

# Identity Federalism in Europe and the United States

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## ABSTRACT

*The turn to identity is reshaping federalism. Opposition to the policies of the Trump administration, from the travel ban to sanctuary cities and the rollback of environmental protections, has led progressives to explore more fluid and contingent forms of state identity. Conservatives too have sought to shift federalism away from the jurisdictional focus on limited and enumerated powers and have argued for a revival of the political safeguards of federalism, including state-based identities. This Article draws on comparative law to study identity as a political safeguard of federalism and its transformation from constitutional discourse to interpretative processes and, eventually, constitutional doctrine.*

*The experience of the European Union, where identity federalism also benefits from a textual anchor, reveals some of the complexities of this process. As an eminently vague concept, identity leaves too much room for judicial discretion and leads to unsolvable conflicts among courts as well as between courts and other branches. Like the old sovereignty-based approaches, identity encourages judges to draw bright lines, resurrects jurisdictional conflicts, and discourages cooperation and compromise. In the age of populism, identity federalism draws courts into new and particularly concerning forms of polarization.*

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## I. INTRODUCTION

A specter is haunting federalism—the specter of identity. Opposition to the policies of the Trump administration, from the travel ban to sanctuary cities to the rollback of environmental protections, has led progressives to rediscover the emancipatory virtues of federalism and emboldened them to explore “more fluid and contingent forms of state identity.”<sup>1</sup> The left’s constitutional agenda overlaps with the conservative strategy to shift away from a focus on jurisdictional matters, seen as having failed to adequately protect state sovereignty,<sup>2</sup> and toward a revival of the political safeguards of federalism—

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1. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1114 (2014) [hereinafter Bulman-Pozen, *Partisan Federalism*]. Bulman-Pozen also notes that she does not “attempt to defend a notion of state identity as such but instead argues that we may be missing a powerful form of identification with states because our understanding of what constitutes political identity is too rigid.” *Id.* at 1108–19.

2. Ernest A. Young, *What Can Europe Tell Us About the Future of American Federalism?*, 49 ARIZ. ST. L.J. 1109, 1113–16 (2017) [hereinafter Young, *What Can Europe Tell Us*] (questioning the effectiveness of a strategy centered on the federal center’s “limited and enumerated powers”). See also Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1645–49 (2002).

including, importantly, state-based identities.<sup>3</sup> While dismissing the idea that states have an identity as “pointless, indeed often silly”<sup>4</sup> had been a common trope during the rise “and rise”<sup>5</sup> of the administrative state in the twentieth century, today’s political climate and constitutional challenges indicate that, as Ernest Young has argued, “reports of the death of state identity are greatly exaggerated.”<sup>6</sup>

The identity turn explains, at least in part, why some American scholars have found that “the most interesting developments in federalism are happening in Europe” and have looked for “European structures and solutions [that] may offer some options that Americans have previously failed to consider or appreciate.”<sup>7</sup> Over the past decade, the European Union (EU) has upgraded its protections of national constitutional identity,<sup>8</sup> and its member states have started operationalizing their own similar protections. In particular, both national and supranational European courts have recognized identity not only as a political safeguard of Europe’s admittedly “*sui generis* community in the process of progressive integration”<sup>9</sup> but also, and

3. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954) (describing the importance of states’ influence on national actions). Recent restatements include Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 215 (2000); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1355–56 (2001); see also Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 621 n.120 (1999) (making the point that distinctive state-based identities are on the rise).

4. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 393 (1998).

5. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994). Already in the mid-1960s, Robert Dahl argued that “the states do not stand out as important institutions of democratic self-government.” Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967).

6. Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* 122 (Feb. 24, 2015) (unpublished manuscript) (on file with Duke Law Scholarship Repository) [hereinafter Young, *The Volk of New Jersey?*].

7. Young, *What Can Europe Tell Us*, *supra* note 2, at 1110. The turn to identity is part of a larger lesson of European identifies the other lessons of as 1) The EU’s capacity to make decisions independent of the Member States is far more limited than Congress’s; 2) the EU has far less money to spend, and far less power to raise more, than does the American federal government; and 3) the EU depends on Member States almost completely to implement European law. *Id.* at 1116–17.

8. Consolidated Version of the Treaty on the Functioning of the European Union art. 4(2), Mar. 30, 2010, 2010 O.J. (C 83) 4(2) (“The Union shall respect the equality of the Member States as well as their national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.”).

9. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (1974). See also Bruno de Witte, *The European Union as International Legal Experiment*, in THE WORLDS OF EUROPEAN CONSTITUTIONALISM (Gráinne de Búrca & J.H.H. Weiler eds, Cambridge Univ. Press

importantly, as a doctrine that “[constitutionalizes] national identity”<sup>10</sup> at both national and European levels.<sup>11</sup> This highly adaptable doctrine has been used both defensively, as a closure mechanism that shields nation-states from deeper supranational integration, as well as offensively as a sword against the authority of the EU.<sup>12</sup> As Joseph Weiler perceptively put it more than a decade ago, “[t]o protect national sovereignty is passé; to protect national identity by insisting on constitutional specificity is à la mode.”<sup>13</sup> Developments in recent years suggest that identity has become the new sovereignty.

While identity federalism remains at an early, exploratory stage in American constitutionalism, the European experience has been sufficiently robust to allow an initial assessment, at least in its original context. Identity has fundamentally altered the tempo of constitutional politics in the EU. Despite hopes that it could serve as a tool of fidelity and principled compromise, the foregrounding of identity in constitutional discourse and its hardening into doctrine have often led to the escalation of long-simmering constitutional conflicts. Actors, especially judicial actors, that had been previously open to compromise, have become significantly more radicalized in the new constitutional landscape. Identity has colonized the self-understanding of the national constitutional orders and recast their relationship to supranational institutions on a basis that is more structural (which

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2012) (arguing that the EU is *sui generis*); Andrew Moravcsik, *The European Constitutional Settlement*, in SOPHIE MEUNIER & KATHLEEN R. MCNAMARA, MAKING HISTORY: EUROPEAN INTEGRATION AND INSTITUTIONAL CHANGE AT FIFTY (2007) (arguing that the European Union is not a federation).

10. Pietro Faraguna, *Constitutional Identity in the EU—A Shield or a Sword?*, 18 GERMAN L.J. 1617, 1620 (2017).

11. While this Article studies the jurisprudence of the Court of Justice of the European Union, there have been signs that the concept of constitutional identity has also started to impact the jurisprudence of the European Court of Human Rights. Although the court does not mention constitutional identity explicitly, scholars have seen that concept implicitly at work in some of that court’s prominent cases. See Federico Fabbrini & Andrés Sajó, *The Dangers of Constitutional Identity*, 25 EUR. L.J. 457, 461–62 (2019) (discussing implicit use of constitutional identity in supranational courts).

12. *Id.* at 1631 (“The concept [of constitutional identity] is no longer used as a shield to protect national constitutional identities against further European integration, but as a sword to fend off the authority of EU law over a Member State jurisdiction. This trend may generate concern, especially when Member States take up illiberal concepts of identity.”).

13. J.H.H. Weiler, *On the Power of the Word: Europe’s Constitutional Iconography*, 3 INT’L J. CONST. L. 173, 184 (2005). See also NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 3–8 (Alejandro Saiz Arnaiz & Carina Alcobero Llivina eds., 2013) (discussing the shift from sovereignty to identity). Interestingly, Flaubert described the concept of constitutional identity as “national or nationalistic delirium, dogmatic caprice of law professors, identity card of nation states, modern variation of the idea of sovereignty.” GUSTAVE FLAUBERT, DICTIONARY OF RECEIVED IDEAS (1911) (mentioned in LAURENCE BURGORGUE-LARSEN, *L’identité constitutionnelle en question*, in L’IDENTITE CONSTITUTIONNELLE SAISIE PAR LES JUGES EN EUROPE 155 (2011)).

institution has the authority to decide what identity is?) rather than dialogical (what is the most inclusive or principled manner of making such decisions?). Identity has also spread like fire across the legal orders of the EU member states. From its original locus in Germany,<sup>14</sup> it has migrated to Spain,<sup>15</sup> the United Kingdom,<sup>16</sup> the Czech Republic,<sup>17</sup> Italy,<sup>18</sup> Poland,<sup>19</sup> and many other jurisdictions in between. Identity has arguably become the most successful legal transplant in the early twenty-first century.<sup>20</sup> Unsurprisingly, identity has shaped the legal disputes related to the crises that have recently befallen Europe, from the Eurozone crisis (is Germany's constitutional identity infringed when fiscal decisions, such as the decision to bail out Greece, are made at the supranational level?<sup>21</sup>) to the refugee crisis (is Hungary's constitutional identity violated if a EU regulation requires it to admit Muslim refugees through a quota system?<sup>22</sup>) and, more recently, the rule-of-law crisis (is Romania's constitutional identity encroached upon by the European Commission's anticorruption recommendations through the Cooperation and Verification Mechanism?<sup>23</sup>).

The institutional corollary of identity federalism has been judicial empowerment. Identity—national or constitutional—is an eminently vague concept whose interpretation leaves much room for judicial discretion.<sup>24</sup> The effect has been less a preoccupation with identifying the best interpretation of identity than a structural concern with the allocation of the authority to interpret its meaning. Thus, even while courts have struggled substantively with the task of defining identity,

14. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 23, 1951, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 14, 32, 50 (mentioning "identitätsbestimmende Staatsaufgaben"). See also *infra* Section III. A. 3. See also Russell Miller, *Germany's German Constitution*, 57 VA. J. INT'L L. 95, 96 (2017) (arguing that Germany's Basic Law is a specifically German constitution).

15. S.T.C., Declaration 1/2004 (Dec 13, 2004).

16. R v. Sec'y of State for Transp. [2014] UKSC 3 (appeal taken from Eng.).

17. Ústavní soud České republiky ze dne 03.05.2006 (Decision of the Czech Constitutional Court of May 3, 2006), Pl US 66/04.

18. Corte Costituzionale (Corte Const.) (Constitutional Court), 24/2017 (Tarrico).

19. Case K 32/09, Pol. Const. Trib., Nov. 24, 2010.

20. On the phenomenon of constitutional migrations, see generally Vlad Perju, *Constitutional Transplants, Borrowing and Migrations*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304–27 (Michel Rosenfeld & Andras Sajó eds., 2012).

21. Bundesverfassungsgericht [BVerfG] [German Constitutional Court] Jan. 14, 2014, Order of the Second Senate of 14 Jan. 2014, 2 BvR 2728/13.

22. Alkotmánybíróság (AB) [Constitutional Court] 22/2016. (XII. 5.) AB határozat (Hung.).

23. Romanian Constitutional Court, Judgment nr. 104/2018 and Judgment nr. 137/2019.

24. See Fabbrini & Sajó, *supra* note 11, at 466–69 (identifying arbitrariness and indeterminacy as the “normative problems” of constitutional identity).

they seem to have uniformly cherished their power to authoritatively make such determinations. Judges have been adamant about protecting their turf even when substantively they could do no better than tie national constitutional identity to general values such as “respect for fundamental principles of our constitutional order or the inalienable human rights”<sup>25</sup> or “the essential attributes of a democratic law-based state.”<sup>26</sup> Less benignly, in countries such as Hungary and Poland, where constitutional courts have been captured by authoritarian populists,<sup>27</sup> identity doctrines have played a critical role in immunizing the authoritarian backsliding from both domestic and European attempts to protect the rule of law.<sup>28</sup>

It is, of course, true that many of these features of identity federalism pertain to Europe’s specific circumstances. Different languages, histories, and legal traditions within Europe give national constitutional identity a weight that states lack within the United States, where nationalization has brought about greater political, cultural, and social integration. There are greater objective differences between Italy and Austria than, say, between Vermont and New Hampshire. Empirical studies have shown that, for the most part, citizens of EU member states see themselves less as Europeans first than US citizens define their identity first as American and in subsidiary as citizens of their respective states.<sup>29</sup> Finally, even if identity were to play a similar role in the United States, as a political

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25. Federico Fabbrini & Oreste Pollicino, *Constitutional identity in Italy: European integration as the fulfilment of the Constitution* 3 (Eur. Univ. Institute, Working Paper No. 6, 2017) (“Italy epitomizes the case of a founding EU member state where the supreme institutional actors have never systematically identified a core set of fundamental elements or values functionally designed to protect the identity of the polity against supranational interference”).

26. Ústavní soud České republiky ze dne 03.05.2006 (Decision of the Czech Constitutional Court of May 3, 2006), Pl US 66/04, ¶ 82.

27. See R. Daniel Kelemen, *Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union*, 52 GOV’T & OPPOSITION 211, 227 (2017) (describing how populist party won majority of seats in Polish parliament in 2015); Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 3, 9 (2017) (“The cases of Hungary and Poland, to mention only the EU examples of a broader international trend, suggest a new worrying pattern in the fate of constitutional democracies”).

28. See Monica Claes & Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler*, 16 GERMAN L.J. 917, 967 (2015) (“The comparative analysis thus reveals a clear trend in the case law of national (constitutional) courts to announce constitutional limitations regarding participation in European integration and to the effect of EU law in the domestic legal order.”).

29. *But see* Ernest A. Young, *A Comparative Perspective*, in OXFORD PRINCIPLES OF EUROPEAN UNION LAW 142–88 (Robert Schütze & Takis Tridimas eds., 2018) (discussing identity in both the European and the American contexts an empirical matter and suggesting that the alignment of emotional attachments is not as clear as traditional scholars have assumed).

safeguard or a constitutional doctrine, American federalism has a vastly different toolkit and more settled structure, both discursive and doctrinal, than the comparatively still-underdeveloped European constitutionalism.<sup>30</sup> Over six decades after its beginnings,<sup>31</sup> Europe remains an association of sovereign national states (“*Staatenverbund*”) whose member states, as Brexit is a constant reminder, retain the kind of exit options that American states lack.<sup>32</sup> EU member states continue to oppose including a United States–style supremacy clause in the Treaty of Lisbon,<sup>33</sup> despite the decade-long case law of the EU’s apex court, the Court of the Justice of the European Union (hereinafter ECJ), holding that EU law has primacy over national law.<sup>34</sup> Mainstream European constitutional theory still conceptualizes relations of authority within the EU as heterarchical, rather than hierarchical, and refers to an ethos of constitutional tolerance through

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30. See Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 273 (2001) (describing the difficulty of comparing constitutional structures: “First, federalism provisions of constitutions are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests. Each federal “bargain” is in important respects unique to the parties’ situations, in contrast to constitutional provisions asserted to guarantee universal, or natural, or necessary rights of women and men as persons. Similar phrases or provisions concerning federalism may have different historical meanings in a particular polity, tied in different ways to the political compromises that are usually at the foundation of a federal union. Second, not only are federal systems agreed to as a compromise, but the compromise typically constitutes an interrelated “package” of arrangements.”).

31. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2407 (1991) (describing the evolution of the EU toward an interstate structure with “a constitutional charter and constitutional principles”).

32. See *Texas v. White*, 74 U.S. 700, 700 (1868) (“The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”); see also Bulman-Pozen, *Partisan Federalism*, *supra* note 1, at 1116–17 (discussing Texas’ plan to secede in the aftermath of President Obama’s reelection, as well similar efforts in other red states including Alabama, Georgia, Louisiana, and Tennessee). For a recent study of secession in American federalism, see generally SANFORD LEVINSON, *NULLIFICATION AND SECESSION IN CONSTITUTIONAL THOUGHT* (2016); see also Jens C. Dammann, *Revoking Brexit: Can Member States Rescind Their Declaration of Withdrawal from the European Union?*, 23 COLUM. J. EUR. L. 265, 300–03 (2017) (analyzing Britain’s exit from the European Union).

33. See Consolidated Version of the Treaty on the Functioning of the European Union 2008 O.J. C 115/47, Declaration 17 [hereinafter TFEU], annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 Dec. 2007 (annexation of a declaration to the Treaty of Lisbon); see also JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 79–81 (2010) (analyzing reasons for the member state opposition to formally enshrining supremacy into the treaty).

34. See Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585 (holding that “the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question.”).

which respect for authority as “invited” rather than commended from the top down.<sup>35</sup> All these features, it is argued, set the EU apart from established federal systems.

And yet, while acknowledging these differences, it would be shortsighted to dismiss the relevance of Europe’s experience with identity federalism.<sup>36</sup> To start, the Trump era has upended many of the formative compromises of American constitutionalism.<sup>37</sup> Second, the political upheavals of the past decade have intensified the cultural debates in which identity plays a central role.<sup>38</sup> Third, as the global wave of populism has made apparent, American politics and law are less insulated than many had thought or might have wished.<sup>39</sup> Thus, as the search for a new constitutional compromise gets underway, both the left and the right could conceivably warm up to a recognizable version of identity federalism. Should developments at the discursive level gain sufficient traction, identity could become a concept used in the process of constitutional interpretation. And from there to doctrinal entrenchment there is only one step. The vortex that identity federalism could bring about, in its final stage as constitutional doctrine but also in its earlier, discursive and interpretative forms, might sound promising for projects that aim to revisit the deep structure of American constitutionalism. The pace at which identity shifts the focus towards the constitutive units of a federative structure may seem useful to the project of legitimizing sites of resistance to the policies of the federal government.

But if such a path is at least imaginable, the EU’s experience becomes relevant, not least as a cautionary tale. Identity federalism has further juridified the sphere of the political in Europe and turned

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35. Joseph Weiler, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 17 (J.H.H. Weiler & Marlene Wind eds., 2003).

36. Such dismissal would rest on some general view of American exceptionalism, which has recently been challenged. Recent studies of democratic decay are only the latest to show that neither European nor American constitutionalism is as exceptional as was traditionally believed. See AZIZ HUQ & TOM GINSBURG, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 4 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

37. See Jack Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 *IND. L.J.* 253, 253 (2019) (discussing the polarization and current mood of American politics).

38. See, for instance, the debates surrounding MARK LILLA, *THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS* (2017).

39. The original debate regarding the use of foreign law in constitutional interpretation centered almost exclusively on the migration of institutions and doctrines that support constitutional liberalism. For a perceptive study of the migration of mechanisms used to erode constitutional liberalism, see Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 *INT’L J. CONST. L.* 296 (2003).

conflict into turf wars from which courts are unwillingly to step away.<sup>40</sup> It is naïve to hope that a turn to identity could orient American federalism away from jurisdictional issues.<sup>41</sup> In reality, jurisdictional issues return with a vengeance within a framework of identity federalism. At play here is the old and familiar logic of sovereignty, rather than a “fluid concept of identity, in which constitutional assertions of self-definition are part of an ongoing process entailing adaptation and adjustment as circumstances dictate.”<sup>42</sup> Progressives, in particular, should find this feature of identity particularly troubling. While identity claims to be a versatile concept capable of supporting the project of new “nationalism,”<sup>43</sup> its doctrinalization risks reviving an old age of American federalism. In that “Federalism 1.0,” as Dean Gerken calls it,<sup>44</sup> the state and federal government were understood as separate spheres of authority whose structural conflicts, derived from their inevitable clashes, could be dealt with in a formalist way that avoided engagement with the underlying substantive issues. And, in the age of populism, those substantive issues include but would arguably be more encompassing even than racism, that original sin of American federalism,<sup>45</sup> as they threaten to empower either specific state jurisdictions or the national government—or both—to wreck wholesale havoc on the rule of law.

Given the early stage of legal developments related to identity federalism, any study has by necessity an exploratory dimension. This Article does not aim to provide a definitive account of the forms and claims of authority and sovereignty involved in these constitutional

40. The relation between political and legal spheres, and specifically the juridification of political controversies, have a long history. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 16 (1835); see also ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (both examples of recent studies that have challenged the long-held assumption about American litigiousness, especially in comparison with Europe. In that debate, Tocqueville’s observation that “[t]here is hardly any political question in the United States that sooner or later does not turn into a judicial question” had reached status of common wisdom). But see generally DAVID ENGEL, *THE MYTH OF THE LITIGIOUS SOCIETY* (2016); R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011) (documenting the centrality of law and litigation in the EU).

