Hung.).

<sup>86</sup>*Id.* at para. 65.

the existing judicial discourses on constitutional identity.<sup>87</sup> The Court pays ample reference to other apex courts in Europe, devoting thirteen out of seventy paragraphs to comparative analysis,<sup>88</sup> before determining that it is entitled to subject EU law to review for its compliance with fundamental rights, Hungary's national sovereignty, and Hungarian constitutional identity.<sup>89</sup> It pays special attention to the jurisprudence of the German Constitutional Court, citing its judgments extensively,<sup>90</sup> at times going so far as to copy passages of the German Constitutional Court's *Lisbon* judgment verbatim.<sup>91</sup>

The differences between the Hungarian judgment and those of other constitutional courts across Europe lie in the context. The Hungarian Constitutional Court was packed by the government—the same government that also wrote Hungary's illiberal constitution. Hungary is one of the prime examples of illiberal constitutionalism emerging in Europe and elsewhere. Its core characteristic is its hollowing out of the core of liberal institutions whilst retaining their shell as a cloak for authoritarianism.<sup>92</sup> Under these circumstances, constitutional identity can no longer be seen as a means of engaging in good-faith judicial dialogue about the boundaries of EU law. Rather, it becomes an instrument to be wielded against EU law at the government's whim. Indeed, it has been convincingly argued that the Court was assisting the Hungarian government in resisting joint European action on the Syrian refugee crisis that would involve the resettlement of refugees in Hungary.<sup>93</sup>

In a similar vein, the Polish government was eager to invoke constitutional identity in defense of its heavily-criticized judicial reform, illegitimately packing its higher courts.<sup>94</sup> The controversial reform, in the government's opinion, was justified because differences among European countries in the composition of the judiciary were a matter of constitutional identity.<sup>95</sup> In the words of the White Paper, "it is obvious that there are differences in legal systems with the EU, this follows from the separate constitutional identities of individual states, and this diversity is protected by the Treaty on European Union." It further invokes the case law of the German Constitutional Court on identity, as well as the European Court of Justice's case law on Article 4(2) of the TEU, in order to corroborate its argument.

These two examples specifically have led some to argue that the concept of constitutional identity should be dismissed altogether alongside the constitutional pluralism for which it is a conceptual vessel. In the eyes of its detractors, the destructive potential of constitutional identity does not hinge upon the concept being distorted in bad faith. Rather, it is intrinsic in the idea itself. Several commentators have argued that the notion of constitutional identity is "inherently dangerous."<sup>96</sup> Autocrats and authoritarians feel a "natural attraction" to concepts like constitutional identity because they "would provide them with justification to ignore the union's common norms." Indeed, such use of constitutional identity is not just a twisted aberration, but rather the implication of carrying the concept to its "logical conclusion." Kelemen and Pech thus feel

<sup>87</sup>Gábor Halmai, *Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, 43 REV. CENT. & E. EUR. L. 23, 37 (2018).

<sup>88</sup>AB, Judgment 22/2016, at paras. 34–46, 49.

<sup>89</sup>*Id.* at para. 69.

<sup>90</sup>*Id.* at paras. 43–44, 49.

<sup>91</sup>Beáta Bakó, *The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires-, and Fundamental Rights Review in Hungary*, 78 HEIDELBERG J. INT'L L. 864 (2018).

<sup>92</sup>Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 EUR. CONST. L. REV. 48 (2019); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

<sup>93</sup>Halmai, *supra* note 87.

<sup>94</sup>The Chancellery of the Prime Minister, *White Paper on the Reform of the Polish Judiciary*, (2018), <https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chancellor-white-paper-3-18.pdf> (Pol.).

<sup>95</sup>*Id.* at 83.

<sup>96</sup>Fabrizio & Sajó, *supra* note 8 "moderating the use of the inherently dangerous concept"; Kelemen & Pech, *supra* note 9, at 60 with respect to constitutional pluralism and constitutional identity that "some ideas are inherently dangerous"

that it is time to end talks of constitutional identity altogether. National courts should disavow the concept and instead adopt the traditional understanding of the primacy of EU law. Writing on his own, Kelemen even demands that states that feel the need to engage in constitutional identity discussions should not be partaking in European legal integration in the first place and instead should leave the European Union.<sup>97</sup>

### E. A Modest Defense of Constitutional Identity

The idea of constitutional identity should be defended against these arguments. The anxieties about constitutional identity—its conceptual indeterminacy and proneness to abuse—reflect the wider anxieties around the rise of authoritarian populism and its impact on the European transnational legal project. But the focus on constitutional identity pervasive among the critics is counterproductive. The idea that the concept of constitutional identity itself is responsible for its misappropriations and the problems they cause in the European legal order is highly questionable.