41. *Id.*

42. GARY JACOBSON, *CONSTITUTIONAL IDENTITY* 13 (2010).

43. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889, 1894 (2014) [hereinafter Gerken, *Federalism as the New Nationalism*]; see also Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 *ST. LOUIS L. REV.* 997, 997 (2015) (proposing a détente between traditional and new nationalism) [hereinafter Gerken, *Time for a Détente?*].

44. Heather K. Gerken, *Federalism 3.0*, 105 *CALIF. L. REV.* 1695, 1695 (2017) (distinguishing three ages of American federalism) [hereinafter Gerken, *Federalism 3.0*]; see also LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 7–24 (3d ed. 2000).

45. See WILLIAM K. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964) (“if . . . one disapproves of racism, one should disapprove of federalism.”), cited in Gerken, *Federalism 3.0*, *supra* note 44, at 1708.

rearrangements. Its aim is rather to provide a preliminary map of these developments, to identify the constitutive parts of national constitutional identity, and to introduce and frame the general debates surrounding identity federalism. Part I explores if identity takes shape around similarity or difference, the choice of national versus constitutional identity and, finally, the mandate of institutions such as courts in defining identity. Part II introduces the state identity in American experience, starting with the dismissal of the identitarian framework post–New Deal and continuing through its recent revival. Part III turns to the lessons from Europe. After placing identity in the context of strategies of national resistance to supranational integration, it studies the use of identity within the constitutional case law of the EU member states, both as a self-standing tool as well in the hands of authoritarian populist governments. In Part IV, this Article draws on the lessons of this comparative analysis and discusses some of the possible future(s) of identity federalism. This Article ends with a brief conclusion.

## II. THEORIZING IDENTITY

The question of what constitutes identity has been called one of “the hardest question[s] of constitutional law.”<sup>46</sup> This Part discusses three aspects relevant to the subsequent analysis. Part II.A. takes up the definition of identity, and specifically the issue of identity as a matter of resistance or belonging. Part II.B. discusses the type of identity—national or constitutional—relationship, and the factors associated with each. Finally, Part II.C. turns to some of the institutional implications and specifically the authority of courts in the process of defining the meaning of identity.

### A. *Similarity versus Difference*

The most common understanding of identity in a legal context refers to the essential characteristics that set a jurisdiction apart from all others and thus define its individuality.<sup>47</sup> France is not Germany

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46. Mark Tushnet, *How Do Constitutions Constitute Constitutional Identity?*, 8 INT'L J. CONST. L. 671 (2010). Somewhat more plastically, a Dutch historian once likened the concept of identity to “a jellyfish on the beach – to be observed with interest, but not to be touched.” Barbara Oomen, *Strengthening Constitutional Identity when there is none: the case of the Netherlands*, 77 REVUE INTERDISCIPLINAIRE D'ETUDES JURIDIQUES 235, 238 (2016).

47. Gerhard van der Schyff, *EU Member State Constitutional Identity*, 76 ZEITSCHRIFT FÜR AUSSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 3 (2016) (defining “constitutional identity as “the individuality or essence of an order”); *see also* Michel Troper, *Behind the Constitution? The Principle of Constitutional Identity in*

and Texas is not California. While each has much in common with the other, they remain nevertheless different in ways that are relevant. When a polity passes a certain threshold of cultural, social and political homogeneity, it means that those distinctive elements are no longer in place. Edward Rubin's views capture this well in the context of the United States. Writing in 2001, he argued that

[a]t present, the United States is a socially homogenized and politically centralized nation . . . With the minor exceptions of Utah and Hawaii, there is no American state with a truly distinctive social profile . . . Our political culture is more uniform still . . . Most important, the primary political loyalty of the vast majority of Americans is to the nation.<sup>48</sup>

Note here the impact of uniformity, homogenization, and centralization on the distinctive state identities. While Texas does not become California, to return to my example above, the differences between them are not greater than what federalism can accommodate. That is because federalism already has built into it a certain breathing space, or degree of respect, for value pluralism. As Mark Tushnet has argued, "federalism has its attractions as a principle of government almost entirely because it provides an almost unassailable base for value-pluralism."<sup>49</sup>

Difference and sameness are to some extent facets of the same coin. Texas is similar to California, and thus both are different from Mexico. Italy is similar to Austria, and both of them are different from Morocco. If one looks at the formation of identity, one notices that the two types of relations are not independent of each other. The forging of a common identity has often required the existence of an outsider in opposition to which one discovers, or constructs, one's own identity.<sup>50</sup> The Roman Empire held itself as different from the Germanic tribes in central Europe, and Europe has always played the role of the "other" for the United States.

The question of the "other" in the formation of identity becomes more complex when identity is seen in a dynamic perspective, through its formation or process of becoming. Anyone with a passing knowledge of European history is familiar with the deep differences between French and German national identities, and about how each identity

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*France*, in ANDRAS SAJO & RENATA UITZ, CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS 187–204 (2010).

48. Edward Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 43 (2001).

49. Mark Tushnet, Comment, *What Then Is the American?*, 38 ARIZ. L. REV. 873, 876 (1996), cited in Bulman-Pozen, *Partisan Federalism*, *supra* note 1, at 1121 (Bulman-Pozen also notes that "[f]ederalism renders diversity a defining structural feature of the United States").

50. See generally KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY (2005); AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY (2006).

formed itself in opposition to the other.<sup>51</sup> Has the process of European integration altered this mode of identity formation? Here is the affirmative answer of a constitutional court in another EU member state: “[t]he idea of confirming one’s national identity in solidarity with other nations, and not against them, constitutes,” in the words of the Polish Constitutional Court, “the main axiological basis of the European Union.”<sup>52</sup> This view, that the process of European identity creates identity through solidarity, rather than through opposition,<sup>53</sup> is connected to the view of European integration as a fundamental commitment to diversity and toleration of the other, which requires fundamental changes internal to the municipal jurisdictions. The European constitutional architecture preserves the plurality of distinct political identities, and political self-determination, as a “civilizing strategy of dealing with the ‘other.’”<sup>54</sup> The nonhierarchical relations of mutual accommodation or “constitutional tolerance.”<sup>55</sup> By contrast to traditional federative states, such as the United States, where the center mandates obedience, the European supranational political formation is voluntary in nature and, therefore, obedience is “invited.” Given the special historical conditions in which it developed, “European constitutionalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power.”<sup>56</sup> The outcome is harmonization, rather than homogenization, and is accordingly less violent. This process is best understood as the political expression of the nonbinary conception of a rich, layered identity. National and European identities can coexist so long as they are not mutually exclusionary.<sup>57</sup>

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51. See generally ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* (1992).

52. Case K 32/09, Pol. Const. Trib., Nov. 24, 2010. See also Mattias Kumm, *Why Europeans Will Not Embrace Constitutional Patriotism*, 6 INT’L J. CONST. L. 117, 120 (2008) (“the universality of an ideal does not make it formally inadequate as an ideal central to the identity of a particular community”).

53. See, e.g., Mattias Kumm, *The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History*, in *DIALOGUES ON JUSTICE: EUROPEAN PERSPECTIVES ON LAW AND HUMANITIES* 108 (Helle Porsdam & Thomas Elholm eds., 2012).

54. Weiler, *supra* note 35, at 20.

55. *Id.* at 17 (referring to the corollary of this principle of constitutional tolerance, understood as the “normative hallmark of European federalism.”).

56. *Id.* at 9.

57. See Armin von Bogdandy, *The European Lessons for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations*, 23 EUR. J. INT’L L. 315, 322 (2012) (referring to the “dual structure of democratic legitimation” – an “innovative concept of democracy”). The philosophical view that informs this conception sees individuals as holders of sovereignty with a dual political identity: both as citizens of their Member States and, concomitantly, as citizens of the to-be-created EU. See Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 EUR. J. INT’L L. 335, 342–43 (2012) (“Article 1(1) of the Treaty Establishing a Constitution for Europe refers to both subjects,

European constitutionalism thus at least attempts to problematize the distinction between similarity and difference in the conception of identity. Whether it is successful in that attempt remains, at least at this stage, an open question. The next Parts will argue that, in practice, identity has generally not been the tool once envisaged for mutual accommodation and tolerance. Nor is it apparent to what extent this model accurately captures the dynamics of European integration. The recent crises that have befallen the EU—from the Eurozone crisis to the refugee crisis to Brexit—have certainly put pressure on the European model of social integration. The question for now, however, is less evaluative and more technical: Does European constitutionalism impact national identity directly, or is its impact through the displacement, or modification, of national identity through distinctively constitutional identity?

### B. National versus Constitutional Identity

It seems uncontroversial to posit that national identity encases a nation's historical, cultural, social, and political experience. But what about its constitution? National identity could be seen as part of constitutional identity,<sup>58</sup> or, conversely, constitutional identity can be part of national identity.<sup>59</sup> In another, and particularly influential view, constitutional identity is distinct from national identity. As Michel Rosenfeld argues, “all constitutions depend on elaboration of a constitutional identity that is distinct from national identity and from all other relevant pre-constitutional and extra-constitutional

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the ‘citizens’ and the ‘states’ of Europe. Even though this constitution drawn up by a convention in 2004 was never adopted, the Lisbon Treaty currently in effect supports the thesis that sovereignty is ‘shared’ between citizens and states.” (citations omitted). *See also id.* at 343 (“Citizens are involved on both sides within the higher-level political community — directly in their role as Union citizens, and indirectly in their role as citizens of the Member States.”); *see also* Jürgen Habermas, *Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the Pouvoir Constituant Mixte*, J. COMMON MKT. STUD. 171 (2017). The difficulty has been to put the two identities on equal par in a way that is at least *prima facie* sustainable. For if sustainability is not secured, then theories of divided sovereignty do little other than delay or obscure but certainly not overcome the binary choice between conflicting claims to absolute supremacy. *See* Vlad Perju, *Double Sovereignty in Europe? A Critique of Habermas's Defense of the Nation-State*, 53 TEX. INT'L L.J. 49, 53 (2018); Vlad Perju, *The Asymmetries of Pouvoir Constituant Mixte*, 25 EUR. L.J. (forthcoming 2019).

58. *See* Leonard F. M. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 UTRECHT L. REV. 36, 42–44 (2010) (describing the intersection between national and constitutional identity).

59. Opinion of Advocate General Bot, *Criminal Proceedings Against Stefano Melloni*, Case C-399/11, ECLI:EU:C:2012:600, ¶ 137 (“I would make it clear that the position which I propose that the Court should adopt in the present case does not mean that account is not to be taken of the national identity of the Member States, of which constitutional identity certainly forms a part.”).

identities.”<sup>60</sup> Successful constitutions, in this view, gain the kind of political and social traction that in turn shapes a community’s collective identity.

As far as constitutional identity is concerned, the question is where to locate the identity elements of constitutional identity. If one focuses on the text, preambles seem like a good place to start. It is well known that preambles usually include references to abstract values.<sup>61</sup> Their rhetorical effect can be quite powerful, and sometimes courts have incorporated preambles into the enforceable parts of the constitutional text.<sup>62</sup> The preamble to the U.S. Constitution is central to Dean Chemerinsky’s project for a progressive revival of American constitutionalism.<sup>63</sup> Constitutions also mark identity through so-called eternity clauses, that is, through provisions that the constitution itself immunizes from future amendment. For example, the German Basic Law lists the principle that Germany is a democracy and the protection of the right to dignity as provisions that cannot be amended.<sup>64</sup> This is not to imply that such provisions can never be changed, but that—absent amendments to the ban itself—their changes would require the adoption of another constitution. Put differently, these eternity provisions encapsulate something so fundamental about the identity of an entire constitutional order that the possibility of changing them would alter that identity in ways that the constitutional drafters thought impermissible. The fundamental distinction at play here, most thoroughly theorized in the work of Carl Schmitt, is between subconstitutional or ordinary constitutional amendments, which can be undertaken by the people’s representatives because they do not alter the identity of a constitutional order, and amendments that do engage that identity and must therefore require the approval of the people as

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60. MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY 10 (2010). See also Michel Rosenfeld, *Constitutional Identity*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 758 (Michel Rosenfeld & András Sajó eds., 2013) (arguing that “it is easily to conceive of the French or German nation without reference to a constitution.”).

61. See, e.g., Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT’L J. CONST. L. 714, 714 (2011).

62. See JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 15–17 (2008) (in France, the Constitutional Council incorporated the Preamble of the 1958 Constitution into the block of constitutional provisions, or *bloc de constitutionnalité*).

63. ERWIN CHEMEKINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 53–60 (2018) (noting that the preamble is “the obvious place to begin discerning the values of the Constitution” and that “[unfortunately] . . . it has been largely ignored in Supreme Court decisions and in scholarly writings.”).

64. See Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010) (for a general discussion of eternity clauses); Ulrich K. Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44 ISR. L. REV. 429, 436 (2011).

the ultimate sovereign.<sup>65</sup> This is a redline conception of identity, which defines the limits of the relation between nation-states and supranational institutions. This conception has resulted from the “constitutionalization of national identity,”<sup>66</sup> which has been a gradual process of “distancing the notion of national identity . . . [in Article 4(2) Treaty on European Union] from cultural, historical or linguistic criteria and turns to the content of domestic constitutional orders.”<sup>67</sup>

### C. Courts versus Culture

As mentioned above in the European context, the constitutionalization of national identity empowers judges and creates an institutional imbalance. The same conclusion seems warranted when looking at American constitutional law. George Fletcher has argued that judges should turn to constitutional identity in hard cases about basic issues of constitutional law.<sup>68</sup> Instead of turning outward toward overarching principles of political morality, “the acceptable way to resolve the disputes and explain the results is to turn ‘inward’ and reflect upon the legal culture in which the dispute is embedded. The way to understand this subcategory of decisions is to interpret them as expressions of the decision makers’ constitutional identities.”<sup>69</sup> There will, of course, be disagreement about the meaning of constitutional identity. Such disagreement is to be expected since the concept of identity itself is, in a Dworkian sense, an interpretative concept.<sup>70</sup>

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65. CARL SCHMITT, *CONSTITUTIONAL THEORY* 150 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928) (“The boundaries of the authority for constitutional amendments result from the properly understood concept of constitutional change. The authority to “amend the constitution,” granted by constitutional legislation, means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.”). See also 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, 411 (2016).

66. Faraguna, *supra* note 10, at 1620. See also Koen Lenaerts, *The Principle of Democracy in the Case-Law of the European Court of Justice*, 62 INT’L & COMP. L.Q. 271, 280 (2013) (“an essential component of the national identity of Member States, the democratic arrangements provided for by national constitutions are not to be undermined by EU law . . . . [F]or national constitutional courts, the EU’s commitment to respecting national democracies is an essential element without which European integration would come to an immediate halt”).

67. Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1422 (2011).

68. George Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737, 737 (1992).

69. *Id.* at 737–40 (discussing from this perspective central cases such as *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Texas v. Johnson*, 491 U.S. 397 (1989)).

70. RONALD DWORKIN, *Hart’s Postscript and the Character of Political Philosophy*, in *JUSTICE IN ROBES* 140 (2006) (positing a distinction between natural

Other scholars have argued that questions of identity should be taken away from the courts and given to other institutional actors.<sup>71</sup> As shown in the next Parts of this Article, this is a particularly important matter since judicial monopoly over constitutional identity leads almost inevitably to judicial aggrandizement. The German Constitutional Court, for instance, has held that “the protection of the latter is a task of the Federal Constitutional Court alone.”<sup>72</sup> By contrast, the French Constitutional Council has held that EU legislation must not violate a rule or principle inherent in the constitutional identity of France except when the constituent power has consented to such reversal.<sup>73</sup> To be sure, such consent can be given directly by the constituent power or through the people’s elected representatives reunited in both houses of parliament. The French Council has declined the power to review both when the authorization is direct,<sup>74</sup> as well as when it is mediated.<sup>75</sup> These differences in approach reflect deeper constitutional traditions in France and Germany.<sup>76</sup>

It is not too difficult to see how national identity can be taken away from courts. But can *constitutional* identity be taken away from courts? The starting point for an answer is to detach constitutional identity from the constitutional text. As constitutions enter their life cycle, the constitutional text becomes the basis of a dialogue between the public officials, including courts, and the larger country. Robert Post has argued that constitutional law “and culture are locked in a dialectical relationship, so that constitutional law arises from and in turn regulates culture.”<sup>77</sup> This “dialogical engagement between the core commitment(s) and its external environment,” as Gary Jacobsohn

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concepts that exist in the natural world and can be described through an accurate assessment of the convention among speakers of the same language, and interpretative concepts, such as law, equality, liberty or justice, that have no normative DNA and whose meaning requires an exploration into what makes them valuable).

71. See, e.g., Pietro Faraguna, *Taking Constitutional Identities Away from the Courts*, 41 BROOK. J. INT’L L. 491, 491 (2016).

72. Bundesverfassungsgericht [BVerfG] [German Constitutional Court] Sept. 6, 2012, No. 2 BvR 2728/13, at ¶ 29.

73. Conseil constitutionnel [CC] [Constitutional Court] decision No. 62-20DC, Nov. 6, 1962 (Fr.) (declining to invalidate results of a referendum that President De Gaulle had called on the question of the direct election of the French President in apparent violation of the constitutional procedures for calling such referenda).

74. *Id.*

75. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2003-469DC, Mar. 26, 2003, ¶ 2–3 (Fr.).

76. See Jan-Herman Reestman, *The Franco-German Constitutional Divide. Reflections on National and Constitutional Identity*, 5 EU CONST. 374, 378 (2009) (discussing French and German identity characteristics). See also Claes & Reestman, *supra* note 28.

77. Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

puts it in his study of constitutional identity, favors a “fluid concept of identity, in which constitutional assertions of self definition are part of an ongoing process entailing adaptation and adjustment as circumstances dictate.”<sup>78</sup> This dialectical conception of constitutional identity means that disharmony “within and around the constitution is key to understanding its identity.”<sup>79</sup> It is, of course, noteworthy that this dialectical conception of identity, which results from the interaction between formal institutions and background culture, was theorized in the United States. Article V makes constitutional amendments notoriously difficult to implement, especially under conditions of deep political polarization, although, at least formally, no constitutional provision is eternal in the sense used above.<sup>80</sup> It was the politics of growing polarization that made the Constitution immune from change, and in that particular sense eternal.

### III. IDENTITY AS A POLITICAL SAFEGUARD: THE CASE OF AMERICAN FEDERALISM

Federalism may be “our Nation’s own discovery,” as Justice Kennedy wrote,<sup>81</sup> but it was not until the federalism revolution of the Rehnquist Court that core debates about the nature and role of state sovereignty returned with a vengeance on the agenda of American constitutionalism.<sup>82</sup> At least since the New Deal, and arguably even earlier, the idea that each state formed a “distinct society . . . [with its own] distinct ethno-cultural identity”<sup>83</sup> might have been a view of historians but received little support in constitutional doctrine and was derided by political scientists. In 1933, political science scholar Luther Gulick argued that “[t]he American state is finished. I do not predict that the states will go, but affirm that they have gone.”<sup>84</sup> As towering a figure as Robert A. Dahl argued that “the states do not stand out as

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78. JACOBSON, *supra* note 42, at 13.

79. *Id.* at 15.

80. Vicki C. Jackson, *The (Myth of Un)Amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 INT’L J. CONST. L. 575, 577 (2015) (the US Constitution is amended less than other national constitutions and far less than state constitutions). *See generally* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS (2017); RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS (2019).

81. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

82. *But see* Gerken, *Federalism 3.0*, *supra* note 44, at 1698–1708 (arguing for jettisoning the mistaken assumptions of the New Deal that state and national power should be conceived of in sovereignty-like terms).

83. Daniel J. Elazar, *Foreword: The Moral Compass of State Constitutionalism*, 30 RUTGERS L.J. 849, 861 (1999).

84. Luther Gulick, *Reorganization of the State*, 3 CIV. ENGINEERING 420, 421 (1933), *cited in* Young, *The Volk of New Jersey?*, *supra* note 6, at 122.

important institutions of democratic self-government.”<sup>85</sup> To be sure, federalism calls for the existence of a dual level of government to which citizens owe their loyalties.<sup>86</sup> James Madison saw divided loyalties as giving federalism the vitality and guiding principles to protect political freedom.<sup>87</sup> That insight was not lost on contemporary political theorists.<sup>88</sup> The difficulty, however, was to find how that political concept informed a constitutional approach that, for much of the twentieth century, had consistently interpreted Congress’s commerce powers very broadly.

The Rehnquist Court’s federalism revival changed that.<sup>89</sup> In a string of cases that have redefined the arc of American federalism, the Supreme Court struck down federal legislation—from the Low-Level Radioactive Waste Policy Amendments Act of 1985<sup>90</sup> to the Gun-Free School Zones Act of 1990<sup>91</sup> and the Violence Against Women Act of 1994<sup>92</sup>—as encroaching upon the powers and rights that the Constitution allocates to states. This development was perceived, understandably, as a vindication of the states but also of the federal system.<sup>93</sup> As the Supreme Court put it, the federal and state

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85. Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967). See also Antoni Abati Ninet & James A. Gardner, *Distinctive Identity Claims in Federal Systems: Judicial Policing of Subnational Variance*, 14 INT’L J. CONST. L. 378, 396 (2016) (“In the United States, distinct cultural, linguistic, and religious groups tend to be geographically dispersed, and even where they are concentrated, as in urban areas, they tend not to comprise majorities capable of exercising political control at the regional level. That dispersion, combined with a longstanding national project of assimilation, has tended to undermine the conditions necessary for ethnocultural distinctiveness to evolve into the kind of substate nationalism sometimes encountered elsewhere. As a result, American states today rarely assert any kind of distinct identity or sovereignty.”).

86. See RIKER, *supra* note 45, at 136 (“[F]ederalism is maintained by the existence of dual citizen loyalties to the two levels of government.”).

87. THE FEDERALIST, Nos. 48–51 (James Madison).

88. See, e.g., Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459, 465 (2007) (observing that, for the Federalists, “[l]oyalty to the states . . . [was] the general protection against the new constitutional order going awry”).

89. See, e.g., Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 2 (2004).

90. See *New York v. United States*, 505 U.S. 144, 144 (1992) (striking down certain provisions of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 on the ground that they improperly “commandeered” state legislative processes).

91. See *United States v. Lopez*, 514 U.S. 549, 549 (1995) (striking down the federal Gun-Free School Zones Act of 1990 on the ground that it fell outside Congress’s power under the Commerce Clause).

92. See *United States v. Morrison*, 529 U.S. 598, 598 (2000) (holding that parts of the Violence Against Women Act of 1994 were unconstitutional as they were not included in Congress’s powers under the Commerce Clause and under section 5 of the Fourteenth Amendment to the Constitution).

93. See Young, *The Volk of New Jersey?*, *supra* note 6, at 5 (arguing that the Framers’ idea that the competition for loyalty between the national government and the States requires that “neither side totally win this competition”).

governments will act as mutual restraints “only if both are credible.”<sup>94</sup> Defending the credibility of the federal government was not a particularly onerous task, in light of decades of judicial deference to Congress. But establishing the credibility of states required both resolve and imagination. Any such account would need more than just an abstract restatement of state sovereignty. It would need an argument about commitment and, possibly, state identity. As John O. McGinnis has argued, successful federalism requires “citizens’ emotional attachments to their states.”<sup>95</sup> Are citizens emotionally attached to their states?

### A. Identity and Politics

The dominant answer among scholars has been a resounding no. Malcom Feeley and Edward Rubin pointed out that “the American people . . . have a unified political identity. Not only do they identify themselves primarily as Americans, but they insist on normative uniformity throughout the nation.”<sup>96</sup> Similarly, James A. Gardner remarked that there is “a general absence of public identification with the polity defined by the state,”<sup>97</sup> and Robert Schapiro referred to debates about state character as “pointless, indeed often silly.”<sup>98</sup>

If this position sounds uncompromising, it is important to understand it correctly in its narrow focus. While there are obvious differences between states, these differences might not be of the kind that translate into different identities. They are, for example, economic differences, rather than differences rooted in historical or cultural distinctions.<sup>99</sup> Conversely, it might be possible, and it is indeed likely, that people form the kind of attachments that are constitutive of identity at subnational but not state levels. As Jessica Bulman-Pozen argues, “although the United States is not a homogenous polity, American heterogeneity does not closely track state borders.”<sup>100</sup> This

94. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

95. John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 526 (2002) (arguing that successful federalism requires “citizens’ emotional attachments to their states.”).

96. MALCOM M. FEELEY & EDWARD RUBIN, *FEDERALISM* 115 (2008). *See also* Jacob T. Levy, *Federalism and the New and Old Liberalisms*, SOC. PHIL. & POL’Y 306, 316 (2007) (“[L]oyalty to states . . . has dwindled to almost nothing in most parts of the United States”).

97. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 830 (1992).

98. Schapiro, *supra* note 4, at 393.

99. Rubin, *supra* note 48, at 43 (“At present, the United States is a socially homogenized and politically centralized nation. Regional differences between different parts of the nation are minimal, and those that exist are based on inevitable economic variations, rather than any historical or cultural distinctions.”).

100. Bulman-Pozen, *Partisan Federalism*, *supra* note 1, at 1110.

might have to do with the social and geographic mobility that leads to “regional rather than state distinctiveness.”<sup>101</sup> This distinctiveness could also develop at lower levels of government, around cities<sup>102</sup> and counties.<sup>103</sup>

Severing the link between emotional attachment and political loyalty to states has far-reaching implications for American federalism. At the level of constitutional doctrine, it suggests, as Robert Schapiro has argued, that “the Supreme Court need not protect enclaves of state policy autonomy because such autonomy would be meaningful only if it reflected distinctive state political communities—which no longer exist.”<sup>104</sup> That observation is even more radical at the level of constitutional theory. If federalism requires dual attachment, and if in the American context, attachment to state government lacks, that seems to put into question the very nature of the state. Federalism may have been our “national neurosis,”<sup>105</sup> but is that still the correct label for the United States? The implications of no longer seeing the United States as a federation, but, in one view, a centralized administrative state,<sup>106</sup> are of course momentous. These consequences register not only at the level of citizen attachment, as important as those may be,<sup>107</sup> but also systemically through how the erosion of popular attachment dilutes the loyalty of public officials.<sup>108</sup> The political safeguards of federalism depend on the national effect of how state officials exercise their public duties.<sup>109</sup> The concern is that the dilution of citizen

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101. *Id.* at 1110–11 (arguing that “half of Americans age twenty-five and older do not live in their state of birth, and more than a quarter of American adults have lived in three or more states. To the extent the states reflect cultural differences, regional rather than state distinctiveness is likely to be what matters.”).

102. Young, *The Volk of New Jersey?*, *supra* note 6, at 106–10 (discussing attachments to cities).

103. See Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10 (2010) (discussing federalism at the local level) [hereinafter Gerken, *The Supreme Court, 2009 Term*]; see also David Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 377 (2001) (discussing the tensions between different sites of government).

104. ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* (2009).

105. Edward Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 903 (1994).

106. *Id.*

107. Sidney Verba, *Comparative Political Culture*, in SIDNEY VERBA & LUCIAN PYE, *POLITICAL CULTURE AND POLITICAL DEVELOPMENT* 512 (1965) (“[i]t is the sense of identity with the nation that legitimizes the activities of national elites and makes it possible for them to mobilize the commitment and support of their followers.”).

108. H.L.A. Hart argued that the authority of law is established when state officials take the internal standpoint and see themselves as bound to follow it. See H.L.A. HART, *THE CONCEPT OF LAW* 111 (1962) (connecting the existence of a legal system with state officials acceptance of its binding authority).

109. See Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 955–56 (2001) (describing threats to federalism and the response of state officials); Herbert Wechsler, *The Political Safeguards of*

loyalties sooner or later does have an effect in how officials discharge their duties.

The impact on American federalism of a lack of citizens' attachment to their states explains partly the reluctance to fully embrace this line of reasoning. Another, and arguably weightier, reason has to do with the constitutional text and the existing constitutional structure. At that level, the issue is one of reconciling the lack of state identity with the existing institutional framework. Some of the most innovative works in American federalism over the past few decades have sought to answer that challenge. Robert Schapiro, for example, has argued for a "polyphonic federalism" that protects a plurality of sources of authority and facilitates their interaction.<sup>110</sup> Since states are evidently one of these centers of authority, he has concluded that the Constitution should protect their "institutional integrity and . . . the continued functioning of each state's political apparatus."<sup>111</sup> Implicit in this position is a realignment of the idea of state identity with a different set of attachments. Without denying the reality of political polarization, increased cultural homogenization sets off a search for other—"civic identities"<sup>112</sup>—to ground citizens' attachments. These identities would be looser, more flexible, and indeed contingent but could nevertheless work as the functional equivalent of unavailable, and perhaps undesirable, deeper forms of state attachments of the kind no longer available in the American republic.<sup>113</sup>

These new forms of identity would be "critical political commitments."<sup>114</sup> Such commitments could, of course, be interpreted from the normative prism as different and localized interpretations of values that the entire nation shares.<sup>115</sup> But these forms of political attachments can be both thinner and equally consequential for the

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*Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543–58 (1954) (identifying several safeguards of federalism dependant upon actions of state officials).

110. SCHAPIRO, *supra* note 104, at 92.

111. *Id.* at 96.

112. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2221 (1998) [hereinafter Jackson, *Federalism*].

113. See Daniel Rodriguez, *State Constitutional Failure*, 2011 U. Ill. L. Rev. 1243, 1260 (2011) (common agendas and objectives tie together citizens of a state).

114. See Ernest Young, *What Does It Take to Make a Federal System? On Constitutional Entrenchment, Separate Spheres, and Identity*, 45 TULSA L. REV. 831, 843 (2011) (arguing that state identity can rest on "critical political commitments").

115. See Paul W. Kahn, *Commentary, Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1166 (1993) (highlighting the similarities between disparate states). In this sense, the states would offer different conceptions of the unifying national concepts. For the distinction between concept and conception, see generally RONALD DWORKIN, *LAW'S EMPIRE* (1998).

overall constitutional structure.<sup>116</sup> In an earlier piece that anticipated subsequent developments, Vicki Jackson argued that using thick identities as the only acceptance grounding citizens' state loyalty, and consequently dismissing federalism on that basis, "ignores the degree to which the political structures of state and local governments provide organizing points for the development and maintenance of political opposition to the national government."<sup>117</sup> The most representative recent work in this direction is Jessica Bulman-Pozen's, who disconnects state identity from cultural attachment but connects it with ideological partisanship, whose effects run sufficiently deep as to enter the territory of identity.<sup>118</sup> Specifically, Bulman-Pozen argues that "our sense of what it means to be an American, our national identity, is mediated by partisanship,"<sup>119</sup> citing further the work of social psychologists that "Red and Blue have become distinct ways of being "American."<sup>120</sup> Using "more fluid and contingent forms of state identity," she finds that "partisanship emerges as a key variable, a reason for individuals to channel loyalty and affiliation toward states rather than toward the nation alone."<sup>121</sup>

### B. *The Conservative Revival*

Recent work, from both conservative and progressive quarters, has started to shift the focus back on state identity. In a recent paper, Ernest Young sought to offer the first comprehensive assessment of the distinctiveness of American states from one another and explore the attachments of American citizens to their states.<sup>122</sup> Young probes the empirical claim that the latter are lacking and finds evidence of "the states' geographic, demographic, and policy diversity, states' impact on political preferences, relative trust in state and federal institutions, state's distinct historical narratives, and the impact of individual mobility among the states."<sup>123</sup> His conclusion, that reports of the death of state identity are greatly exaggerated, is particularly important in

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116. See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 769 (1995) ("[N]ationwide crosscutting cleavages make American federalism stable because they give it a Madisonian plurality of interest groups, no one of which is likely to terrorize the others on a permanent basis.").

117. Jackson, *Federalism*, *supra* note 112, at 2218 n.177.

118. Bulman-Pozen, *Partisan Federalism*, *supra* note 1, at 1114.

119. *Id.*

120. Abraham M. Rutchick & Collette P. Eccleston, *Ironic Effects of Invoking Common Ingroup Identity*, 32 BASIC & APPLIED SOC. PSYCHOL. 109, 111 (2010), *cited in* Bulman-Pozen, *Partisan Federalism*, *supra* note 1, at 1114.

121. Bulman-Pozen, *Partisan Federalism*, *supra* note 1, at 1108–9.

122. Young, *The Volk of New Jersey?*, *supra* note 6.

123. *Id.* at i.

the larger context of Young's analysis of federalism.<sup>124</sup> It was a mistake, he argues by looking at the European experience, to channel the interpretative resources of American federalism toward the scope of regulatory jurisdiction.<sup>125</sup> From the early Republic through the *Lochner*-era and even during the Rehnquist federalist revival, there had never been consistent or particularly effective constitutional constraints on the scope of congressional regulation and thus on the powers of the national government.<sup>126</sup> The reference to Europe is important in this context because, as later shown in this Article, European federalism recognizes relatively broad jurisdiction for the central, or supranational, institutions without, however, making federalism any less meaningful. The explanation, in Young's view, is a system of representation in supranational institutions that limits the EU's capacity to make decisions independently of its member states, limits the financial resources available to the supranational authorities,<sup>127</sup> and puts member states in charge of implementing European law, subject to some degree of supranational oversight. These are structural safeguards whose implementation follows the logic of political engagement. That political-pragmatic "would" should be the focus of federalism studies rather than the jurisdictional "could" that assumes the national government will go as far as its formal legal powers will allow it.<sup>128</sup>

It is in this larger context that, Young argues, scholars of American federalism should turn their attention to identity.<sup>129</sup> His discussion follows the question of identification.<sup>130</sup> Many Europeans consider themselves Italian, Spaniards, or Poles first, and only after that Europeans.<sup>131</sup> By contrast, it is assumed that Americans think of themselves first as such only in subsidiary, and not consistently, as Vermonters, Californians, or North Carolinians.<sup>132</sup> But, Young argues, the reality might be more complex.<sup>133</sup> There is evidence of polarization and fragmentation across the American political landscape, which

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124. *See id.* at 123.

125. *See id.* at 25.

126. Young, *What Can Europe Tell Us*, *supra* note 2, at 1121.

127. *Id.* at 1118 (arguing that "EU revenue comes predominantly from three sources: duties on imports, collected by the Member States and transferred to the EU; a share of the value-added tax collected by the Member States; and a levy on the gross national income of each Member State capped at slightly under 1.3 percent.").

128. *See generally* Ernest A. Young, *The Constitution Outside the Constitution*, 177 *YALE L.J.* 408 (2007); Ernest A. Young, *Federalism as a Constitutional Principle*, 83 *U. CIN. L. REV.* 1057 (2015).

129. Young, *What Can Europe Tell Us*, *supra* note 2.

130. *See id.*

131. *See id.* at 1124.

132. *See id.*

133. *See id.*

impacts issues of state identity.<sup>134</sup> Moreover, issues of identity are not preinstitutional, but rather the outcome of institutional structures.<sup>135</sup> Put differently, it is remarkable that citizens' attachment to their states has survived *in any degree* the homogenization under an institutional structure that "one nation" doctrines of federalism have imposed as orthodoxy throughout the twentieth century.<sup>136</sup> But when that institutional framework is loosened, and more authority is recognized to states, the degree of citizens' attachment to their states will grow deeper.<sup>137</sup> The political energy that such attachment would unleash is, in Young's view, part of the universe of political possibility and doctrinal opportunity that renewed attention to the question of state identity can bring to the fore.<sup>138</sup>

### C. *The Progressive Revival*

The rediscovery of states is not exclusively a conservative project. Past are the days of civil-rights federalism when the project of political emancipation went hand in hand with a defense of central authority.<sup>139</sup> Under today's version of Federalism 3.0, as Gerken calls it, the boundaries between state and federal has become much more porous and the interplay between the two levels of government reflects the complexity of the regulatory and discursive realities of contemporary society.<sup>140</sup> Under this new logic, devolution to states does not promote state-centered ends and centralization promotes nationalist ones, as the sovereign-centered, old interpretation of federalism assumed. Rather than sites where "groups can shield themselves from national policy, national politics, or national norms," states are "the sites where we battle over—and forge—national policy, national politics, and

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134. *See id.*

135. *See id.* at 1111 (arguing that scholars need to look to institutions for an understanding of identity).

136. *See id.* at 1115–16 (describing the effects of federalism doctrines on legal culture).

137. *See id.* at 1138–39 ("it is not hard to imagine . . . a de-escalation by returning some of these divisive issues to jurisdictions where they can be resolved").

138. *Id.* at 1124–25 ("The basic question whether Americans identify with their states breaks down into a host of more specific issues, all of which deserve further investigation. Do the states represent distinct political communities that meaningfully affect political beliefs? To what extent do personal attachments to states affect political behavior? And do attachments to states trade off with, or complement, loyalty to the nation? Few American legal scholars have taken these questions seriously, but they go to the basic sociological underpinnings of federalism. The European literature has long had a much better handle on these questions and it is time Americans paid more attention to them.").

139. *See* WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964) ("[I]f . . . one disapproves of racism, one should disapprove of federalism.").

140. Gerken, *Federalism 3.0*, *supra* note 44, at 1696.

national norms.”<sup>141</sup> An entire school of nationalism in federalism studies seeks to show how devolution can serve nationalist, rather than state-centered, aims.<sup>142</sup> The implications are twofold. First, since states return to the fore, the question of what underpins their appeal and ultimate authority is also making a comeback. The answer need not submit to the logic of sovereignty, which, by contrast to conservative federalists,<sup>143</sup> the school of progressive federalism considers to be *passé*.<sup>144</sup> Some of the scholars in the later camp, such as Dean Gerken, shy away from the language of identity.<sup>145</sup> Other scholars, from the younger generation, have proven to be somewhat more comfortable with a fluid and contingent approach to identity.<sup>146</sup> It is certainly too early to draw definitive conclusions as to whether identity will be a normative medium for progressive federalism. Such conclusions must await the political challenges that await progressivism in the Trump, and post-Trump, age.

Here, this Article comes upon the second implication of the (re)turn to states. If states participate in the making of national policy and norms, then one should expect to see them use both their political and legal powers to influence the landscape of federal law.<sup>147</sup> And, indeed, as Jessica Bulman-Pozen has argued, states have been involved in the separation of powers at the federal level by seeking “to defend federal legislative prerogatives against the federal executive

141. *Id.*

142. *Id.* at 1722–23 (“Neither the federal government nor the states preside over their own empire; instead, they regulate shoulder-to-shoulder in a tight regulatory space, sometimes leaning on one another and sometimes deliberately jostling each other. So, too, states are no longer enclaves that facilitate retreats from national norms. Instead, they are the sites where those norms are forged. And while local and state structures were once condemned solely as tools for blocking racial change, they also provide crucial structures for seeking change.”). See generally Gerken, *Federalism as the New Nationalism*, *supra* note 43; Gerken, *Time for a Détente?*, *supra* note 43.

143. Young assumes that the federalism revival returns the focus on state “sovereignty”. See Young, *The Volk of New Jersey?*, *supra* note 6, at 2 (arguing that “ever since the Rehnquist Court began reviving the notion of constitutional limitations on national power in the early 1990s, American legal scholars have rejoined the age-old debate on the relationship between national and state “sovereignty.”). See also Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 233–34 (2005) (discussing ideologies of federalism).

144. See Gerken, *Federalism 3.0*, *supra* note 44, at 1698 (associating the idea that states and the national government belong to different spheres of authority to pre-New Deal Federalism 1.0).

145. Gerken, *The Supreme Court, 2009 Term*, *supra* note 103, at 16–17 (qualifying as “odd” the discussion whether Americans identify with their states).

146. See, e.g., Bulman-Pozen, *Partisan Federalism*, *supra* note 1, at 1108–9 (criticizing a rigid approach to understanding identity).