While it must be conceded that the concept has its weaknesses, such categorical critiques of constitutional identity draw the wrong conclusions from the Hungarian and Polish instances of abuse. Essentially, constitutional contestation and judicial dialogue are not an ephemeral phenomenon of the European legal order, but arguably integral to that order's legitimacy as a whole. Most likely, the concept of constitutional identity is bound to remain a part of that dialogue. But even if the frame for judicial dialogue were to change, the bad faith on the part of authoritarian populists and their packed courts would not disappear. Other concepts are just as easy to be abused as constitutional identity.

#### I. Constitutional Identity is Not Going Away

Suggestions to abandon the concept of constitutional identity in the context of EU constitutional pluralism tend to downplay the fundamental importance of constitutional identity in general. Constitutional identity is not just a rhetorical figure that courts employ in setting limits to the reach of EU law. At its core stands a very fundamental idea of the state in its irreducible complexity, as a core political site where legitimacy for the exercise of authority is forged. This idea will not simply go away—indeed, constitutional identity is only the latest iteration of this idea.<sup>98</sup> It expresses something fundamental about how the EU and its component parts relate to one another and how the past decades of supranational integration have challenged and provoked the idea of state-based constitutional democracy in unprecedented ways.

Demanding that constitutional identity, along with the constitutional pluralism for which it is a vessel, should be dismissed in favor of uncontested EU law primacy because of the way it is being abused misses the wider point that many constitutional pluralists have been advancing. Constitutional pluralism, on a deep reading, is not just a “serviceable fudge” for the avoidance of constitutional conflict, as Kelemen and Pech describe it.<sup>99</sup> Rather, it involves a set of deep normative and descriptive claims about the wider European legal order. In a pluralist description, the heterarchical relation between competing and overlapping authorities is integral to the European legal order's material legitimacy as a whole. Kelemen's exit solution wrongly suggests that the balance of legitimacy that pluralism brings is, in fact, nothing more than a technicality of

<sup>97</sup>See generally R. Daniel Kelemen, *The Dangers of Constitutional Pluralism*, in RESEARCH HANDBOOK ON LEGAL PLURALISM AND EU LAW (Gareth Davies & Matej Avbelj eds., 2018); R. Daniel Kelemen, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone*, 23 MAASTRICHT J. EUR. COMP. L. 136 (2016).

<sup>98</sup>Vlad Perju—albeit highly critical of constitutional identity—very aptly describes this evolution. See Vlad Perju, *On the Uses and Misuses of Human Rights in European Constitutionalism*, in HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD OF DISORDER (Silja Voieneky & Gerald L Neuman eds., 2018).

<sup>99</sup>Kelemen & Pech, *supra* note 9, at 60.

institutional configuration that can be easily reconfigured. In fact, many constitutional pluralists argue that “[i]t becomes increasingly difficult if not impossible not to conceive of the environment of constitutionalism . . . as a place of heterarchically interlocking legal and political systems.”<sup>100</sup> If we accept this premise, the demand for uncontested EU law primacy is not the straightforward conclusion drawn from the abuses of constitutional identity and pluralism that Kelemen and Pech make it out to be. It would entail, in fact, a significant shift of authority towards the EU level and bring about a significantly enhanced constitutional claim on the part of the EU.<sup>101</sup> Whether the EU indeed has the normative resources to complete such a shift when its legitimacy is already largely parasitic upon the more robust constitutionalism of the Member States is questionable, to say the least.<sup>102</sup> Just as questionable is whether it would be normatively desirable to shield the European legal order from national contestations, thereby potentially also depriving the wider European legal order of the constructive role that constitutional conflict can play in strengthening its legitimacy.<sup>103</sup>

National courts will continue to contest EU law primacy, and in doing so, they will most likely retain the vocabulary of constitutional identity. For better or worse, the European legal space is best conceived of in pluralistic terms as a space where authority is heterarchically negotiated rather than hierarchically settled. The language of constitutional identity is key to this negotiation.

## II. Overdrawn Criticisms

One might now object that even if pluralism is to remain a part of constitutional reality in Europe for the foreseeable future, why would we be so wedded to the concept of constitutional identity? It might well be the case that other conceptual frames for contestation, less dangerous and abuse-prone than that of constitutional identity, are available. If this is the case, one should argue that the more responsible courts in the European constitutional arena ought to abandon the constitutional identity frame and instead pursue judicial contestation with an improved vocabulary.<sup>104</sup>

However, one should question whether the conceptual criticisms of constitutional identity, while adequate to some extent, are not either overdrawn or similarly too reliant on an exceedingly legalistic perspective. A common complaint, featuring prominently in the work of Fabbrini and Sajó, is that the indeterminacy of constitutional identity undermines the requirements of the rule of law.<sup>105</sup> However, the relative open-endedness of the identity concept merely reflects the potentially absolute open-endedness of inter-constitutional conflict in general. It is expressive of the fuzziness of the interstitial space in which national and European constitutional orders relate to one another. Managing this space in a way that does not excessively jeopardize the value of legal certainty is nothing that can be guaranteed through sufficiently determinate legal concepts.

<sup>100</sup>Neil Walker, *Constitutionalism and Pluralism in Global Context*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 18 (Matej Avbelj & Jan Komárek eds., 2012).

<sup>101</sup>One might object that Kelemen frames his suggestion not immediately in terms of the uncontested primacy of EU law or an enhanced EU constitutional claim, but rather as concerning the remedy employed when there is a fundamental conflict between national and EU law. Rather than declaring—or threatening to declare—a provision of EU law unconstitutional, the state concerned ought to remedy the situation by leaving the EU. In doing so, Kelemen either glosses over or ignores that the question of what type of remedy is acceptable in a conflict of authority tells us a whole lot about the very nature of a polity and its relation to its component parts.

<sup>102</sup>Peter L. Lindseth, *The Perils of “As If” European Constitutionalism*, 22 EUR. L.J. 696 (2016).

<sup>103</sup>Ana Bobić, *Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU*, 22 CAMBRIDGE Y.B. EUR. LEGAL STUD. 60 (2020).

<sup>104</sup>See, e.g., Massimo Fichera & Oreste Pollicino, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, 20 GERMAN L.J. 1097 (2019). Similarly, Luke Dimitrios Spieker, *Framing and managing constitutional identity conflicts: How to stabilize the modus vivendi between the Court of Justice and national constitutional courts*, 57 COMMON MKT. L. REV 361 (2020).

<sup>105</sup>See, e.g., Julio Baquero Cruz, *Another Look at Constitutional Pluralism in the European Union*, 22 EUR. L.J. 356 (2016); Pavlos Eleftheriadis, *Pluralism and Integrity*, 23 RATIO JURIS 365 (2010).

It is a matter of cultivating precisely the “ethic of political responsibility” among judges and other public officials that constitutional pluralists have been trying to encourage.<sup>106</sup> The fact that under the moniker of constitutional identity, courts across Europe have found a relatively uniform, if indeterminate, conceptual vessel through which to pursue judicial contestation is a positive. It shows that there is a demand for intersubjective appraisal and mutual legitimation in instances of contestation. Scholarship has a role to play here in sharpening the contours of the constitutional identity concept as a vessel of pluralism, precisely by tracking this intersubjectivity and setting out conditions of legitimacy for the use of constitutional identity arguments.

Fabbrini and Sajó’s second complaint, that the cultural roots of constitutional identity would enable populist and nativist considerations to enter the constitutional adjudication stage, requires some nuance.<sup>107</sup> It is true that notions of identity—such as collective, national, and ethnic—play a particularly central role in the vocabulary of right-wing populists and nativists. These groups will, therefore, be tempted to misappropriate the concept of constitutional identity to further their purposes. However, these are misappropriations—abuses of the notion of constitutional identity—and they are identifiable as such. Furthermore, the entrance of nativist and populist considerations into constitutional adjudication does not hinge upon the semantic essence of constitutional identity. It hinges upon the political presence and force of populists and nativists in our current time. The entrance of populism and nativism into constitutional adjudication is not the result of using one concept. Rather, it results from more profound pathologies in the material foundations of constitutionalism that cannot be remedied by legal means. If our reaction to this populist and nativist surge is to retreat into a conception of the law that is ‘sanitized’ of all cultural roots, we are more likely to aggravate than to subdue the sentiments we are trying to keep out of considerations of constitutional adjudication.<sup>108</sup> Rather than regarding culture as inimical to constitutionalism, it has to be seen as part of its material foundations.<sup>109</sup> Arguably, all successful constitutions have cultural roots, as they need to be embedded in their subjects’ lived experiences in order to be successful.<sup>110</sup> Constitutional identity’s ‘cultural roots’ are not a nuisance to the purity of liberal constitutionalism, but an inextricable feature of the former<sup>111</sup>—it is here, in fact, that identity can be regarded as genuinely providing something of constitutional value.