147. See Heather Gerken & Joshua Revesz, *Progressive Federalism: A User’s Guide*, DEMOCRACY JOURNAL (2017), <https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/> [https://perma.cc/SR7P-CAZ9] (archived Dec. 3, 2019) (suggesting progressive federalism as an avenue for shaping national policies).

branch.”<sup>148</sup> This is the key for interpreting recent litigation that states introduced against the Trump administration. In the litigation to enjoin the first travel ban,<sup>149</sup> Washington, Minnesota, and Hawaii argued that President Trump violated the Immigration and Nationality Act, a federal statute, and that they—the states—were defending federal statutes against the executive.<sup>150</sup> These are not new developments, and Professor Bulman-Pozen documents a similar dynamic at work, although with different ideological alignments, in litigation that states brought against the Obama and George W. Bush administrations.<sup>151</sup> However, given the ideological contours of the Trump administration and the ever-deeper polarization of American politics, it is possible that the new wave of litigation will take these litigation efforts to another level. And, at that level, the authority of states might call for foundations of the kind that the argument from identity can provide. Particularly noteworthy, however, is the role that the federal Constitution would play in the state identity. If advocates of Federalism 3.0 are correct, and states are sites of national norm making, interpreting, and implementing, then state identity might bypass the federal government to form a direct, Protestant interpretation of the national commitments.<sup>152</sup>

Because the (re)turn to states spans the ideological spectrum, one should not believe that the move is postideological. Instead, the path to the return is deeply steeped in political ideology on both the left and the right. It is just that both sides calculate what they stand to gain from using this rhetoric. One need not wait for time to tell which side, if any, is correct and who, if any, is miscalculating constitutional

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148. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 488 (2012) (showing that state administration of federal law affects the relative power of the executive and Congress).

149. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

150. Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and “The New Process Federalism”*, 105 CALIF. L. REV. 1739, 1741, nn.7–9 (2017). Similarly, in litigation over stripping funding from “sanctuary cities”, San Francisco argued that “[i]n directing that sanctuary jurisdictions are not eligible to receive federal funds, the Executive Order asserts legislative power that the Constitution vests exclusively in Congress.” *Id.* at 1741 nn.10–12.

151. *Id.* at 1742 (documenting suits brought by states seeking to invalidate, under the Take Care Clause, the Deferred Action for Parents of Americans and Lawful Permanent Residents program (“DAPA”), and against the Obama Administration’s Clean Power Plan, as well as states challenging the EPA’s failure under the George W. Bush Administration to regulate greenhouse gas emissions pursuant to congressional authorization (*Massachusetts v. EPA*, 549 U.S. 497 (2007)).

152. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 18–51 (1988) (distinguishing between Catholic constitutional interpretation, which requires the mediation of an authoritative interpreter such as the Supreme Court, and Protestant constitutional interpretation, where each subject can interpret the Constitution directly).

strategy. It is possible to turn to Europe, and with all due caution, learn from its own ongoing experiment with national identity.

#### IV. IDENTITY AS DOCTRINE: THE CASE OF EUROPEAN FEDERALISM

The move from political safeguard to constitutional doctrine gives identity a transformative effect on the institutional architecture and the discourse of federalism. In the European experience, identity has shown itself as a versatile, flexible and, under certain political circumstances, an effective means to undercut federal centralization. It has arguably played a role in the self-understanding of European's constitutional project as one informed by a certain set of values. It has also undoubtedly played a role in the national resistance to the constitutional and political project of European unification. First, this Part places the role of identity in the arc of European federalism. Secondly, this Part studies developments in the last decade after the constitutionalization of identity.

##### A. *The Origins of Identity*

It is helpful to start by providing the specific historical and jurisprudential contexts in which the function and significance of identity must be understood. Supranational centralization is an essential element of those contexts. Subpart A.1. presents the radicalism of the claims that European constitutionalism, through the doctrines of the Court of Justice, made on the legal orders of the member states. Subpart A.2. discusses the resistance of national legal orders to the supranational claims. While that resistance was initially far less significant than mainstream constitutional theory now sees it, it nevertheless provides the proper context for the arrival of identity on the postwar European legal scene. Subpart A.3. presents that arrival in the German legal system, which initially tied resistance to European federalism to a duty to protect human rights as part of the German constitutional identity. After human rights turned out to be too shaky a ground on which to rest that resistance, German constitutionalism brought out the big guns: at first, democracy in the *Maastricht* decision and, finally, identity in its pure form in the *Lisbon* decision.

##### 1. The Structure of European Federalism

The nature of the EU is often labeled as *sui generis*, which puts the EU in a category of its own—something less than a state but more

than an international organization.<sup>153</sup> This conclusion has less to do with the nature of the claims that European constitutionalism imposes on the legal orders of the member states, which suggests a hierarchical structure by and large typical of federations, than it is a statement of the overall success or political traction of those claims. The first step is to take stock of the claims themselves, made over the course of more than six decades by the Court of Justice of the European Union on behalf of the EU constitutive treaties. This Article presents the core of the process of “constitutionalization,”<sup>154</sup> and thus centralization, of the Treaty of Rome, as a package sufficiently weighty to explain why Pierre Pescatore characterized the process of European legal integration as one that “undermines categories of thought which have been settled for centuries, overturns deeply-rooted political ideologies and strikes at powerfully organized interests.”<sup>155</sup>

The ECJ interpreted the treaty to create a legal order distinct—or “autonomous,”<sup>156</sup> in the court’s language—from both domestic and international legal orders. By marked contrast to international law, the effect of the legal norms of this supranational legal order would be consistent across the national jurisdictions and subject to the ECJ’s interpretative authority. European norms of any rank—treaty or legislation—would by themselves be capable of conferring individual rights enforceable in national courts. Should conflicts arise between

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153. See, e.g., William Phelan, *What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime*, 14 INT’L STUD. REV. 367, 371 (2012).

154. See Eric Stein, *Lawyers, Judges and the Making of the Transnational Constitution*, 75 AM. J. INT’L L. 1, 24 (1981) (arguing that a constitutionalist framework explains the early decisions interpreting the Treaty of Rome); Joseph Weiler, *The Transformation of Europe* 100 YALE L.J. 2403, 2425–26 (1991) (describing the constitutional interpretations of the Treaty of Rome). For evaluation, see Morten Rasmussen, *Revolutionizing EU Law: A History of the Van Gend en Loos Judgment*, 12 INT’L J. CONST. L. 136, 140 (2014) (calling the constitutionalization of the Treaty a “decisive turning point in the history of the European Court of Justice and of EU law in general”). For a recent critique of the process of constitutionalization, see Peter Lindseth, *The Perils of As-If Constitutionalism*, 22 EUR. L.J. 696 (2018); Morten Rasmussen & Dorte Martinsen, *EU Constitutionalization Revisited: Redressing a Central Assumption in European Studies*, 25 EUR. L.J. 251 (2019). For a study of EU constitutionalization in the history of ideas, see Daniel Halberstam, *Joseph Weiler, Eric Stein, and the Transformation of Constitutional Law*, in *THE TRANSFORMATION OF EUROPE: TWENTY-FIVE YEARS ON* 219 (Miguel Maduro & Marlene Wind eds., 2017).

155. PIERRE PESCATORE, *THE LAW OF INTEGRATION* 4 (Christopher Dwyer trans., 1974). In the same spirit, Walter Hallstein, jurist and president of the European Commission, wrote in 1962 that the decisions of the European Court of Justice represented the “apex of the Community so far.” He deemed “the importance of the legal developments” as “the greatest thus far.” WALTER HALLSTEIN, *UNITED EUROPE* 35, 37 (1962).

156. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

European and domestic norms, the former would prevail.<sup>157</sup> As a jurisdictional implication of this priority rule, national judges, acting in their superseding authority as European courts,<sup>158</sup> could “set aside”<sup>159</sup> or disapply conflicting domestic norms even when—as was virtually always the case—they lacked such authority under their national constitutions.<sup>160</sup> Conversely, only the ECJ could invalidate European legislation.<sup>161</sup> Complex doctrines were built on these foundations, including jurisdictional rules regarding the obligation of national judges to refer questions up to the ECJ to the availability of effective national remedies for violations of EU law, the duty to make interim relief available, and the duty to guarantee the integrity of the EU process by raising *sua sponte* questions of European law.<sup>162</sup> Later, the ECJ would accept the corollary of this approach—that member states can be held liable in tort under EU law for failure to send preliminary references to Luxembourg.<sup>163</sup>

In one of its early foundational statements, the ECJ held that “[b]y contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.”<sup>164</sup> It has long been a matter of controversy how to understand the normative interface between the national and the supranational legal orders. In one view, European integration is best understood as a form of complex coordination.<sup>165</sup> Each legal order—national and supranational—exists alongside one another in heterarchical relations that European constitutional theory

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157. See, e.g., Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585, 599–600 (holding that certain Articles in the EEC Treaty do create individual rights which domestic courts are obligated to protect).

158. Case T-51/89 *Tetra Pak Rausing SA v. Comm’n*, 1990 E.C.R. II-309, II-364, ¶ 42 (“[W]hen applying [Community law], the national courts are acting as Community courts of general jurisdiction.”).

159. Case 106/77, *Italian Minister of Finance v. Simmenthal*, 1978 E.C.R. 629, 638.

160. Judicial review in many European legal systems is centralized, in the sense that only one constitutional court can review constitutional challenges to the validity of legislation. See generally VÍCTOR FERRERES COMELLA, *CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES* (2009).

161. Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] E.C.R. 4199.

162. See, e.g., Case C-213/89, *The Queen v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433, I-2473-74, ¶¶ 20–23 (explaining the duty to address issues of international law which are implicated).

163. Case C-224/01, *Köbler v. Austria*, 2003 E.C.R. I-10239, I-10331. For a fuller description of these doctrinal developments, see 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, 411 (2018).

164. Case 6/64, *Costa*, 1964 E.C.R. 585, 593.

165. See Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1, 4 (1993) (arguing that “the European Communities . . . constitute a legal order co-ordinate with that of the Member States.”).

has spent decades trying to theorize.<sup>166</sup> An alternative view sees European integration as a form of unification or fusion which, for all the complexity of the resulting legal order, nevertheless meets the criteria of vertical, hierarchical integration. Coordination is not excluded from this latter model but by itself it does not capture the originality and radicalism of European constitutionalism.

The radicalism of European constitutionalism stems from the closer alignment of the ECJ with the fusion or unification model of European integration. A compelling argument to that effect goes beyond the aim of this Article. It suffices for the present purpose to point to the core doctrines of autonomy and supremacy, which, in the court's jurisprudence, form the unitary foundations of European constitutionalism. Autonomy entails that courts may not tie the effect of European norms within their jurisdictions to municipal rules, including rules of constitutional rank, that determine the domestic effect of international legal norms. Irrespective of whether national legal orders are monist or dualist in regard to how the domestic legal orders relate to international law, the imperatives of systemic unity demand the centralization of decisions regarding the effect of EU norms to the supranational level. And once the decision to centralize is interpreted as deriving from the treaty itself, which is a source of law independent of the decisions of its signatories or of their legal order, the autonomy of the European legal order becomes immunized and secure.

The consolidation of the authority of European law has been a long process and remains ongoing. An important part of that process has been a defense of its legality, that is, of the claim to autonomy of the European legal order *qua* legal order. This explains, for instance, the recurrent and tantalizingly tautological deployment of the effectiveness rationale in the formative decisions of European constitutionalism.<sup>167</sup> Since effectiveness is a necessary, albeit hardly sufficient, condition of legality, concerns about the former are understandably heightened in legal orders that are at early stages of development. In the specifically European supranational context, effectiveness is a function of the uniformity of interpretation and implementation across domestic jurisdictions. The core idea is that the legal effect of European legal norms cannot depend on the different traditions and structures of municipal jurisdictions, or even more

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166. KLEMEN JAKLIČ, CONSTITUTIONAL PLURALISM IN THE EU 3 (2013) (describing constitutional pluralism as the dominant branch of European constitutional theory).

167. See *Costa*, 1964 E.C.R. at 594 (“[T]he law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question.”).

questionably, on the political interests *du jour*.<sup>168</sup> Centralization thus reflects the constitutional demands of a political project not guided by “the laws of expediency [but one that] should be built upon a more permanent and objective foundation.”<sup>169</sup>

## 2. Reciprocal Supremacy

The supremacy doctrine is central to the constitutional project of supranational centralization. Supremacy, according to the ECJ, is the normative implication of the autonomy of the European legal order.<sup>170</sup> From the “praetorian”<sup>171</sup> holding in *Costa* regarding, to the absolute

168. The ECJ held that “[t]he obligations undertaken under the treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.” *Id.* But, as far as international law is concerned, the issue has its own complexities. The Permanent Court of International Justice had held that municipal norms, including norms of constitutional rank, could not be invoked to bar or otherwise limit that effect of international law. *Polish Postal Service in Danzig*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11 (May 16). Expanding on this analysis, Derrick Wyatt argued a few decades ago that much of what the ECJ sought out to do in *Van Gend* could already be accomplished under international law. Derrick Wyatt, *New Legal Order, or Old?*, 7 EUR. L. REV. 147, 148 (1982); see also Bruno de Witte, *Retour à “Costa”: La primauté du droit communautaire à la lumière du droit international*, 20 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 425 (1984).

169. ANDRE M. DONNER, THE ROLE OF THE LAWYER IN EUROPEAN COMMUNITIES 59 (1968). This is not to deny that, conceptually speaking, coordination rationale can be sufficient to explain supranational centralization. In the case of European legal integration, such an account would envisage successive spill-over processes set and kept in motion by the need for ever more perfect coordination between municipal jurisdictions. But, as Donner suggests, that process would not rest on “permanent and objective foundation.” *Id.* Even aside from close association between the logic of coordination and international law, one insuperable difficulty of understanding integration as an ever-perfectible process of coordination is that, by itself such a process is aimless. What gives it direction is an understanding of its purpose, be that pacification, prosperity and/or the full axiological panoply of collective self-government: equality, liberty, and solidarity. For a study, see Dimitry Kochenov, *The Ought of Justice*, in EUROPE’S JUSTICE DEFICIT (Dimitry Kochenov et al. eds., 2015); Pierre Pescatore, *L’objectif de la Communauté Européenne comme principes d’interprétation dans la jurisprudence de la Cour de Justice*, in MISCELLANEA W.J. GANSHOF VAN DER MEERSCH 325–63 (2d ed. 1972).

170. Once the Luxembourg judges settled the difficult question of autonomy of the European legal order, and did so specifically on the grounds laid out in *Van Gend*, the extension to supremacy of European over municipal norms is a small conceptual, albeit not political, step. See Editorial, *For History’s Sake: On Costa v. ENEL, André Donner and the Eternal Secret of the Court of Justice’s Deliberations*, 10 EUR. CONST. L. REV. 191, 195 n.12 (2014) (relying on circumstantial evidence to argue that the *Costa* decision was unanimous, by contrast to *Van Gend*, which was decided by the narrowest of margins (four to three votes)).

171. See Philippe Manin, *The Nicolo Case of the Conseil d’Etat: French Constitutional Law and the Supreme Administrative Court’s Acceptance of the Primacy of Community Law over Subsequent National Statute Law*, 28 COMMON MKT. L. REV. 499, 511 (1991) (discussing Patrick Frydman’s *Nicolo* submission as Commissaire du Gouvernement in that case).

supremacy of EU law and the working out of its jurisdictional implications,<sup>172</sup> to its recent expansion in *Melloni* of the charter's primacy over national law,<sup>173</sup> the ECJ has been highly protective of its capacity to control the relation between national and European legal orders. The *Luxembourg* judges have reasserted and refined the supremacy of the EU Treaty and have drawn out its bold jurisdictional and institutional implications.<sup>174</sup>

How national apex courts have reacted to the ECJ's constitutionalization of the Treaty of Rome, and specifically to the supremacy holdings, is critical for understanding the origins of identity federalism in the EU. National courts are typically seen as resistant to the ECJ's claims, and often willing to offer counterclaims grounded in their own national legal orders.<sup>175</sup> The national challenge to the supremacy of European law and the primacy of its norms to those originating in domestic legal orders takes the form of a theoretical account about dual, or reciprocal, supremacy. The gist of this view is that, by virtue of the limited constitutional and institutional capacities of the EU, only the cooperation or acceptance of national constitutional guardians can give EU law "an impact on legal reality."<sup>176</sup> The "full

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172. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* 1978 E.C.R. 630, 644, ¶ 21 ("Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.")

173. E.C.J. Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 2013 E.C.R. 1 (holding that the primacy of the Treaty involves obligation on national courts to set aside national law even when European norm is not directly effective). For analysis, see Leonard F.M. Besselink, *The Parameters of Constitutional Conflict After Melloni*, 39 EUR. L. REV. 531 (2014).

174. In recent cases, the ECJ has found itself in a position to balance, and occasionally constrain, its supremacy claims as it comes into conflict with other fundamental principles such legal certainty. See E.C.J. Case C-409/06, *Winner Wetten v. Bürgermeisterin der Stadt Bergheim*, 2010 E.C.R. ¶ 67 (allowing national legislation to stand, exceptionally and for overriding considerations of legal certainty, grant a provisional suspension of the usual effect which EU law has on conflicting national law). On prevention of retroactivity given considerations of legal certainty, see E.C.J. Case C-25/14, *UNIS v. SNRT*, 2015 ¶51 (public procurement contracts can be executed even if violate EU law); res judicata (E.C.J. *Impresa Pizzarotti*, Case C-213/13, *Impresa Pizzarotti & C. SpA v. Comune di Bari*, EU:C:2014:2067, ¶¶ 58–59; see also E.C.J. Case C-379/15, *Association France Nature Environment v. Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie*, EU:C:2016:603 (July 28, 2016). In most of these cases, the ECJ mediated balancing between two principles with different pedigree—national and supranational—but is rather internal to EU law. See Katy Sowers, *Reconciling Primacy and Environmental Protection: Association France Nature Environment*, 54 COMMON MKT. L. REV. 1157, 1164 (2017).

175. The Polish Constitutional Tribunal has held that Polish law trumps EU law, and threatened to use the *ultra vires* doctrine in preserving the ability of the "Republic of Poland to continue functioning as a sovereign and democratic state." TK (Polish Constitutional Tribunal) May 11, 2005, Case 18/04, ¶ 11 (Pol.).

176. Bruno de Witte, *Direct Effect, Primacy and the Nature of the European Legal Order*, in THE EVOLUTION OF EU LAW 323, 346 (Gráinne de Búrca & Paul P. Craig eds.,

reception” of EU law thus “depends on its incorporation into the constitutional orders of the Member States and its affirmation by their supreme courts.”<sup>177</sup> While the ECJ and national apex courts both claim ultimate authority, neither claim by itself captures the nature of constitutional authority within the EU; only both perspectives, in tandem, do. The reception into national law of the ECJ’s supremacy doctrine, according to such a view, is not exogenous to the supremacy doctrine; rather, it becomes a constitutive part of the doctrine itself.<sup>178</sup> EU supremacy is “*necessarily* bi-dimensional”<sup>179</sup> in the sense that it is co-constituted by two perspectives, each originating from within legal orders that make mutually incompatible claims on one another. According to this account, the ECJ’s supremacy holdings stand neither higher nor lower but alongside and on an equal plane with the doctrines of national courts that incorporate—or not—the supranational doctrine into the constitutional orders of the several member states.<sup>180</sup>

The ensuing account is one of integration as coordination, not fusion.<sup>181</sup> Recent scholarship has attempted to back up this account with a historical narrative.<sup>182</sup> The assertiveness of the Court of Justice is portrayed here as an instance of judicial activism. Rather than the much-needed textual anchor for the court’s constitutional revolution, the Treaty of Rome is seen as a “fundamentally ambiguous”<sup>183</sup> text that

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2011) (“There is a second dimension to the [primacy] matter, which is decisive for determining whether the Court’s doctrines have an impact on legal reality: the attitude of national courts and other institutions.”). See also Weiler, *supra* note 35, at 13 (“[B]oth in fact and in law, ultimate authority still rests in national constitutional orders which sanction supremacy, define its parameters, and typically place limitations on it.”).

177. Joseph Weiler, *The Community System: the Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267, 275–76 (1982) [hereinafter Weiler, *The Community System*].

178. For a critical discussion, see Vlad Perju, *Against Bidimensional Supremacy in EU Constitutionalism* (2019) (unpublished manuscript) (on file with author).

179. Weiler, *The Community System*, *supra* note 177, at 275.

180. See also Neil MacCormick, *The Maastricht Urteil: Sovereignty Now*, 1 EUR. L.J. (1995) 259, 264 (commenting that the relations between the national and supranational legal orders does not have “any all-purpose superiority of one system over another.”).

181. See *id.* at 263–64 (“Once we have established this doctrine of the supremacy of Community law, however, the question inevitably to be posed is whether there is any need at all for an elaborate theory about interaction of distinct systems. If system X enjoys supremacy over system Y, why trouble to have a theory about separate systems, rather than a theory which acknowledges the fact that Y belongs to X as subsystem of it?”).

182. See, e.g., Antoine Vauchez, *The Transnational Politics of Judicialization*. Van Gend en Loos and the Making of EU Polity, 16 EUR. L.J. 1 (2010).

183. See Morten Rasmussen, *Revolutionizing European Law: A History of the Van Gend en Loos Judgment*, 12 INT’L J. CONST. L. 136, 145 (2014) [hereinafter Rasmussen, *Revolutionizing European Law*]. A useful study is Morten Rasmussen, *The Origins of a Legal Revolution—the Early History of the European Court of Justice*, 14 J. EUR.

could not offer the needed textual grounding for the court's constitutional revolution. The treaty was negotiated with due realpolitik alertness to the challenges of gaining ratification in national legislatures, in the aftermath of failures to expand the institutional architecture of the early European Coal and Steel Community in the direction of either a defense or of a full-blown political community.<sup>184</sup> Accordingly, the Treaty of Rome is said to have taken the supranational political construct away from the goal of unification and toward enhancing the role of states in the institutional architecture of the Common Market.<sup>185</sup> Its constitutionalization was the work of jurists—a “little group of entrepreneurs”<sup>186</sup>—that hijacked with impunity the political project of the six signatory states—France, Germany, Italy, and the Benelux countries—disregarding their intentions and departing from the letter and, importantly, the spirit of their agreed-upon text.<sup>187</sup> The act of hijacking itself is said to have been quite elaborate, with the grand decisions of the ECJ playing an important, if somewhat limited, role.<sup>188</sup> In one elaborate version of this account, the court's foundational decisions were “empty vessels”<sup>189</sup> that turned into grand political moments through complex processes of meaning-ascription staged and executed by a network of self-interested, European-minded jurists.<sup>190</sup>

The soundness of this criticism is open to debate. It seems at best an exaggeration to portray the Treaty of Rome as a fundamentally ambiguous step in the direction of integration. While it may be true that the treaty diluted compliance mechanisms by states with their community obligations that existed in the Treaty of Paris establishing

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INTEGRATION HIST. 77 (2008) [hereinafter Rasmussen, *The Origins of a Legal Revolution*].

184. *Id.*

185. Evidence for this claim is given in the form of the weakening of supranational institutions, especially the Commission and the Court of Justice, and the greater legislative powers, including the veto, given to states as represented in the Council of Ministers. See LEVINSON, *supra* note 152.

186. Antoine Vauchez, *Integration Through Law: Contribution to a Socio-history of EU Political Commonsense* 12 (Eur. Univ. Inst., Working Paper No. 10, 2008).

187. See, e.g., Anne Boerger-De Smedt, *Negotiating the Foundations of EU Law, 1950-1957: The Legal History of the Treaties of Paris and Rome*, 21 CONTEMP. EUR. HIST. 339, 340 (2012) (arguing that “a small number of politicians and jurists managed to insert the potential for constitutional practice into the treaties despite the conscious attempt by the majority of the governments not to establish a European constitutional order.”). In this context, it is worth remembering that, in the large majority of cases, subsequent treaties ratified the decisions of the court by incorporating them into the text of the revised treaties.

188. See generally Vauchez, *supra* note 186.

189. *Id.* at 9.

190. See Rasmussen, *Revolutionizing European Law*, *supra* note 183, at 137 (calling *Van Gend* “a focal point for a rich patchwork of constantly reproduced historical memory and myths used for ideological purposes”).

the European Coal and Steel Community,<sup>191</sup> it is also the case that, in important respects, Rome strengthened supranational institutions. Pointing to its much-analyzed preamble is sure to draw the ire of commentators who see such textualism as narrow, legalistic approaches, yet anyone with passing knowledge of treaty negotiation knows that such language is the outcome of protracted negotiation and ought not be dismissed as weightless pamphlets.<sup>192</sup> More substantively, the rejection of proposals to replace the ECJ with an *ad hoc* arbitration tribunal combined with the strengthening of the court's preliminary reference jurisdiction in the interpretation of norms were deeply consequential. The relatively open-ended delineation of competencies between states and the community enabled the commission to expand the jurisdiction of the community considerably.<sup>193</sup>

The trope about the hijacked treaty is similarly quite unconvincing. It is true that the received wisdom has long been that the court's bold early doctrines were developed in splendid isolation from public opinion.<sup>194</sup> The implication of that view is that only in such a setting, and hiding behind the cover of the highly technical nature of its cases that could never appeal to the larger public or even the informed if busy national politician, could the ECJ constitutionalize the Treaty of Rome. The day of reckoning would thus inevitably come,

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191. The infringement procedure, the main legal tool for securing compliance from states, was weakened because the ECJ could no longer levy fines. *Compare* Treaty Establishing the European Economic Community, art. 169–171, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome], *with* Treaty Establishing the European Coal and Steel Community, art. 44, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]. In addition, infringement proceedings started by the Commission were lengthened, a two-step process. Similarly, the Treaty limited standing for private litigants in the Court of Justice, which modified the institutional architecture of the ECSC. This was done by “by blurring the distinction between decisions directed towards a particular firm and general decisions and acts.” *See* Rasmussen, *The Origins of a Legal Revolution*, *supra* note 183, at 85. The relevant cases are Case 3/54, *Associazione Industrie Siderurgiche Italiane (ASSIDER) v. High Authority of the European Coal and Steel Community*, 1955 E.C.R. 63; Case 4/54, *Industrie Siderurgiche Associate (ISA) v. High Authority of the European Coal and Steel Community*, 1955 E.C.R. 91.

192. The oft-cited Preamble of the Treaty of Rome starts by “DETERMINED to lay the foundations of an ever-closer union among the peoples of Europe.” Treaty of Rome. For analysis, *see* Joseph Weiler, *Political and Legal Culture of European Integration: An Exploratory Essay*, 9 INT'L J. CONST. L. 678, 689 (2011).

193. The Court of Justice obliged, not striking down any piece of Community legislation as *ultra vires* for the first four decades of European integration. *See also* Tobacco Advertisement cases in the 1990s. For analysis, *see generally* Democracy and Constitutionalism in the European Union: Collected Essays (Federico Mancini ed., 2000).

194. *See* Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 1 (1981) (“Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure.”).

in this view, when the court's work would be brought into the light—and rejected. In reality, however, things were much more nuanced. European constitutional integration was hardly the pet project of a handful of sectarian jurists.<sup>195</sup> Connections between, on the one hand, the ECJ, and, on the other hand, wide networks of jurists across the continent prove that supranational constitutionalization did have roots in the legal traditions of the member states.<sup>196</sup> While actual litigation in Luxembourg was indeed the work of a number of repeat players, the doctrines and legal strategies were not alien to legal thought and the legal profession.<sup>197</sup>

While the conventional view of the early development of European constitutionalism needs revisiting, it nevertheless provides the context for understanding what one might call the dual structure of European constitutionalism. In addition to Luxembourg's holdings, that dual structure includes the resistance those doctrines supposedly encountered when they came into contact with national doctrines and national legal establishments.<sup>198</sup> The claims of EU supremacy met, in this account, with the counterclaims originating in the national legal orders. As Karen Alter sums up this view, "the ECJ can say whatever it wants, the real question is why anyone should heed it."<sup>199</sup> Thus, whatever domestic traction the supremacy claim might have within national legal systems, its explanation is not reducible to the ECJ's pronouncement. The sources of such traction must, rather, be sought in the reaction of national legal orders. And, from that national perspective, European supremacy has an additional, or second, dimension, "which is decisive for determining whether the Court's doctrines have an impact on legal reality: the attitude of national

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195. See, e.g., Alexandre Bernier, *Constructing and Legitimizing: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law*, 21 CONTEMP. EUR. HIST. 399 (2012).

196. For the particular—and not entirely surprising—case of the Netherlands, see Jieskje Hollander, *The Dutch Intellectual Debate on European Integration (1948–present). On Teachings and Life*, 17 J. EUR. INTEGRATION HIST. 197, 201 (2011) (describing "the choice between unifying Europe in a federation or remaining an order of nation states" as one "between life or death, or freedom and slavery").

197. For the role of Europeanization beyond the legal profession to social movements, see LISA CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 3 (2002). I study this phenomenon in the context of disability rights movement in Vlad Perju, *Impairment, Discrimination and the Legal Construction of Disability in the European Union and the United States*, 44 CORNELL INT'L L.J. 279 (2011).

198. For a study, see Perju, *Against Bidimensional Supremacy in EU Constitutionalism*, *supra* note 178.

199. Karen Alter, *The European Court's Political Power: the Emergence of an Authoritative International Court in the European Union*, 19 WEST EUR. POL. 458, 459 (1996).

courts and other institutions.”<sup>200</sup> The dual structure of European constitutionalism informs an account of reciprocal supremacy.

Focusing on the initial encounter, generations of EU scholars have answered that question by pointing out that resistance characterized the reactions of national legal orders through their apex courts.<sup>201</sup> A number of canonical judgments—*Semoules*,<sup>202</sup> *Solange I*,<sup>203</sup> *Cohn-Bendit*,<sup>204</sup> *contro-limiti*,<sup>205</sup> *Maastricht*,<sup>206</sup> *Lisbon*<sup>207</sup> or the *Polish Accession Judgment*<sup>208</sup>—have been offered as evidence of national resistance to the ECJ’s claim of absolute and unconditional supremacy of EU law. When member states recognized the primacy of EU law, they did it, with few exceptions,<sup>209</sup> by using their national constitutions rather than the EU doctrine as the basis for such limited recognition. Whether it was Article 11 of the Italian Constitution, the doctrine of parliamentary supremacy in the United Kingdom, Article 24(1) of the German Basic Law, Article 55 of the French Constitution, or Article 93 of the Spanish Constitution, acceptance of EU primacy rarely if ever

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200. de Witte, *supra* note 176, at 346; *see also* Weiler, *supra* note 35, at 13 (“both in fact and in law, ultimate authority still rests in national constitutional orders which sanction supremacy, define its parameters, and typically place limitations on it.”).

201. As Neil Walker correctly pointed out, there is wide agreement on the descriptive basis of constitutional pluralism. Yet agreement on those bases push the normative analysis in the direction of pluralism. *See* Neil Walker, *Constitutional Pluralism Revisited*, 22 EUR. L.J. 333, 346 n.46. For a challenge to that consensus, *see* Perju, *Against Bidimensional Supremacy in EU Constitutionalism*, *supra* note 178.

202. Conseil d’Etat, 1 Mar. 1968, *Syndicat Général de Fabricants de Semoules de France* (1970) CMLR 395 (Fr.).

203. German Federal Constitutional Court, May 29, 1974, *Solange I - Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, BVerfGE 37, 271 [1974]

204. Conseil d’Etat Dec. 22, 1978, *Case Ministre de l’intérieur c. Cohn-Bendit* (Fr.).

205. (Corte Cost.) (Constitutional Court) Dec. 18, 1973, *Judgment 183 Frontini v Ministero delle Finanze* (It.).

206. German Federal Constitutional Court, Oct. 12, 1993, *Maastricht*, BVerfGE 89, 155; German Federal Constitutional Court, Oct. 12, 1993, *Brunner v. European Union Treaty*, 1994 1 CMLR 57.

207. German Federal Constitutional Court, June 30, 2009, *Lisbon Treaty Constitutionality Case*, BVerfGE (2009).

208. TK (Polish Constitutional Tribunal) May 11, 2005, Case no. 18/04 (*Accession Treaty*).

209. For instance, of the original six member states, Luxembourg and the Netherlands seem to have acknowledged that authority on the same basis as the ECJ’s *Costa* jurisprudence. *See* George Thill, *La primauté et l’effet direct du droit communautaire dans la jurisprudence luxembourgeoise*, 6 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 978 (1990). For case law, *see* Cour de Cassation July 14, 1954; Conseil d’Etat Nov. 21, 1984, *Bellion et al. v. Minister for the Civil Service* (Fr.). For the Netherlands, *see* Alfred Kellermann, *Supremacy of Community law in the Netherlands*, 14 EUR. L. REV. 175 (1989). At the same time, the national constitutional text unsurprisingly played a role in Luxembourg and Netherlands. It was the text that enabled the courts to issue the decisions they did.

rested upon *Costa* itself.<sup>210</sup> Even after some of the original constitutional anchors metamorphosed into provisions specifically dealing with EU membership, national courts rejected absolute and unconditional supremacy in favor of a relative and conditional acceptance.<sup>211</sup> As a matter of EU doctrine, using international law to frame the national reception of the European legal order was in and of itself contrary to the ECJ's interpretation that the treaty is an independent and original source of law which forms a legal order that is autonomous from international law.<sup>212</sup> Thus, resting the authority of EU law on national constitutional text, rather than the EU Treaty, is interpreted as a rejection of *Costa's* claim to unconditional and absolute supremacy of supranational norms.

It goes beyond the scope of this Article to undergo a complete assessment of this conventional account of reciprocal supremacy.<sup>213</sup> This Article only suggests here that the view according to which national resistance was inevitable given the radical claims of European constitutionalism, is far from self-evident. In a different interpretation, the reception of EU law, including its supremacy claims, into national legal orders was far less resistant. Grounding acceptance on the national constitution, as opposed to EU doctrine, was far from unreasonable. Neither was, in fact, the analogy between European and international law. Not only should one expect national courts to refer to international law, which is technically correct since the Treaty of Rome was, after all, an international treaty, but one should also expect national judges to use the doctrines of the ECJ strategically, at least in legal systems where there existed long-simmering doctrinal debates about the place of international law.<sup>214</sup> It is perfectly understandable that national legal systems would use the closest available anchor to process the claims of the ECJ. This is true across jurisdictions. In Belgium, for example, where jurists contemplated a constitutional amendment to change an "exceptionally retrograde"<sup>215</sup> model that

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210. There are exceptions. One is Luxembourg. See Thill, *La primauté*, *supra* note 209. See also Cour de Cassation July 14, 1954; Conseil d'Etat Nov. 21, 1984, Bellion et al. v. Minister for the Civil Service. The second exception is the Netherlands. See Kellermann, *supra* note 209, at 177.

211. This is Germany. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12 1993, MAASTRICHT 89, 155 (Ger.).

212. I use international law in the general sense. For a suggestion that international law should rather be understood in the narrower sense of peremptory norms (*jus cogens*), and a schematic account of possible implications, see Henry G. Schermers, *The Scale in Balance: National Constitutional Courts v. The Court of Justice*, 27 COMMON MKT. L. REV. 97, 98 (1990).

213. See Perju, *Against Bidimensional Supremacy in EU Constitutionalism*, *supra* note 178.

214. See Manin, *supra* note 171, at 511.

215. See Case Note, *Conflicts between Treaties and Subsequently Enacted Statutes in Belgium: Etat Belge v. S.A. "Fromagerie Franco-Suisse Le Ski"*, 72 MICH. L. REV. 118,

allowed later-in-time legislation to trump international law, national courts used the opportunity of EU law to reverse that system and, while referring to the *Costa* rationale, grounded their holding in the “very nature of international treaty law.”<sup>216</sup> In France, positioning in relation to the EU became part of simmering conflicts between the two supreme courts, *Conseil d’Etat* and *Court de cassation*, on the “correct” interpretation of Article 55 of the French Constitution.<sup>217</sup> It revealed deep divisions on the question of the powers of the executive, legislative, and the judiciary in interpreting international treaties under the constitutional architecture of the French Fifth Republic.<sup>218</sup>

Unsurprisingly, it was not *Costa* itself as much as the national judges’ vision of their own role that shaped the terms of national reception, more so at the moment of first impact than later.<sup>219</sup> For, again as one would expect, the vision and doctrines of national apex courts evolved in time. When, two decades after it rejected the supremacy of EU law in the *Nicolo* judgment, the French supreme administrative court reversed that decision,<sup>220</sup> that reversal could be seen in no other way than as “a full-blown success for European integration through law.”<sup>221</sup> That reversal, like the earlier recognition

120 (1973) (illustrating the Belgian legal tradition of giving effect to subsequent national laws over earlier treaties in the case of conflicts between the two).

216. *See id.* (analyzing the Belgian judiciary’s establishment of treaty preeminence over national law).

217. 1958 CONST. 55; *see* CE Sect., Mar. 1, 1968, 62814, Rec. Lebon 149 (Fr.) (denying the supremacy of a treaty over a subsequent conflicting national law); *see also* Gerald L. Neuman, 45 CORNELL INT’L L.J. 257, 306 (noting that the Conseil d’Etat and the Cour de cassation disagreed over whether later statutes superseded earlier treaties).

218. *See* Cour de cassation [Cass.] [supreme court for judicial matters] crim., Oct. 27, 1970, Gaz. Pal. 1970, 90, 6–7 (Fr.) (advancing a more favorable stand than *Conseil d’Etat* towards European Law, even though again Article 55 of the constitution serves as the legal basis); *see also* Gerhard Bebr, *How Supreme is Community Law in the National Courts?*, 11 COMMON MKT. L. REV. 3, 8 (1974) (“Under the French legal system, only the executive may interpret public international treaties. Such an interpretation may already implicitly predetermine the solution of the conduct between an international treaty and a municipal law. This practice may not be particularly conducive for French courts to develop a judicial policy ensuring the supremacy of international treaties. This may in turn have some effect on the attitude of French courts towards Community Law”).

219. *See* Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585 (asserting the supremacy of European Economic Community law); *see generally* THE EUROPEAN COURT AND NATIONAL COURTS: DOCTRINE & JURISPRUDENCE (Anne-Marie Slaughter et al. eds., 1998).

220. The French *Conseil d’Etat* signaled it might reverse its stance as early as 1986, in *Smanor*, and followed through in 1990, *Nicolo*. *See* CE, Nov. 19, 1986, 41852 45416, Rec. Lebon; CE Ass., Oct. 20 1989, 108243, Rec. Lebon. The ground for acceptance of EU law is Art. 55 of French Constitution, not the reasoning of the ECJ about specificity of EU law. By contrast to 1975 decision of the French *Conseil Constitutionnel*, which based its decision on both Art. 55 and *Costa*. *See* Conseil Constitutionnel [CC] [Constitutional Court] Decision No. 74-54DC, Jan. 15, 1975, Rec. 19 (Fr.).

221. Jens Plötner, *Report on France*, in THE EUROPEAN COURT AND NATIONAL COURTS: DOCTRINE & JURISPRUDENCE, *supra* note 219, at 41, 48.

of EU authority in the constitutional context,<sup>222</sup> rested both on the provisions of the French constitution and on the acceptance of *Costa*, alongside the national constitution, at the basis of EU supremacy.<sup>223</sup> The available constitutional text, the nature of the ongoing doctrinal and jurisprudential debates, and, importantly, the sheer magnitude of the ECJ's claims and novelty of the situation into which they threw national courts—and at times even the ECJ itself<sup>224</sup>—provide an explanation for those references. It would be the height of formalism to abstract them entirely from their context and interpret them as a rejection of *Costa* and of the absolute supremacy of EU law.

This radical claim of European constitutionalism, on the one hand, and the complex counterreactions of national courts, some of them amplified *ex post*, on the other hand, provide the origins of identity federalism in the EU. For, as shown in the next subpart, identity provided from the beginning a purportedly principled ground and malleable cover for resisting European integration. Some of this resistance was, in the abstract, legitimate. National legal orders were concerned that supranational norms did not provide sufficient protections to either the constitutionalist (fundamental rights) or the democratic guarantees of their own domestic legal orders. Yet, identity became a useful cover behind which constitutional nationalism could hide itself until it could emerge in full view in prime time.