### III. The Dangers of “Conceptual Whack-a-Mole”

Finally, we should not overinflate the importance of the conceptual frame of constitutional identity by reducing human agency and material circumstances to a question of semantics. At the root of the destructive potential of constitutional identity is not the concept as such, but rather the emerging reality of illiberal constitutionalism across Europe. The increasing abuse of constitutional identity is indicative not so much of constitutional identity being inherently *bad*. Rather, it illustrates the simple reality that authoritarians and illiberals across Europe increasingly seek to draw legitimacy by utilizing and integrating into—that is, abusing—existing power discourses.<sup>112</sup>

<sup>106</sup>Neil Walker, *Populism and Constitutional Tension*, 17 INT’L J. CONST. L. 515 (2019) [hereinafter Walker 3].

<sup>107</sup>Fabbrini & Sajó, *supra* note 8, at 471.

<sup>108</sup>Wen-Chen Chang, *Back into the Political? Rethinking Judicial, Legal, and Transnational Constitutionalism*, 17 INT’L J. CONST. L. 453 (2019).

<sup>109</sup>See generally Marco Goldoni & Michael Wilkinson, *The Material Constitution*, 81 MOD. L. REV. 567 (2018).

<sup>110</sup>See generally Kim Lane Scheppele, *The Social Lives of Constitutions*, in *SOCIOLOGICAL CONSTITUTIONALISM* (Paul Blokker & Chris Thornhill eds., 1st ed. 2017).

<sup>111</sup>TRIPKOVIC, *supra* note 63, at 196 (arguing that “the normative significance of identity arises from the inescapability of occupying an evaluative standpoint”).

<sup>112</sup>Scheppele, *supra* note 92; Rosalind Dixon & David Landau, *1989–2019: From Democratic to Abusive Constitutional Borrowing*, 17 INT’L J. CONST. L. 489 (2019).



The problem lies therein that “autocratic authorities care little about conceptual logic or an honest reading of EU law,”<sup>113</sup> as Kelemen and Pech state correctly—and somewhat paradoxically, one might think.<sup>114</sup> But if this is the case, then simply dismissing the concept of constitutional identity will not lead to the disappearance of the meanings imparted through it. As long as the root problem of illiberal authoritarianism in Europe persists, illiberals and authoritarians will abuse the law to their own ends—not just constitutional identity.

If we seek the blame in concepts rather than agents, we are likely to be drawn into a game of “conceptual whack-a-mole”, where cracking down on one concept might just provoke a similar concept in disguise to pop up elsewhere. Consider Pollicino and Fichera’s suggestion to shift from a language of constitutional identity to the vocabulary of “common constitutional traditions.”<sup>115</sup> On a surface reading, one can agree that the latter seems less conflictual than the former, as it frames dissent as a matter of commonality rather than an objection based on national particularisms. But with just enough effort, even common constitutional traditions can be fragmented, disputed, and reinterpreted—especially given the wealth of undemocratic constitutional traditions across Europe, both previous and present. Nothing prevents constitutional courts from construing a particularistic understanding of common European constitutional traditions that is untethered from contemporary European constitutionalism. Seeing as Viktor Orbán is already now framing Hungary as “the forward post of European Christianity,”<sup>116</sup> one might think that there is just as much space for sophistry within this alternative frame. In fact, the Hungarian Constitution could be seen to provide the perfect basis for such a reinterpretation of common constitutional traditions, because it “prefers to situate Hungary in terms of Europe’s millennial Christian tradition, rather than as part of the European Union.”<sup>117</sup> Europe is cast as a “historical artefact”<sup>118</sup> rather than as a community of values. The choice of conceptual frame can do very little to mitigate damage where certain actors have intentions to the contrary.

Yet none of this means that we have to simply surrender to those that misappropriate the language of constitutional identity for their illegitimate ends. We can identify and distinguish the ways in which constitutional identity is being abused from regular uses of the concept. Scholarship can thus play a productive part in mapping the ways in which the bad faith of illiberals and authoritarians manifests itself in trying to draw legitimacy from existing power discourses. A clearer picture of how the abuse of constitutional identity works will enable us to call out these wrong ideas where they arise.

## F. Towards an Understanding of Constitutional Identity Abuse

Understanding the conceptual dynamics at play where constitutional identity is being abused is important for two reasons. First, it will allow us to more easily identify and call out abusive claims where they arise. Potentially, it could even provide us with a deeper set of arguments in making the case that such claims are wrong rather than just a reference to shared European values.

Second, it might help us to identify deficiencies persisting even in non-abusive constitutional discourse that could be seen to enable or legitimize abusive identity claims. In conceptualizing

<sup>113</sup>Kelemen & Pech, *supra* note 9, at 69.

<sup>114</sup>Kelemen and Pech state elsewhere that autocrats are merely carrying constitutional identity and pluralism to their “logical conclusion” (*Ibid.*, at 65). One might think that they would have to pick a side eventually—are autocrats merely applying, or deliberately abusing and misappropriating these concepts? If the latter is the case, what is to keep the autocrats from distorting and misrepresenting the accounts of the primacy of EU law, in the name of, say, interpretive pluralism?