### B. Identity and Human Rights

The early history of identity federalism's entrance in European constitutionalism is German through and through.<sup>225</sup> It was in a decision from Karlsruhe that identity made its first—notably

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222. See Cour de cassation [Cass.] [supreme court for judicial matters] ch. mixte, May 24, 1975, Bull. civ., No. 4 (Fr.) (holding that a European Economic Community treaty had greater authority than a municipal law under Article 55 of the French Constitution).

223. In that case, Attorney-General Touffait asked the Court to hold EU supremacy on the basis of ECJ doctrine in *Costa*, not Article 55. The Court chose both Article 55 and *Costa*'s reasoning, and recast the conflict as internal to French law: as between legislatively implementing the international law, and maintaining the statutory norm. See Plötner, *supra* note 221, at 45.

224. In *Van Gend*, the ECJ referred to the European legal order as a new legal order “of international law.” The international law qualification was dropped in subsequent cases. See Case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 (establishing that domestic courts must recognize and enforce certain rights conferred by EU law).

225. See generally Polzin, *supra* note 65 (discussing the evolution of constitutional identity in Germany).

subdued—appearance.<sup>226</sup> In *Solange I* [1974],<sup>227</sup> the German Constitutional Court subscribed to the ECJ's view that the European legal order “forms an independent system of law flowing from an autonomous legal source.”<sup>228</sup> What it did reject was the ECJ's claim to the supremacy of EU law in *Costa*.<sup>229</sup> Specifically, the constitutional judges held that, when conflicts arise between European secondary legislation and the human rights provisions of the German Basic Law, national judges retained “the right to review the validity of the Community legislation—that is, to render it without effect within the jurisdiction it controls.”<sup>230</sup> The grounds for that right, and for the national resistance to *Costa*, were to be found in human rights.<sup>231</sup> The German court was concerned about the missing human rights guarantees at the European level equivalent to those afforded under the Basic Law.<sup>232</sup> If European law recognized the supremacy that *Costa* claims it has over national law, and if European law offers no protection to human rights,<sup>233</sup> the fundamental rights that the Basic Law recognizes to its subjects could conceivably be violated with impunity. The upshot is that it is not the European doctrine of supremacy, as articulated by the ECJ, that determines the effect of European legal norms in cases of their potential conflict with human rights norms, but rather the independent assessment of national courts, making their decisions on the basis of a feature—human rights—they deem essential for national and supranational legal orders alike.

*Solange I* presents the protection of human rights as an “inalienable, essential feature”<sup>234</sup> of the German constitutional order. Famously, the German Basic Law makes the right to dignity and the

226. For further discussion, see Vlad Perju, *On Uses and Misuses of Human Rights in European Constitutionalism*, in HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD OF DISORDER 263, 268–74 (Silja Voeneke & Gerald L. Neuman eds., 2018) [hereinafter Perju, *Uses and Misuses*].

227. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 *Solange I* 271 [hereinafter *Solange I*].

228. See *id.* (“[I]n agreement with the law developed by the European Court of Justice,” the Court writes, “Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source”); see also *Lütticke*, 31 BVerfGE 145 (June 9, 1971).

229. See [BVerfG] [Federal Constitutional Court], *Solange I*; see also Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585, 594.

230. See [BVerfG] [Federal Constitutional Court], *Solange I*. It should be noted that such pressure pre-dated *Solange I*. In a decision from 1966, the German Constitutional Court indicated it might have the right to review European legal norms. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 16, 1966, 22 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE]* 293 (298).

231. See [BVerfG] [Federal Constitutional Court], *Solange I*.

232. See *id.*

233. But see Perju, *Uses and Misuses*, *supra* note 226, at 274–80 (arguing that human rights are a fundamental part of the European legal order).

234. See [BVerfG] [Federal Constitutional Court], *Solange I*.

democratic nature of the state unamendable.<sup>235</sup> As the German judges put it, “[t]he part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law.”<sup>236</sup> That basic structure forms the basis of the “identity” of the Basic Law.<sup>237</sup> It thus remained incumbent upon the German Constitutional Court to protect the German constitutional order by mandating the acceptance of the claim of European supremacy in terms that were conditional on the preservation of its identity.

How do human rights dovetail into an identitarian paradigm? The relation certainly has its complexities. While constitutional identity develops in time, the passing of time changes identity. At the same time, however, identity is also that which cannot change (merely) through the passing of time. The German Constitutional Court holds, in this context, that fundamental rights represent an aspect of the German constitutional identity that cannot and *will* not be surrendered to the supranational level.<sup>238</sup> Joseph Weiler provides a theoretical account of this complex relation. Fundamental rights, in his view, are at the same time fundamental boundaries.<sup>239</sup> Boundaries here are a “metaphor for the principle of enumerated powers or limited competences which are designed to guarantee that in certain areas communities (rather than individuals) should be free to make their own social choices without interference from above.”<sup>240</sup> The EU is the “above,” the threat to aspects of identity through which communities distinguish themselves from others and, generally, from the outside world. Rights are, in Weiler’s account, “both a source of, and index for, cross-national differentiation and not only cross-national assimilation.”<sup>241</sup> They represent core values that are part of self-understanding—a community’s “particularized identity rooted in

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235. GRUNDGESETZ [GG] [BASIC LAW], Art. 1, 20, 79 Abs. 3, *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) [<https://perma.cc/SQ3G-XTM6>] (archived Oct. 27, 2019).

236. See [BVerfG] [Federal Constitutional Court], Solange I.

237. See *id.* at [43]. For an argument along similar lines, see Fabbrini & Sajó, *supra* note 11, at 463 (noting that German Constitutional Courts have limited the direct application of EU laws when they conflict with fundamental German constitutional principles).

238. GRUNDGESETZ [GG] [BASIC LAW], Art. 79 Abs. 3; see 37 BVerfGE 271.

239. See JOSEPH 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* 102, 106 (1999) (arguing that fundamental boundaries and fundamental rights are part of the same societal choice between promoting the fundamental right of the individual and the fundamental right of the government to act in the general interest).

240. *Id.* at 103–04.

241. *Id.* at 105.

history . . . and political culture.”<sup>242</sup> Rights are inherently fragile since they are the outcome of clashes of deeply felt values and normative projects at the national level. Since “[h]uman rights are almost invariably the expression of a compromise between competing social goods in the polity,”<sup>243</sup> the process of European integration should tread carefully so as not to interfere with those constitutional accomplishments that everyone with passing knowledge of modern history knows to be distressingly fragile.

*Solange I* relied on human rights to contain the vertical integration of German constitutional order into European federalism.<sup>244</sup> The practical effect of those limits was itself quite limited.<sup>245</sup> For the period of a little over a decade, until the German Constitutional Court became satisfied that the European legal order had developed protections of human rights that were comparable to those afforded under the Basic Law and reversed it,<sup>246</sup> *Solange I* was never applied as ground for nullifying the legal effect of European secondary legislation in Germany.<sup>247</sup> And it may well be that its limited practical role was part of the reason for the subsequent radicalization of German constitutional resistance to the project of European unification. After all, *Solange I* had acquiesced to the ECJ’s holding of the Treaty of Rome as an independent source of law.<sup>248</sup> Seen from the perspective of the search for effective tools to resist European integration, *Solange I* was in a sense only a half measure. Particularly effective opposition to European integration required taking the ECJ

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242. *Id.*

243. *See id.* at 106.

244. [BVerfG] [Federal Constitutional Court], *Solange I*.

245. At least so long as that effect is measured in application of the doctrine in subsequent case-law. More difficult to gauge is its impact on the landscape of European constitutionalism as a mere “law in the books.” The German Constitutional Court took credit in *Solange II* for this development at the European level, although its self-serving congratulatory mood should be viewed with skepticism. *See* G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175, 187 (1994) (“It would be an exaggeration to say that the European Court was bulldozed into protecting fundamental rights by rebellious national courts.”). It is also worth recalling that *Solange I* was met, both domestically and in Europe, with dismay and disparagement. *See* Hans Peter-Ipsen, *BVerfG versus EuGH re “Grundrechte”*, 10 EUROPARECHT 1 (1975) (arguing that *Solange I* was “wrong . . . fallacious, superfluous, and legally-politically mistaken . . . [and] groundless.”).

246. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 339.

247. For a watering-down of the doctrine, *see* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 25, 1979, 52 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 187.

248. *See* [BVerfG] [Federal Constitutional Court], *Solange I* (“[I]n agreement with the law developed by the European Court of Justice, [the German court] adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source.”).

seriously that autonomy and supremacy are the double helix of European constitutionalism—only to then reject them both.<sup>249</sup> Interestingly, for the purpose of this Article, the search for a more effective strategy did not require abandoning the role of identity. If anything, it meant bringing identity more prominently into the foreground of national constitutional resistance.

In the *Maastricht* decision, the German judges rejected the claim to autonomy of the European legal order and European constitutionalism wholesale.<sup>250</sup> The German court moved from human rights to democracy, and the related interpretation of limited, conferred powers from the member states to the EU, as the grounds of its resistance to supranational, European law. The German judges held that the imperative of democratic self-government, also an unamendable constitutional provision and implicitly part of German constitutional identity,<sup>251</sup> provided the necessary ground to dis-apply within Germany the EU laws that the national judges deemed to have been enacted *ultra vires*, that is, in violation of the principle of conferred powers.<sup>252</sup>

*Maastricht* theorizes explicitly and unabashedly the European legal order as a subset of the international legal order:

The Maastricht Treaty constitutes an agreement under international law establishing a compound of States of the Member States which is oriented towards further development. The inter-governmental community is dependent upon the Treaty continually being constantly revitalized by the Member States;

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249. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 155; BVerfG, 2 BvR 2134/92 & 2159/92, Oct. 12, 1993, [http://www.proyectos.cchs.csic.es/euroconstitution/library/Brunner\\_Sentence.pdf](http://www.proyectos.cchs.csic.es/euroconstitution/library/Brunner_Sentence.pdf) [<https://perma.cc/P5SY-YX7T>] (archived Oct. 27, 2019), translated in 1 C.M.L.R. 57, 58 (1994). As one scholar put it, the reduction of supranational commitments to the aims of international law was a “slap in the face of [Walter Hallstein’s] idea of legal community.” JO ERIC KHUSHAL MURKENS, FROM EMPIRE TO UNION 192 (2013) (quoting Ingolf Pernice, *BVerfG, EGMR, und die Rechtsgemeinschaft*, 23 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 705, 706 (2004) (Ger.)).

250. See 89 BVerfGE 155 (“The Maastricht Treaty constitutes an agreement under international law establishing a compound of States of the Member States which is oriented towards further development. The inter-governmental community is dependent upon the Treaty continually being constantly revitalized by the Member States; the fulfillment and development of the Treaty must ensue from the will of the contracting parties.”).

251. See ERNST-WOLFGANG BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, in CONSTITUTIONAL AND POLITICAL THEORY (Mirjam Künkler & Tine Stein eds., 2017).

252. *Id.*

the fulfillment and development of the Treaty must ensue from the will of the contracting parties.<sup>253</sup>

The Treaty of Maastricht is thus seen as establishing a community of states, whose identity is respected and autonomy guaranteed, as is the case in any international organization—“and not with membership in a single European State.”<sup>254</sup> The conclusion, replete with international lingo, is that “Germany is therefore maintaining its status as a sovereign State in its own right as well as the status of sovereign equality with other States in the sense of Art. 2, sub-para 1 of the UN Charter of 26 June, 1945.”<sup>255</sup> At the time of German reunification, as the Constitutional Court took it upon itself the task of replenishing the normative resources of the German state, German constitutionalism demanded that nation-states remain the controlling agents of European integration.<sup>256</sup>

In this brave (old) world, human rights are both insufficiently effective as the central medium for national resistance to European unification as well as too important a category to dismiss them outright. The task, then, is to repackage them. The starting point of the repackaging strategy is the depiction in both *Solange I* and *II* of human rights as an element of constitutional identity.<sup>257</sup> Interestingly, however, self-government itself is part of the identity package, following *Maastricht*'s depiction of a community that promises to itself to preserve a space for politics where decisions affecting the life of each member will be made collectively.<sup>258</sup> What, one might wonder, of the inherent normative tension between human rights, on the one hand,

253. See 89 BVerfGE 155; BVerfG, 2 BvR 2134/92 & 2159/92, Oct. 12, 1993, [http://www.proyectos.cchs.csic.es/euroconstitution/library/Brunner\\_Sentence.pdf](http://www.proyectos.cchs.csic.es/euroconstitution/library/Brunner_Sentence.pdf) [<https://perma.cc/P5SY-YX7T>] (archived Oct. 27, 2019). As one scholar put it, the reduction of supranational commitments to the aims of international law was “a slap in the face of [Walter Hallstein’s] idea of legal community.” See MURKENS, *supra* note 249, at 192.

254. See 89 BVerfGE 155, [16].

255. See *id.* at [21]. The court would continue along the same lines in its *Lisbon* judgment. Christian Calliess calls it “almost tragic” that, in adopting an international law perspective, “the court is adopting this restrictive democratic approach towards the very organization which—contrary to classic institutional organizations like the UN and WTO—actually has a parliament that is directly elected by its citizens and has far-reaching decision-making and control powers.” Christian Calliess, *The Future of the Eurozone and the Role of the German Federal Constitutional Court*, 31 Y.B. EUR. L. 402, 406 (2012).

256. See MURKENS, *supra* note 249, at 154 (arguing that the court’s use of meta-concepts such as identity, statehood or sovereignty can be explained as a show of force vis-à-vis the ECJ, caused by the failure to reconceptualize public law, especially “the constitutional relation with the European Union”).

257. See Perju, *Uses and Misuses*, *supra* note 226, at 283 (noting that both *Solange I* and *Solange II* rested on the German Constitution’s guarantee of a minimum standard of protection for fundamental human rights).

258. See *id.* at 290–91.

and democracy, on the other? If national constitutional identity is to be coherent, its component elements, including human rights and the commitment to self-government, must be made coherent.<sup>259</sup> This is not only a normative challenge but also, given the judgments of the German Constitutional Court, a doctrinal problem.

Doctrinally, one might expect a *Solange III* that sorts out the effect of democratic self-government on human rights, through the lens of constitutional identity. It is thus perhaps unsurprising that the *Solange III* label has been applied, among others, to the *Maastricht*<sup>260</sup> and *Lisbon* decisions,<sup>261</sup> as well as cases in the European Arrest Warrant saga.<sup>262</sup> So much has been included under that rubric that perhaps *Solange III* is best understood not so much as a case in waiting,<sup>263</sup> but rather as the name, and an appropriate one at that, of an entire age of German, and indeed European, constitutionalism.

### C. The Constitutionalization of Identity

The analysis of how identity became constitutional doctrine proceeds in a few steps. The first is a study of the “constitutional identity lock” in the German legal system under the *Lisbon* judgment (subpart B.1.).<sup>264</sup> The second is an analysis of the migration of identity across European legal orders, including the empowerment of courts and substantive difficulties that the adoption of doctrine of identity has created across national legal systems (subpart B.2.). Finally, subpart B.3. presents the crescendo from the early mention of identity in the judgment of the German Constitutional Court to the far less benign recent decision of the Hungarian Constitutional Court on “constitutional self-identity” that validated the Hungarian government’s refusal to apply EU regulations regarding the acceptance of asylum seekers.

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259. See Joseph Weiler et al., *European Democracy and Its Critique*, 18 WEST EUR. POL. 4, 34 (1995) (“Constitutionalism, despite its counter-majoritarian effect, is regarded as a complementary principle to majoritarianism rather than its negation.”).

260. See, e.g., Kevin D. Makowski, *Solange III: The German Federal Constitutional Court’s Decision on Accession to the Maastricht Treaty on European Union*, 16 U. PA. J. INT’L BUS. L. 155, 174 (2014).

261. See, e.g., Jacques Ziller, *The German Constitutional Court’s Friendliness towards European Law: On the Judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon*, 16 EUR. PUB. L. 53, 56 (2010) (noting that the Lisbon Treaty builds on the German Constitutional Court’s “well-known *solange* theory”).

262. See, e.g., 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, 550 (2016).

263. The possibility that *Solange III* is a case in waiting has occasionally surfaced in German constitutional scholarship. See MURKENS, *supra* note 249, at 165.

264. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 123 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 267.

## 1. Identity and Democracy

G. Federico Mancini, a former judge at the ECJ, wrote that “the closer the [European] Union moves towards statehood, the greater the resistance to the attainment of this goal becomes.”<sup>265</sup> Mancini captures accurately the historical moment at the end of the Cold War, when, just as the stars of history seemed aligned to further the project of European federalism,<sup>266</sup> the protection of national identity transitioned to the supranational level. The Treaty of Maastricht included a provision that “[t]he Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.”<sup>267</sup> The historical explanation for the Europeanization of the protection of national identity has to do with the tradeoff that the project of unification had to pay for significant integration in several policy fields. Specifically, the protection of national identity was one of a number—and certainly not the most significant—of concessions to Germany, which made the difficult and momentous step of giving up its national currency when entering the Eurozone.<sup>268</sup>

The national identity clause was revised in the Amsterdam Treaty, specifically by detaching identity from democracy. The new Article 6(3) provides that “[t]he Union shall respect the national identities of its Member States,” thus allowing for the possibility, and arguably inviting, an interpretation of identity that goes beyond self-government.<sup>269</sup> Enter, then, Article 4(2) of the Treaty on European Union, which provides that

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265. G. Federico Mancini, *Europe: The Case for Statehood*, 4 EUR. L.J. 29, 31 (1994).

266. No coincidence, then, to find at that time the intervention. See Tim Koopmans, *Federalism: The Wrong Debate*, 20 COMMON MKT. L. REV. 1047, 1050 (1992) (“For the future of the peace in the world, the important thing is probably not to abolish States or to replace old States by new States, but to devise levels of coordinate government.”).

267. Treaty on European Union, art. F, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Treaty of Maastricht].

268. By this I mean that it should be interpreted as a concession made to Germany. On the idea that guarantee of national identity was introduced to counterbalance the deeper integration in Maastricht, see Monica Claes, *National Identity: Trump Card or Up for Negotiation?*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION, *supra* note 13, at 109, 118; Theodore Konstadinides, *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, 198 (2012); Bogdandy & Schill, *supra* note 67, at 1435.

269. Article F(1) TEU of the Maastricht Treaty was later replaced by Article 6(3) TEU of the Amsterdam Treaty. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 1, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam] (“The Union shall respect the national identities of its Member States”). In response to the invitation to go beyond self-government, the preamble of the Charter of Fundamental Rights of the

[t]he Union shall respect the equality of Member States . . . as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.<sup>270</sup>

A few observers have interpreted the Lisbon provision as ratifying the case law of the German Constitutional Court on the resistance to European supremacy.<sup>271</sup> The protection of constitutional national identity has been called “a beacon of European constitutional pluralism”<sup>272</sup> and has been interpreted as “a strong re-affirmation of the non-federal structure of the European Union.”<sup>273</sup> Indeed, the German Constitutional Court wasted little time in using the identity provision to draw anew, and in a far more visible form than before, the contours of its national sovereignty. In the *Lisbon* decision, the German judges included a list of the domains of public policy that must remain within the full control of German citizens. The court held that particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state and (4), decisions of particular cultural importance, for example on family law, the school and education system, and on dealing with religious communities (5).<sup>274</sup>

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European Union reads: “national identities of the Member States and the organisation of their public authorities at national, regional and local levels.” Charter of Fundamental Rights of the European Union, 2010 O.J. (C 83) 389 [hereinafter Charter of Rights].

270. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 3a, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

271. See, e.g., Giuseppe Martinico, *What Lies Behind Article 4(2) TEU?*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION, *supra* note 13, at 93, 95 (arguing that the Lisbon Treaty incorporated principles from the German Constitutional Court’s *Solange* decisions).

272. See Bogdandy & Schill, *supra* note 67, at 1426 (the authors also argued that Art. 4(2) gave European expression to the *controlimiti* jurisprudence of the Italian and German Constitutional Court).

273. See also Leonard F. M. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 UTRECHT L. REV. 36, 48 (remarking that “the provision of Article 4(2) EU forms an important qualification of the rule on the primacy of EU law, and a modification of the case law under *Costa v. ENEL*.”).