<sup>115</sup>Fichera & Pollicino, *supra* note 104.

<sup>116</sup>Bernard-Henri Lévy, *How an Anti-Totalitarian Militant Discovered Ultrationalism*, THE ATLANTIC (May 13, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/bernard-henri-levy-interviews-viktor-orban/589102/>.

<sup>117</sup>Renata Uitz, *Can You Tell When an Illiberal Democracy Is in the Making?: An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INT’L J. CONST. L. 279 (2015).

<sup>118</sup>*Id.*

abuse, one ought to be careful not to construct too rigid a binary between abusive and non-abusive identity arguments. Labeling certain uses of constitutional identity as abuses of the concept does not exonerate all other uses from criticism. However, in conceptualizing constitutional identity abuse, it is possible to identify potentially destructive synergies between non-abuses and abuses of constitutional identity at a more profound conceptual level that ultimately goes deeper than simply confounding constitutional identity with its abuse.

I propose that we think about constitutional identity and its abuse on three conceptual planes: Substantive, generative, and relative. On the substantive level, constitutional identity claims will be abusive because their substantive content is at odds with the normative expectations of constitutionalism implicit in the very idea of constitutional identity. On the generative level, constitutional identity claims will be abusive because they have come about in an illegitimate way—through packed courts, rushed constitutional amendments, illegitimate constitutional drafting processes, or quite simply reaching beyond the constitution. On the relative level, constitutional identity claims will be abusive because of *how* they are advanced, ignoring the need to engage with and relate to competing constitutional claims in good faith.

On all of these levels, abusive constitutional identity arguments operate from a conceptual grid deformed by the authoritarianism they are supposed to bolster. They transform the meaning of constitutional identity by changing its position in relation to other metaconstitutional concepts—such as constitutionalism, constituent power, or the idea of the people. The following sections will highlight three possible ways in which this can be done: First, by obscuring the relationship between constitutional identity and constitutionalism; second, by primordializing identity claims; and third, by radicalizing the epistemology of identity claims.

### **I. Substantive Abuse: The “Constitution” in Constitutional Identity**

The substance of what can be plausibly defended as constitutional identity is not boundless. When we talk about constitutional identity in a normative rather than an analytical sense, we are talking about a concept tied up in a bundle of expectations about what a constitution ought to be and achieve.<sup>119</sup> This means that constitutional identity is not valuable in and of itself but only insofar as, and to the extent that, it gives concrete expression to a legitimate form of constitutionalism. Without being tied to some form of constitutionalism, constitutional identity is stripped of normative worth. When we speak of constitutional identity, we speak of a concept that wakes normative requirements that need to be fulfilled.

As a normative concept, constitutional identity cannot be severed from the normative ideals of constitutionalism, as a set of practices and norms that enables the collective self-determination of equal citizens. The point of constitutional identity is not to rally around particularity in order to justify transcending these requirements, but to enable and frame constitutional government in the light of the particularities of the polity.

In the European context, constitutional identity must be understood as embedded in and derived from a shared form of constitutionalism. As an argument made in a context of supranational legal integration and transnational legal entanglement, constitutional identity cannot be fully severed from the shared understandings of legitimacy that have developed in its context.<sup>120</sup> A legitimate claim from constitutional identity cannot stray so far from these shared understandings that it would make it impossible for other jurisdictions in the EU to yield authority to that

<sup>119</sup>TRIPKOVIC, *supra* note 63, at 31 (noting the “general” aspect of constitutional identity that “follows from the reasons of having a constitution as such”).

<sup>120</sup>On the idea of a shared European constitutionalism, see, e.g., Wojciech Sadurski, *European Constitutional Identity?*, EUI LAW WORKING PAPER SERIES (2006), <http://www.ssrn.com/abstract=939674>; Armin von Bogdandy, *The Idea of European Public Law Today*, MPIL RESEARCH PAPER SERIES (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2933427](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933427); CATHERINE DUPRÉ, *THE AGE OF DIGNITY: HUMAN RIGHTS AND CONSTITUTIONALISM IN EUROPE* (2016); PETER HÄBERLE, *EUROPÄISCHE VERFASSUNGSLEHRE* (7th ed. 2011).

constitution.<sup>121</sup> In the context of transnational legal integration, constitutional identity acquires relational and collective dimensions that supplement the individual dimension of identity as national particularity.<sup>122</sup> As Anna Sledzińska-Simon argues, “the question of whether constitutional identity in a nation-state in Europe can dismantle the European identity . . . is unfounded, since the two are not exclusory, but complementary notions.”<sup>123</sup>

However, on a bad-faith reading of constitutional identity, the relational and collective aspects of constitutional identity do not figure. Claiming constitutional identity without fulfilling these shared normative expectations of what a constitution is means to abuse the idea of constitutional identity. Constitutional identity is not constitutional because it is based on a shared conception of constitutionalism. Instead, what counts as constitutional is determined from within the identity claim itself. This stance is actually all too evident in the infamous constitutional identity judgment of the Hungarian Constitutional Court, which argued that “the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law—it is merely acknowledged by the Fundamental Law.”<sup>124</sup> The implication of this is that constitutional identity is logically prior to the constitution and untethered from the relational entanglements of transnational constitutionalism. Identity suddenly stands front and center in the conceptual universe of constitutional order. Rather than being derivative of a constitutional order embedded in a shared practice of constitutionalism, the identity claim is constitutive of constitutional order. The value of constitutional identity lies in giving expression to how the cultural, national, and religious dispositions of a polity translate into a certain way of living together.<sup>125</sup>

But conceiving of constitutional identity in this way is self-defeating. It presents constitutional identity as self-legitimizing—bare any kind of normative limitations that would set limits to or qualify its value. Without the constraints of a prior conception of constitutionalism, constitutional identity collapses into a mere statement of fact. Insofar as a constitutional identity claim purports to express certain fundamental commitments of the constitutional community, it requires a prior conception of constitutionalism that makes sure any given commitment can be attributed to the polity in the first place.<sup>126</sup> Thus, the normative claim from constitutional identity is tied to its appeal to a prior normative concept of the constitution and constitutionalism. In order to be constitutional, constitutional identity requires such a prior conception. Scholarship can play a significant role in spelling out in clearer terms just what the constitution in constitutional identity means and how it restricts the scope of what can plausibly be considered part of constitutional identity.

## II. Generative Abuse: Primordializing Constitutional Identity

There is a performative contradiction in the radical politics of constitutional change pursued by authoritarian populists and their simultaneous insistence on the importance of constitutional identity. Authoritarian populists have an instrumental view of constitutions that merges the constitutional and the policy spheres into one.<sup>127</sup> As a result, they frequently circumvent constitutional norms or commandeer the constitutional framework altogether in the service of a

<sup>121</sup>As Advocate-General Cruz Villalon stated in his opinion in the Gauweiler case, “the constitutional identity of each Member State . . . cannot be regarded, to state matters cautiously, as light years away from [a] common constitutional culture.” Opinion of Advocate General Cruz Villalon at para. 61, Case C-62/14, Gauweiler v. Deutscher Bundestag, ECLI:EU:C:2015:7 (Jan. 14, 2015), <https://curia.europa.eu/juris/document/document.jsf?docid=161370&doclang=en>.

<sup>122</sup>Anna Śledzińska-Simon, *Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and Its Application in Poland*, 13 INT’L J. CONST. L. 124 (2015).

<sup>123</sup>*Id.* at 140.

<sup>124</sup>AB, Judgment 22/2016, at para. 67.

<sup>125</sup>See also Vinx, *supra* note 73.

<sup>126</sup>Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Neil Walker & Martin Loughlin eds., 2008) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199552207.001.0001/acprof-9780199552207-chapter-2>.

<sup>127</sup>Blokker, *supra* note 7.

substantive political project.<sup>128</sup> In Hungary's case, this involved the continuous employment of constitutional amendments, even after having packed the courts and rewritten the constitution under dubious conditions of legitimacy.<sup>129</sup> In Poland's case, it involved the active destabilization of constitutionality through actively violating existing constitutional norms to also pack the courts.<sup>130</sup>

And yet, both countries' governments are very keen on relying on the constitutional identity defense. The active destabilization of an existing constitution, or replacement of a previous constitution with a fundamentally new one, appears at odds with the idea of a settled and firm constitutional identity to be asserted and defended. The more contested, in flux, and unstable the constitutional framework of a country is, the less sense the idea of a constitutional identity seems to make.

The way around this contradiction is to locate constitutional identity not within but outside the constitutional framework. Abusive constitutional identity claims are often primordialized—they advance ethnically charged, primordial, and forever fixed identities. The debasement of formal constitutionality underscores that what is seen as the actual constitution is looming behind the text. Constitutional identity is seen as lying outside the constitutional text in the form of collective political unity—it becomes “the national character of a people, formed of dispositions which are not only lasting but which *ought* to last because of the normative force [attached to] religion, history, culture, etc.”<sup>131</sup>

A primordialized constitutional identity becomes petrified and unable to dynamically evolve as the constitutional culture evolves. The best way to make sure that constitutional identity does not change is to make sure that the people do not change either, or even better, to make the case that the people *have always been like this*. Where constitutional identity is rooted not just in a constitutional claim of eternity, but in an *eternal people*, constitutional identity becomes the ultimate bogus argument for not just the normative inferiority, but even for the logical impossibility of change.