274. BVerfG, 2 BvR 2728/13, Jan. 14, 2014, [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2014/01/rs20140114\\_2bvr272813en.pdf;jsessionid=3AEB8D478F68787F97EE1F66F47BA732.1\\_cid394?\\_\\_blob=publicationFile&v=1](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2014/01/rs20140114_2bvr272813en.pdf;jsessionid=3AEB8D478F68787F97EE1F66F47BA732.1_cid394?__blob=publicationFile&v=1) [https://perma.cc/BH88-H8SX] (archived on Oct. 27, 2019).

It did not take long for critics to berate this list as political, random, and basically unsupported by any account of the nature of the state.<sup>275</sup> Part of the problem is undoubtedly the court's own role in assuming exclusive jurisdiction over the protection, and implicitly the meaning, of national constitutional sovereignty, as "the task of the Federal Constitutional Court alone."<sup>276</sup> But when courts take on the task of defining the meaning of constitutional identity, they entrench the limits of identity, sovereignty, and supranational integration in ways that are almost impossible to overcome.<sup>277</sup>

Interestingly, the fundamental limitation, in the court's interpretation, is subsumed to the imperative of respective national identity as outlined in Article 79(3) of the Basic Law ("*unverfügbare Verfassungsidentität*").<sup>278</sup> The court had already interpreted that provision in its *Maastricht* decision as a ban on subsequent supranational transfers of sovereign powers that could erode the fundamentals of German democracy.<sup>279</sup> But in *Lisbon* it offers a more robust, and more protectionist approach. Specifically, it interprets the EU as an association of sovereign national states (a so-called *Staatenverbund*).<sup>280</sup> EU member states may transfer sovereign rights to the EU but they do not thereby remain depleted of sovereignty.<sup>281</sup> It follows, in this view, that whatever sovereignty supranational institutions can claim is derived, rather than autonomous.

The colonizing tendencies of the concept of identity are apparent in recent case law of German courts, where identity review has become the ground of resistance to European federalism that distills and integrates previous doctrines of resistance (human rights, *ultra vires*

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275. See, e.g., Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja zu Deutschland!"*, 10 GERMAN L.J. 1241 (2009).

276. BVerfG, 2 BvR 2728/13, Jan. 14, 2014, [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2014/01/rs20140114\\_2bvr272813en.pdf;jsessionid=3AEB8D478F68787F97EE1F66F47BA732.1\\_cid394?\\_\\_blob=publicationFile&v=1](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2014/01/rs20140114_2bvr272813en.pdf;jsessionid=3AEB8D478F68787F97EE1F66F47BA732.1_cid394?__blob=publicationFile&v=1) [<https://perma.cc/BH88-H8SX>] (archived on Oct. 27, 2019).

277. In France, by contrast, the task of ascribing meaning to identity has been taken up by scholars rather than courts. See Bertrand Mathieu, *Les rapports normatifs entre le droit communautaire et le droit national: Bilan et incertitudes relatifs aux évolutions récentes de la jurisprudence des juges constitutionnel et administratif français*, REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 675 (2007) (arguing that "[t]he principle of *laïcité*, the definition of the persons entitled to vote in French political elections, the prohibition to give specific rights to ethnic, linguistic and other minorities and the definition of the criteria for access to public functions" are part of constitutional identity). See generally Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420 (2013) (analyzing conflicts between constitutional courts and the EU).

278. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 123 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 267.

279. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 155.

280. See 123 BVerfGE 267.

281. *Id.*

review).<sup>282</sup> In a case involving the execution of a European arrest warrant, the judges bridged the identity and human rights review to hold that human dignity is part of constitutional identity and part of its human rights mandate.<sup>283</sup> Accordingly, identity is used to establish a separate national track for the protection of human rights whose activation does not depend, as the court had previously held,<sup>284</sup> on a structural deficiency of the protection of human rights at the supranational level. The national track is not subsidiary, and can thus be invoked, through the human dignity guarantee, by all rights holders.<sup>285</sup>

## 2. The Migration of Identity

The versatility, malleability, and effectiveness of identity review in German constitutional law explains its extraordinary appeal and fast migration across jurisdictions within the EU. German identity

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282. Both of the two preliminary references that the German Constitutional Court has ever sent to Luxembourg mention constitutional identity. In 2014, the German Constitutional Court sent a preliminary reference on whether the outright monetary transaction (OMT) mechanisms of the European Central Bank, which allowed the purchase of governments' bonds on the secondary market, exceeded the mandate of the ECB and violated the EU prohibition of monetary funding. BVerfG, 2 BvR 2728/13 et al., Feb. 7, 2014, [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2014/01/rs20140114\\_2bvr272813en.pdf;jsessionid=3AEB8D478F68787F97EE1F66F47BA732.1\\_cid394?\\_\\_blob=publicationFile&v=1](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2014/01/rs20140114_2bvr272813en.pdf;jsessionid=3AEB8D478F68787F97EE1F66F47BA732.1_cid394?__blob=publicationFile&v=1) [<https://perma.cc/XD3H-UZXZ>] (archived Oct. 27, 2019). The German court included in the preliminary reference language to the effect that it—Karlsruhe—has the right to decide whether the OMT decision “could violate the constitutional identity of the Basic Law if it created a mechanism which would amount to an assumption of liability for decisions of third parties which entail [budgetary] consequences that are difficult to calculate.” *Id.* at 102. In August 2017, the German Constitutional Court mentioned the German constitutional identity in a preliminary reference to Luxembourg on whether the legality of the European Central Bank's public sector purchase program. BVerfG, 2 BvR 859/15 et al., Aug. 15, 2017, [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2017/07/rs20170718\\_2bvr085915en.pdf?\\_\\_blob=publicationFile&v=1](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2017/07/rs20170718_2bvr085915en.pdf?__blob=publicationFile&v=1) [<https://perma.cc/CCC3-SD76>] (archived Oct. 27, 2019). For the ECJ's response, see E.C.J. Case C-493/17, Weiss, <http://curia.europa.eu/juris/document/document.jsf;jsessionid=8A44291A7920BE6F2D041528FB26AE18?text=&docid=208741&pageIndex=0&doclang=en&mode=lst&dir=&oc c=first&part=1&cid=7848713> [<https://perma.cc/T3Y9-WLT5>] (archived Oct. 27, 2019) (holding that the challenged program is compatible with EU law).

283. BVerfG, 2 BvR 2735/14, Dec. 15, 2015, [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2015/12/rs20151215\\_2bvr273514en.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2015/12/rs20151215_2bvr273514en.pdf?__blob=publicationFile&v=4) [<https://perma.cc/B56H-MWSR>] (archived Oct. 27, 2019).

284. BVerfG, 1 BvF 1/05, ¶ 47, Mar. 13, 2007, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/03/fs20070313\\_1bvf000105en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/03/fs20070313_1bvf000105en.html) [<https://perma.cc/LUY6-ZAUS>] (archived Oct. 27, 2019).

285. For analysis, see Julian Nowag, *EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix?*, 53 COMMON MKT. L. REV. 1441, 1450–51 (2017) (noting that the German Constitutional Court has required human dignity compliance under national law, “no matter in what way EU law develops”).

review has become a model for other constitutional courts.<sup>286</sup> The doctrine has traveled from the United Kingdom, where the Supreme Court held that incorporation into national law of EU legislation cannot be intended to abrogate rule of law principles in the constitution or common law,<sup>287</sup> to France, where the *Conseil constitutionnel* held that transposition of EU legislation should not violate a rule or principle that was inherent in the constitutional identity of France.<sup>288</sup> Even the Constitutional Court of Belgium, which has been one of the most obedient apex courts, has found constitutional identity irresistible.<sup>289</sup> Moving toward the new member states, the Slovak Constitutional Court held that the Constitutional Court has the power

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286. Kriszta Kovács, *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts*, 18 GERMAN L.J. 1703, 1705 (2017) (“[T]he German Federal Constitutional Court served as a role model for V4 [the Visegrád Group: the Czech Republic, Hungary, Poland and Slovakia] courts to empower themselves to exercise identity review”). See also Ágoston Mohay & Norbert Tóth, *Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law*, 111 AM. J. INT’L L. 468, 472 (2017) (arguing that “[i]t is particularly interesting to note that, in reaching its decision, the [Hungarian] Constitutional Court expressly referred to and summarized the most relevant case law of other EU member states’ constitutional courts, thus emphasizing the importance of judicial dialogue between those courts themselves and with the CJEU. In this connection, it seems that the Constitutional Court views the German Federal Constitutional Court (the *Bundesverfassungsgericht*) as its greatest influence. In and of itself, that is not problematic, but the Court’s approach appears somewhat oversimplified (a ‘cut-and-paste’ affair) that failed to provide a deeper dogmatic analysis of why the Hungarian and German constitutional systems do or should share the same constitutional core or follow the same avenues of control”). It is equally interesting, however, how the German Constitutional Court itself relied on foreign law to establish the legitimacy of its identity jurisprudence. See BVerfG, 2 BvE 2/08, ¶ 47, June 30, 2009, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630\\_2bve000208en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html) [<https://perma.cc/FVE5-JU33>] (archived Oct. 26, 2019) (enumerating a half dozen jurisdictions that share the Federal Constitutional Court’s view that the precedence (of application) of European Union law does not apply unrestrictedly, but that it is restricted by national (constitutional) law and specifically by provisions such as “constitutional identity and to limit the transfer of sovereign powers to the European Union”).

287. See *R v. Sec’y of State for Transp.* [2014] UKSC 3, [111] (appeal taken from Eng.) (advancing the argument that a Court of Justice order should not be construed in a way that questions “the identity of the national constitutional order”).

288. See *Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2006–540DC*, July 27, 2006, J.O. du 3 août 2006, 11541 (Fr.) (“The transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto.”); *Conseil constitutionnel [CC] [Constitutional Council] decision No. 2011–631DC*, June 9, 2011, J.O. du 17 juin 2011, 10306 (Fr.) (refusing to review a domestic law’s compatibility with EU directives).

289. Philippe Gérard & Willem Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse*, 13 EUR. CONST. L. REV. 182, 186–88 (2017) (analyzing the Belgian Constitutional Court’s non-binding opinion that it has the power to review legislatively approved treaties or the implementation of those treaties to ensure they comport with the Belgian constitution).

to review EU law in order to protect Slovak constitutional identity<sup>290</sup> and the Croatian legal establishment is similarly seized with these identity matters.<sup>291</sup>

Particularly revealing is the *Taricco* case of the Italian Constitutional Court.<sup>292</sup> In that case, the Italian court, which has a long history of tensions with the ECJ,<sup>293</sup> used the concept of identity for the first time. At issue in this case was the application of the ECJ's previous preliminary reference, demanding that Italian judges disapply national statutes of limitations rules that would undercut domestic prosecution of tax crimes against the EU.<sup>294</sup> Specifically, the question was whether the ECJ's answer must be applied even when the effect of its application would undermine the principle of legality in criminal law, which is a fundamental principle of the Italian Constitution.<sup>295</sup> The ECJ took issue with the doctrinal premise of the question, and pointed out that the application of the principle of legality in this case would not clash with the principle of retroactivity in criminal law, because legality does not apply to a procedural matter, such as the statute of limitations.<sup>296</sup> When the case returned to the Italian Constitutional Court, the court relied on the concept of identity although not quite in the manner that the constitutional nationalists would have liked.<sup>297</sup> The court drew connections between constitutional identity and constitutional traditions and pointed out

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290. Ústavný súd Slovenskej republiky [Constitutional Court of Slovakia] Apr. 6, 2011, Decision No. II. ÚS 501/2010.

291. See Branko Smerdel, *In Quest of a Doctrine: Croatian Constitutional Identity in the European Union*, 64 ZBORNIK PFZ 513, 518 (2014) (asserting the importance of a national constitutional identity in the context of EU integration).

292. See Order, Nov. 23, 2016, n.24, G.U. Feb. 1, 2017 (It.) (declaring that the ECJ's rule in *Taricco* violated the Italian Constitution's prohibition on retroactive application of criminal statutes).

293. In *Frontini*, the Italian Constitutional Court held that the EU must respect the "fundamental principles of our constitutional order." Corte Costituzionale (Corte Cost.) (Constitutional Court), 27 Dicembre 1973, n.183, Foro it. 1974, I, 97, 314–29, translated in 2 COMMON MKT. L. REV. 372 (1974); see Corte Cost., 8 giugno 1984, n.170, 29 Giur. Cost. I 1098, translated in 21 COMMON MKT. L. REV. 756, 762–63 (1984) (acknowledging the supremacy of European Community rules with direct effect over national legislation).

294. See Case C-105/14, *Taricco & Others*, 2015 <http://curia.europa.eu/juris/document/document.jsf?docid=164056&mode=req&pageInd ex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=7561101> [https://perma.cc/Z3T8-LVBB] (archived Oct. 25, 2019) (requiring Italian courts to disapply criminal law provisions when certain conditions are met).

295. Art. 25 Costituzione [Cost.] (It.) ("No case may be removed from the court seized with it as established by law. No punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person's liberty save for as provided by law.")

296. For analysis, see Fabbrini & Pollicino, *supra* note 11, at 11–14 (discussing the procedural history of the *Taricco* case).

297. See Order, Nov. 23, 2016, n.24, G.U. Feb. 1, 2017 (It.) (emphasizing the importance of both national and European constitutional traditions).

the pluralism inherent in the constitutional traditions.<sup>298</sup> This indicates an avenue open in Europe, although not so much in the United States, where discretion in the interpretation of identity is limited by the appeal to tradition.<sup>299</sup>

If national constitutional identity is not tied to a concept such as tradition, the task of judicial definition is even more fraught with risk. Constitutional courts have often struggled to answer this question without losing face. The elements that national courts have subsumed under the rubric of identity are oftentimes banal and common. They include elements such as the “basic values and principles [of the constitution],”<sup>300</sup> “inalienable human rights,”<sup>301</sup> or “the essential attributes of democracy or the rule of law.”<sup>302</sup> Somewhat less abstractly, courts have referred to the principle of certainty,<sup>303</sup> the general principles of nondiscrimination, or even the obligation to give reasons.<sup>304</sup> The difficulty, however, is that all these principles characterize both the European and the municipal (*all* the municipal legal orders<sup>305</sup>), so that, to the extent that identity includes an element of differentiation, that work could be done only at the interpretative level. And, as it is often the case in law, interpretation becomes less a matter of substance than structure—specifically, a claim over which specific interpretation has allocated the power to issue authoritative statements about the meaning of a particular principle.<sup>306</sup> This is interpretation as turf.<sup>307</sup>

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298. *See id.* (asserting that Member States may adopt a particular understanding of European constitutional traditions).

299. For an early argument in favor of connecting identity with tradition, *see* Wojciech Sadurski, *European Constitutional Identity?* 7–21 (Eur. Univ. Inst., Working Paper No. 33, 2006).

300. *See* S.T.C., Dec. 13, 2004 (B.O.E., No. 3, 5) (Spain) (declaring that some provisions of the Constitution of Spain place limits on the applicability of European law).

301. *See* Fabbrini & Pollicino, *supra* note 11, at 3 (“Italy epitomizes the case of a founding EU member state where the supreme institutional actors have never systematically identified a core set of fundamental elements or values functionally designed to protect the identity of the polity against supranational interference.”).

302. *See* Nález Ústavního soudu ze dne 03.05.2006 (ÚS) [Judgment of the Constitutional Court of May 3, 2006], sp.zn Pl. ÚS 66/04.

303. Bogdandy & Schill, *supra* note 67, at 1437 (analyzing the language used by constitutional courts when identifying constitutional limits to EU laws).

304. *Id.*

305. Kumm, *supra* note 53, at 120 (“the universality of an ideal does not make it formally inadequate as an ideal central to the identity of a particular community”).

306. *See* Vlad Perju, *Supranational States in the Postnational Constellation*, INT’L J. CONST. L. (forthcoming 2019).

307. What stands out is how in deciding these cases, the national courts do not send preliminary references to Luxembourg. *See supra* Part IV.A. For a similar observation, *see* Mohay & Tóth, *supra* note 286, at 473 (noting, with regard to the Hungarian Constitutional Court, that the court did not even consider requesting a preliminary ruling from the CJEU).

The examples above show that judicial discretion has been particularly difficult to contain when courts have sought to fill out the meaning of identity proactively. But when confronted with specific cases, discretion has been somewhat contained by the factual circumstances of specific cases. The UK Supreme Court, for instance, has held that the EU lacks the power to make decisions about British citizenship, which is part of the national constitutional identity.<sup>308</sup> While, at least initially, the German Constitutional Court sought to keep *ultra vires* separate from identity, other courts have been less rigorous. In the Czech Republic, in 2012, the Constitutional Court assumed jurisdiction to review a decision of the ECJ applying EU legislation on the harmonization of pension systems among national legal systems, and holding that social security benefits of Czech retirees should include the period they worked in Czechoslovakia prior to that country's dissolution in 1992. The Czech judges held that the ECJ exceeded the EU's competencies to regulate solely cross-border situations and should therefore be inapplicable within the jurisdiction of the Czech Republic.<sup>309</sup> By holding the ECJ's decision *ultra vires*, the Czech constitutional judges acted in violation of foundational doctrines of European constitutionalism that give the ECJ the final word over the interpretation of the EU law, including on jurisdictional matters.<sup>310</sup> As in Germany, the Czech court subsumed the *ultra vires* ground, and therefore was immunized to identity review.<sup>311</sup>

### 3. Identity and Nationalism

The history of European constitutional identity includes many instances where national legal orders set the theoretical grounds for resisting the claims of European federalism but did not follow through in practice. The German Constitutional Court, which assumed a leadership role in opposing European integration, never rendered a piece of European legislation without effect either on the human rights or the limited conferral grounds.<sup>312</sup> Identity seems eminently

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308. See *Pham v. Sec'y of State for the Home Dep't* [2015] UKSC 19, [58], [82], [90]–[91] (appeal taken from Eng.) (holding that ultimately domestic courts determine the jurisdictional limits of European treaties).

309. *Nález Ústavního soudu ze dne 31.01.2012 (ÚS)* [Judgment of the Constitutional Court of Jan. 31, 2012], sp.zn Pl. ÚS 5/12.

310. For a discussion, see Jan Komárek, Case Note, *Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*; *Judgment of January 31, 2012, Pl. ÚS 5/12*, *Slovak Pensions XVII*, 8 *EUR. CONST. L. REV.* 323, 328–34 (2012) (explaining why the Constitutional Court's decision was “plainly wrong” and giving context for the decision).

311. *Nález Ústavního soudu ze dne 03.05.2006 (ÚS)* [Judgment of the Constitutional Court of May 3, 2006], sp.zn Pl. ÚS 66/04.

312. Between 1974 (*Solange I*) and 1986 (*Solange II*), the German Constitutional Court did not exercise the prerogative it claimed for itself to deprive of effect EU

positioned to change that dynamic by emboldening national courts to follow through with their threats.

Some instances are worrisome but largely benign. The case of the Czech Constitutional Court decision in the *Landtová* case discussed above is one such example.<sup>313</sup> Another example, if somewhat more concerning, is the 2016 *Ajos* decision of the Danish Constitutional Court.<sup>314</sup> In that case, the Danish judges refused to apply the EU principle of nondiscrimination on the basis of age to a dispute between private parties.<sup>315</sup> The Danish judges explained that such application lacked explicit grounding in the EU Treaty, that it was the creation of the ECJ and that, if applied in the case at hand, it would violate the terms of Denmark's accession to the EU and lead the Danish Constitutional Court to overstep its own jurisdictional boundaries.<sup>316</sup> While the ECJ's far-reaching case law on the general principle of nondiscrimination on the basis of age into domestic law had given rise to many controversies, the Danish court went one big step further when it declined to fulfill its duties under EU law.<sup>317</sup> While the Danish court did not use explicitly the concept of identity, identity's radiating effect informs the legal analysis. Identity is the *genus proximus* for the principles of legal certainty and the protection of legitimate expectations, which contrast here with the principle of nondiscrimination on the basis of age.<sup>318</sup> This debate engages some of the most central doctrines of European constitutionalism.<sup>319</sup> A case more difficult to classify comes from Romania. There, the Romanian Constitutional Court held that its duties under the national constitution rank higher than any obligation to protect judicial independence and comply with other anticorruption safeguard mechanisms upon which the supranational institution conditioned the country's EU accession.<sup>320</sup>

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legislative acts that violated the fundamental rights provisions of the German Basic Law. For a discussion, see Perju, *Uses and Misuses*, *supra* note 226, at 263–95.