A primordialized constitutional identity relies on manufactured homogeneity—illiberal authoritarians will engage in the “willful misrepresentation of a nation's history in order to artificially realign social coherence with political self-interest.”<sup>132</sup> The radical politics of memory that, among others, the governments of Hungary and Poland are pursuing, is indicative of attempts to bolster certain historical narratives.<sup>133</sup> In Hungary, the manipulation of collective history goes along with a historicization of constitutional law through the concept of the historical constitution<sup>134</sup>: In its constitutional identity judgment, the Constitutional Court even explains that the “real” constitution of Hungary is not to be found in the Fundamental Law, but rather in the “historical constitution,” on which the former rests.

The result of constructing constitutional identity like this is that it ultimately collapses into a radicalized form of national identity: Whereas the nation is seen as a “prestatist, prepolitical,

<sup>128</sup>Walker 3, *supra* note 106.

<sup>129</sup>Kriszta Kovács & Gábor Attila Tóth, *Hungary's Constitutional Transformation*, 7 EUR. CONST. L. REV. 183 (2011).

<sup>130</sup>WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN ch. 3 (2019).

<sup>131</sup>Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 EUR. CONST. L. REV. 6 (2016).

<sup>132</sup>Vlad Perju, *On the (De-)Fragmentation of Statehood in Europe: Reflections on Ernst-Wolfgang Böckenförde's Work on European Integration*, 19 GERMAN L.J. 403, 421 (2018).

<sup>133</sup>See, e.g., Miklós Könczöl, *Dealing with the Past in and around the Fundamental Law of Hungary*, in LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2017); Tomasz Tadeusz Koncewicz, *On the Politics of Resentment, Mis-Memory, and Constitutional Fidelity: The Demise of the Polish Overlapping Consensus?*, in LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2017).

<sup>134</sup>See Zsolt Körtvélyesi, *From “We the People” to “We the Nation”*, in CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW (Gabor Attila Toth ed., 2012).

existential and almost eternal unity,” the state becomes a “quasi-accidental and ephemeral phenomenon, which supports the survival of the nation throughout history, but is not really the embodiment of the essence of the nation.”<sup>135</sup>

### III. Relational Abuse: Radicalizing the Epistemology of Identity Claims

I have argued above that one of the reasons for the metaconstitutional nature of constitutional identity arguments is to provide an argument beyond national constitutional doctrine that renders the identity claim appraisable from the outside. Constitutional identity arguments, aiming to provide reasons to situate authority at one constitutional site rather than another, have to be open to such intersubjective appraisal. The negotiation of constitutional identity takes place within a framework of “relative authority” in which the proper engagement with and relation to competing authority claims necessarily has a bearing on the legitimacy of one’s own claim to authority.<sup>136</sup> However, abusive identity claims aim to negate, rather than acknowledge, the importance of that relationship and present constitutional identity as a justification to disengage from dissenting outside opinions.

Abusive constitutional identity claims espouse an “epistemology of provenance” that connects the claim to an identity with a “claim to an exclusive domain of knowledge.”<sup>137</sup> Thereby, constitutional identity becomes the product of a radicalized, self-contained form of communitarian subjectivity, deliberately shutting out the possibility of external influences having any bearing on them. That something is part of one’s constitutional identity is thereby tantamount to saying that something is beyond reproach to outsiders. Whoever does not take part in an identity is simply epistemically unable to appraise the validity of the claims emanating from that identity, let alone substantively criticize those claims. The overlapping territories of constitutional identity, then, seemingly bar any possibility of contestation across communities because they do not aspire to a common vision of public right, but one that is limited to a single constitutional community.

The implication is that the legitimacy of constitutional identity claims no longer depends on engaging in good faith dialogue with overlapping authorities. In the Hungarian context, the Constitutional Court’s judgment on constitutional identity did not initiate a dialogue with the European level but set off an internal dynamic of identity-based political resistance to an EU measure. Constitutional identity was turned from an argument subject to relational constraints into a resource of unbridled authority to be leveraged between different internal state institutions against outside threats. In a different vein, one can consider the Polish government passed its infamous muzzle law, reserving the power to decide on the independence and impartiality of judges to the Extraordinary Chamber of the Supreme Court, whose independence itself stands in question.<sup>138</sup> Through this law, the Polish government effectively mandated the disengagement of Polish courts from European standards of legitimacy.

To think that constitutional identity claims should have such far-reaching implications is mistaken. While it is true that constitutional identity claims are well characterized as “contingent constitutional visions”<sup>139</sup> that do not strive to implement mind-independent values, this does not sever them from the shared European normative universe, equally a historically grown contingency. The character of constitutional identity as a contingent constitutional vision should, if

<sup>135</sup>Ulrich K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution*, 14 CARDOZO L. REV. 639, 648 (1992).

<sup>136</sup>See NICOLE ROUGHAN, *AUTHORITIES: CONFLICTS, COOPERATION, AND TRANSNATIONAL LEGAL THEORY* (2018).

<sup>137</sup>I have borrowed this term from a contribution to feminist political theory that criticizes certain types of standpoint epistemology. See Sonia Kruks, *Identity Politics and Dialectical Reason: Beyond an Epistemology of Provenance*, 10 HYPATIA 1 (1995).

<sup>138</sup>Katarzyna Gajda-Roszczyńska & Krystian Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, 12 HAGUE J. RULE L. 451 (2020).

<sup>139</sup>TRIPKOVIC, *supra* note 63, at 51.

anything, serve to highlight the temporariness and plasticity of constitutional identities and thereby open up the possibility for transformation of identities through learning and exchange with other, equally contingent, constitutional visions. But contingency can also be wrongly inverted to zero in on the inevitability of the past, and thereby serve to absolutize and immunize any given constitutional vision, given that vision's spatial limitation and negation of universality.

This point requires some further clarification. Some constitutional pluralists, like Neil Walker, work from within an axiom of “epistemic incommensurability” of competing constitutional claims—that is, where national and European constitutional orders advance competing authority claims, there is no external vantage point from which to assess the superiority of any one claim over the other.<sup>140</sup> One might be led to think that this is an implicit endorsement of this radicalized epistemology—legal orders are epistemically incommensurable; hence there is no need, perhaps not even the possibility, for them to make their authority claims comprehensible to one another in a way that would relate to commonalities, such as common substantive principles.

But the epistemic incommensurability of separate legal orders does not provide a license for constitutional solipsism.<sup>141</sup> Nor does it actually preclude the possibility of shared knowledge in a common normative universe. The axiom of epistemic incommensurability does not absolve actors from adopting an appropriate “ethic of political responsibility”<sup>142</sup> that allows for good-faith dialogue. The idea that the theories of constitutional pluralists, on a good faith reading, would enable or even encourage such a radicalized form of identity claim, as some commentators seem to imply,<sup>143</sup> is a mischaracterization of pluralism.

## G. Conclusion

This Article has provided an account of constitutional identity abuse that is at odds with the anti-pluralist account that has so far dominated academic debate surrounding the topic. Contrary to the anti-pluralist arguments, the populist and authoritarian appropriations of constitutional identity are not to be seen as the logical consequence of the use of an inherently dangerous concept. As long as the problem of authoritarian populism in Europe persists, authoritarian populists will seek to integrate into constitutionalist discourses for the purpose of drawing legitimacy from them. If the conceptual site of constitutional identity were to disappear, the next conceptual frontier—be it that of common constitutional traditions or any other—could provide just as much of a canvas for abusive arguments as a constitutional identity would. Rather than wishing the illiberal abuses of constitutional identity away by fleeing into normative reveries about the uncontested primacy of EU law, we ought to strive to more clearly understand constitutional identity abuse. This Article has made a first attempt at arriving at a theoretically based understanding of constitutional identity abuse. By casting constitutional identity arguments as metaconstitutional arguments, they can be understood as situated on a shared conceptual plane that allows for intersubjective appraisal and mutual legitimation. Abusive constitutional identity arguments, it has been argued, operate from a warped and modified conceptual plane in order to arrive at a radicalized concept of constitutional identity that enables abusive claims. We can differentiate between the substantive, generative, and relational aspects of constitutional identity abuse. Identity claims can be abusive by virtue of their substantive content, how they have come about, and how they are advanced. Abusive identity claims tend to distort the relationship between constitutionalism and constitutional identity and primordialize identity in order to portray it as static and forever fixed. The

<sup>140</sup>Walker 1, *supra* note 2, at 337.

<sup>141</sup>TUORI, *supra* note 51, at 102.

<sup>142</sup>Walker 1, *supra* note 2.

<sup>143</sup>Kelemen & Pech, *supra* note 9.

result is a radicalized epistemology of identity claims that connects the identity claim to an exclusive, esoteric sphere of knowledge, thus justifying disengaging from good-faith dialogue with overlapping sites of authority. Hopefully, a more intricate understanding of constitutional identity abuse will help us more powerfully call out abusive arguments where they arise, as well as identify more general deficiencies and pathologies in the realities of judicial dialogue in Europe.

**Julian Scholtes** PhD Researcher, European University Institute, Department of Law.