313. Czech Constitutional Court, Pl U.S 66/04, May 3, 2006.

314. Danish Constitutional Court Case no. 15/2014 Dansk Industri (DI) acting for *Ajos A/S v. Estate of A* (relating to European Court of Justice, Case C-441/14 *Dansk Industri*, acting on behalf of *Ajos A/S v. Estate of Karsten Eigil Rasmussen*).

315. *Id.*

316. *Id.* at 45–51.

317. *Id.*

318. *Id.* at 9–10.

319. Rass Holdgaard, et al., *From Cooperation to Collision: The ECJ's Ajos Ruling and the Danish Supreme Court's Refusal to Comply*, 55 COMMON MKT. L. REV. 17 (2018); see also Urška Šadl & Sabine Mair, *Mutual Disempowerment: Case C-441/14 Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v. The estate left by A*, 13 EUR. CONST. L. REV. 347 (2017).

320. Romanian Constitutional Court, Judgment nr. 104/2018, ¶¶ 88–90 and Judgment nr. 137/2019, ¶ 77.

When identity is combined with authoritarian populism, the result is to take resistance to European integration to new levels. The case law of the Hungarian Constitutional Court stands out in this context.<sup>321</sup> Litigation ensued over disagreements over Hungary's reallocation of asylum seekers under EU Decision 2015/1601.<sup>322</sup> The government had failed to stop the application of the EU Decision by way of a constitutional amendment that would have introduced in the Hungarian Fundamental Law language to the effect that "[w]e hold that the defense of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state."<sup>323</sup> The newly amended EU clause would have stipulated that EU law "in harmony with the fundamental rights and freedoms established in the Fundamental Law must not place restrictions on Hungarian territory, its population, the state, or its inalienable rights."<sup>324</sup> The Hungarian Constitutional Court, which had been captured by Viktor Orbán's regime, used the constitutional doctrine of identity to accomplish what the government could not accomplish through political means.<sup>325</sup> The court held that accepting asylum seekers into Hungary pursuant to the EU scheme would amount to a violation of the constitutional self-identity of Hungary.<sup>326</sup> That identity was "a fundamental value not created by the Fundamental Law—it is merely acknowledged by the Fundamental Law."<sup>327</sup> The court held that constitutional identity is rooted in Hungary's history and as such cannot be dispensed with by way of international treaty.<sup>328</sup> The decision is replete with the vestiges of nationalism, shot through with references to mystic patriotism and Saint Stephen's Holy Crown as a source of authority.<sup>329</sup> The constitution must be interpreted in the light of the Preamble called the "National Avowal" and the "achievements of the historical constitution," Article R(3).<sup>330</sup>

Particularly relevant is the way in which the Hungarian Constitutional Court reaches out to the German Constitutional Court

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321. Alkotmánybíróság (AB) [Constitutional Court of Hungary] Nov. 30, 2016, AK.XII.5 22/2016 (Hung.).

322. EU Decision 2015/1601 (Sept 22, 2015).

323. Alkotmánybíróság (AB) [Constitutional Court of Hungary] Nov. 30, 2016, AK.XII.5 22/2016 (Hung.).

324. See 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 (2018).

325. *Id.*

326. For further analysis, see *id.*

327. Alkotmánybíróság (AB) [Constitutional Court of Hungary] Nov. 30, 2016, AK.XII.5 22/2016 (Hung.).

328. *Id.*

329. For a study, see Kovács, *supra* note 285, at 1705.

330. Alkotmánybíróság (AB) [Constitutional Court of Hungary] Nov. 30, 2016, AK.XII.5 22/2016 (Hung.).

for inspiration on how to use the concept of identity as a doctrinal tool that integrates both human rights and *ultra vires* considerations.<sup>331</sup> The Hungarian judges held that it falls within its own scope of competences, on the basis of a relevant petition, in exceptional cases and as a resort of *ultima ratio*, i.e. along with paying respect to the constitutional dialogue between the member states, it can examine whether exercising competences on the basis of Article (E)(2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the state) and the constitutional self-identity of Hungary. While the court retains the right to determine the content of constitutional identity on a case-by-case basis, it did offer some guideposts: “freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, equality of rights, acknowledging judicial power, the protection of nationalities that are living in Hungary.”<sup>332</sup>

At a general level, little about this statement sounds inherently problematic. Yet, in its specific application, its wide range enables the Hungarian judges to draw bright lines to European integration. Such unilateral action would have the result of fragmenting European federalism even under regular circumstance. But when the loss of the court’s judicial independence renders the court a mouthpiece for a government engaged in the undoing of the rule of law and the Hungarian constitutional state,<sup>333</sup> identity shows its dark effects.

Hungary is not the only jurisdiction where these effects are already visible. In October 2018, the Court of Justice of the European Union granted a consequential, if somewhat unusual, interim order at the request of the European Commission acting as plaintiff in an infringement action against Poland.<sup>334</sup> The ECJ ordered Poland to reinstate with immediate effect judges of the Polish Supreme Court who had been forced into early retirement by legislation overhauling the Polish judiciary.<sup>335</sup> The European Commission alleged that the legislative measures violate judicial independence as protected under EU law and would produce harm that was irreparable if not corrected without delay.<sup>336</sup> After some initial grumbling, the Polish authorities implemented the ECJ’s interim order, although concomitantly they referred the matter to the Polish Constitutional Tribunal, asking for

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331. See Kovács, *supra* note 286, at 1705.

332. *Id.*

333. See generally Kelemen, *supra* note 27, at 211; Pech & Scheppele, *supra* note 27, at 3.

334. Case C-619/18, R Commission v. Poland, Order of the Vice-President of the Court, E.C.J. Oct. 19, 2018.

335. *Id.*

336. *Id.*

clarification as to what effect, if any, an *ultra vires* act of the EU can have in Poland.<sup>337</sup> The question was tongue in cheek. The Polish Tribunal had previously held that national authorities are under no duty to give effect to acts of EU institutions that transgress the delegation of national powers to the European level.<sup>338</sup> While “acts of EU institutions” are typically construed to refer to secondary legislation, acts of the ECJ, including orders and judgments, can also be subject to review.<sup>339</sup> Thus, when national apex courts determine that *Luxembourg* has transgressed its powers under the EU Treaty, national judges will likely perform almost a reverse-*Mangold*<sup>340</sup> review and take the treaty’s enforcement into their own hands.

The ECJ delivered its judgment in this case in June 2019.<sup>341</sup> The court held, without specifically engaging Poland’s identity-based arguments, that lowering the retirement age of the judges of the Supreme Court of Poland and that “granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations” to respect judicial independence.<sup>342</sup> This, however, may not be the end of the matter. A decision on this matter of the Polish Constitutional Tribunal is yet to be delivered.<sup>343</sup> The Warsaw *Trybunał Konstytucyjny* may well choose to reiterate existing precedent that the Polish Constitution enjoys “precedence of binding force and precedence of application”<sup>344</sup> over EU

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337. For analysis, see Tomasz Tadeusz Koncewicz, *From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court*, VERFBLOG (Feb. 27, 2019), <https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court/> [<https://perma.cc/789X-S8UW>] (archived Jan. 13, 2020).

338. TK (Polish Constitutional Tribunal) Nov. 24, 2010, Case no. K 32/09 (Treaty of Lisbon).

339. Pursuant to this understanding, the Italian *Corte costituzionale* held recently that Italian authorities are under no obligation to implement ECJ decision that conflict with Italian constitutional identity. See Italian Constitutional Court Order No. 24, § 2 (2017), [https://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/O\\_24\\_2017.pdf](https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf) [<https://perma.cc/A84Z-YKL5>] (archived Dec. 3, 2019). For another recent similar holding, see *R v. Sec’y of State for Transp.* [2014] UKSC 3 (appeal taken from Eng.) (holding itself free not to implement decisions of the ECJ that go too far, and continuing to apply national law).

340. Case C-144/04, *Mangold v. Helm*, E.C.J. Nov. 22, 2005. The Court of Justice of the European Union held that, in the area of non-discrimination of the basis of age, EU legislation codifies constitutional principles that already exist in the Member States. The implication is that those national principles receive heightened protection from their recognition at the supranational level, including by the ECJ. A reverse-*Mangold* situation would place national courts in charge of enforcing supranational law.

341. Case C-619/18, E.C.J. June 24, 2019.

342. *Id.*

343. For a second recent decision of the ECJ, see *A. K. & Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C 624/18, C-625/18), Nov. 19, 2019.

344. TK (Polish Constitutional Tribunal) May 11, 2005, Case 18/04, ¶ 11.

law as well as the central role of the *ultra vires* doctrine in preserving the ability of the “Republic of Poland to continue functioning as a sovereign and democratic state.”<sup>345</sup> The *Trybunał* may also mention its duty to protect the national constitutional identity of Poland (*tożsamość konstytucyjna*),<sup>346</sup> wherein democratic self-government, translated as the ability of the Polish political community to govern themselves through its freely chosen representatives enacting laws, such as the judiciary reforms at issue here, reigns supreme. If, further, the authority of EU law in the legal systems of its member states is granted not pursuant to the Treaty itself but rather “by virtue of [national] constitutional empowerment,”<sup>347</sup> as the German Constitutional Court held in the *Lisbon* decision, then the normative interface between the supranational and national legal orders becomes even harder to police from a supranational level.

## V. THE FUTURE(S) OF IDENTITY FEDERALISM

This Part turns the attention to a few of the possible central themes in the future of identity federalism. Subpart V.A. discusses centralization as backlash to identity claims on behalf of subunits. Subpart V.B. discusses the alignments of attachments outside of the binary model of state (nation-state) and federal (supranational). It looks to the formation of identity in the middle, in-between spaces. Regionalism is one such example. Finally, subpart V.C. returns to the specific claims of identity in the age of populism.

### A. Centralization

Like all theories that seek to ground state sovereignty, identity federalism sooner or later encounters attempts to curb the centrifugal tendencies that it generates within a federal system. Each such system has mechanisms of centralization ready to be activated in these situations. The arc of American federalism, after the Civil War but particularly post–New Deal, has included a broad interpretation of the Commerce Clause, which, together with a strict enforcement of the

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345. *Id.* ¶ 8.

346. TK (Polish Constitutional Tribunal) Nov. 24, 2010, Case nr. K 32/09 (Treaty of Lisbon). For a study, see 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 243 (Christian Calliess ed., 2019).

347. German Constitutional Court, BVerfGE 123, 267 (348-349, 354, 397, 400, 402) *Lissabon* (2009). Cf. English translation, *supra* n.8, §§ 240 (“the primacy . . . only applies by virtue and in the context of the constitutional empowerment”), 331–32 (“primacy by virtue of constitutional empowerment”), 334–35, 339, 343.

supremacy clause and a rigorous interpretation of preemption doctrines, have become the doctrinal mechanisms to support the political, cultural, and social homogenization. It is true that some doctrines have survived this process of nationalization, which justify the leeway they afford to states by reference to their identity. One such example is the “independent interpretation” doctrine, which concerns the interpretation of provisions in a state constitution that mirror those of the federal constitution.<sup>348</sup> According to this doctrine, while state courts cannot violate federal law, they may decide to give state constitutional provisions different meaning than the federal constitution.<sup>349</sup>

The European experience proves the challenges of doctrinalizing identity, especially at both the federal and subfederal levels. As shown, the duty of the EU to protect the national (constitutional) identity of its member states is specifically included in the Treaty of Lisbon.<sup>350</sup> The question then becomes what constitutes identity, and who gets to answer that question. National constitutional courts have been hard at work seeking to define, each for themselves, the meaning of their identity. But while the efforts of national courts might have been triggered by developments at the European level, many national courts, as it has been shown, framed their efforts as one mandated by their own national constitutions. As the German Constitutional Court has spelled out, it is possible that the meaning of national identity under the national constitution could fall outside of the boundaries of what deserves protection as national constitutional identity at the European level.<sup>351</sup> From the standpoint of the national constitution, the list of identity might be considerably longer and the need for identity protection further reaching. To take just one example from the Germany context, the German Constitutional Court has held that fiscal decisions are central to democratic self-government and that their delegation to the supranational, European level, would violate the identity of the German Constitution.<sup>352</sup> From the European perspective, however, the Eurozone crisis has exposed the inherent instability of a monetary union that is not backed up by a fiscal union.<sup>353</sup> Political proposals to prop up the Eurozone have inevitably

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348. Schapiro, *supra* note 4, at 393.

349. *Michigan v. Long*, 463 U.S. 1032, 1040–44 (1983). For analysis, see James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1221–24 (1998); Schapiro, *supra* note 4, at 393.

350. Consolidated Version of the Treaty on European Union art. 4(2), 2010 O.J. C 83/01 [hereinafter TEU].

351. See Claes & Reestman, *supra* note 28, at 938–41.

352. BVerfG, Case No. 2 BvE 2/08; see *supra* Section III.B.1.

353. For a recent such argument, see Pierpaolo Barbieri & Shahin Vallée, *A Fiscal Union for the Eurozone: The Only Way to Save the EU*, FOREIGN AFF. MAG. (Sept. 26,

included the creation of a common budgetary mechanism that would amount to a fiscal union.<sup>354</sup> Would such reforms, which are arguably indispensable to the future of the European Union, violate Germany's national constitutional identity? Could Germany invoke that constitutional identity in order to prevent their application, and would such invocation be deemed compatible with the demands of European constitutionalism? The German court made the implications of constitutional identity explicit in its first-ever preliminary reference on whether the European Central Bank could lawfully purchase bonds through special mechanisms put in place during the Eurozone crisis.<sup>355</sup>

The outcome of this clash of identity versus identity remains unknown because the ECJ's approach to defining the meaning of national identity at the European level has thus far been cautious and pragmatic. Thus far, the ECJ held that national constitutional identity can be used to justify the limitation on free movement stemming from the prohibition of last names that retain nobility titles.<sup>356</sup> The ECJ has upheld a national interpretation of human dignity;<sup>357</sup> holding that a national language constitutes "a constitutional asset which preserves the nation's identity";<sup>358</sup> freedom of assembly and expression;<sup>359</sup> media diversity;<sup>360</sup> and protection of minors.<sup>361</sup> But it is far from apparent what exactly the concept of constitutional identity does in these cases. Here, EU law defers to national law in grounds for reasons that are cultural. But if that is sufficient to bring them within the purview of the national identity, then this clause is so broad that it includes virtually everything. Unsurprisingly, it has been argued that

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2017), <https://www.foreignaffairs.com/articles/europe/2017-09-26/fiscal-union-eurozone> [<https://perma.cc/W4AP-9H7J>] (archived Dec. 3, 2019).

354. *Id.*

355. BverfG 2 BvR 2728/13 et al, order of 7 February 2014. The German court included in the preliminary reference language to the effect that it – *Karlsruhe* – has the right to decide whether the OMT decision "could violate the constitutional identity of the Basic Law if it created a mechanism which would amount to an assumption of liability for decisions of third parties which entail [budgetary] consequences that are difficult to calculate." *Id.* § 102. In August 2017, the German Constitutional Court mentioned the German constitutional identity in a preliminary reference to Luxembourg on whether the legality of the European Central Bank's public sector purchase program. BverfG 2 BvR 859/15 et al, order of 15 August 2017. For the ECJ's response, see Case C-493/17, Weiss (holding that the challenged program is compatible with EU law).

356. Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13693.

357. Case C-36/02, *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609.

358. Case C-391/09, *Malgozata Runevič-Vardyn and Lukasz Pawel Wardyn v. Vilniaus miesto savivaldybes administracija and Others*, 2011 E.C.R. I-3787.

359. Case C-112/00, *Schmidberger v. Austria*, 2003 E.C.R. I-5659.

360. Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, 1997 E.C.R. I-3689.

361. Case C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 2008 E.C.R. I-00505.

constitutional identity is the new label for the court's longtime jurisprudence of limitations on the fundamental freedom of movement.<sup>362</sup> Moreover, very few decisions of the ECJ require EU institutions to take into consideration the national identity of its member states.<sup>363</sup> In no case does Article 4(2) by itself constitute sufficient ground for the holding. The ECJ has rejected pleas to recognize that respect for national identity has been part of European constitutionalism from the beginning of European integration.<sup>364</sup> There are, of course, cases of exceptions from the fundamental freedoms, but it is hard to see how they can be interpreted as "constitutional identity" cases. Moreover, and importantly, the ECJ has refused to tweak its supremacy jurisprudence to accommodate a constitutional identity clause.<sup>365</sup>

But, and importantly, the ECJ offers authentic interpretations of the EU Treaty. It can, in that capacity, control the effect of national identity by imposing a unitary meaning. This area seems ideally suited for the ECJ to claim, as it so often does, that the effectiveness of EU law would be eroded if member states could invoke their identity in order to apply EU law selectively. This need not deny member states of any powers in this area, but it simply circumscribes their interpretations to a range of acceptable meanings.<sup>366</sup>

It helps to recall in this context that the concept of constitutional identity does not enter the universe of European constitutionalism in a vacuum. Rather, it enters at a particular moment in time and within a framework that has been developing for over half a century. The identity provision becomes part of EU law, at least in this form, at the moment when it is least likely to have much of an effect. Not quite the extraordinary tool that its advocates see in it, identity receives this

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362. Konstadinides, *supra* note 268.

363. Case C-300/11, *ZZ v. Secretary of State for the Home Department*, 2013 E.C.R. (holding that Art. 4(2) TEU and Art. 346(1) TEU hold that national security remains the sole responsibility of Member States).

364. See Opinion of Advocate General Maduro, Case C-160/03, *Spain v. Eurojust* 2005 E.C.R. I-2077; Opinion of Advocate General Maduro, Case C-213/07, *Michaniki* 2008 E.C.R. I-10999, ¶ 31.

365. Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, 2010 E.C.R. I-08015. Along similar lines, in Case C-515/08 *Palhota*, AG Villalon argued that values listed in Art. 9 TFEU (high level of employment, adequate social protection, high level of education) are ground for greater discretion to Member States. For discussion, see Sinisa Rodin, *National Identity and Market Freedoms after the Treaty of Lisbon*, 7 CROATIAN Y.B. EUR. L. & POL'Y 11, 16 (2011) (interpreting AG Villalon's position to mean that "a high level of social protection constitutes part of the national identity of Member States and justifies a departure from market freedoms."). The Court did not follow the AG's recommendations. For a similar dynamic, in the procedural context, see Case C-173/09, *Georgi Ivanov Elchinov v. Natsionalna zdravnoosiguritelna kasa*, 2010 E.C.R. I-08889.

366. This path would bring the ECJ into tension with the *OMT* decision of the German Constitutional Court. See Claes & Reestman, *supra* note 28.

more robust formulation at the time when—and, to some extent, precisely because—it can be easily neutralized using existing European doctrines.<sup>367</sup> First, its reach is restricted by the existence of other provisions, such as mainly Article 2 of the Treaty on European Union.<sup>368</sup> While the abstract text of neither provision interprets itself, it seems quite straightforward that the several interpretations will have to meet a certain threshold of normative coherence. It is hard to believe that a regime such as Hungary's, for instance, will be allowed to invoke national identity in order to protect itself from European scrutiny. Emphasis here is on the verb “allow” since the Hungarian government will certainly seek to invoke Article 4(2).

A second related reason why the identity provision need not amount to a limitation of supremacy is that, by inclusion into the treaty, the concept of identity becomes a concept of EU law. The implication is that the court, in its “pre-eminent position of the ECJ as the ultimate interpreter of this legal order,”<sup>369</sup> can control its effect by centralizing its meaning. The ECJ has used this technique previously throughout its jurisprudence, for instance when defining the meaning of concepts such as the meaning of “worker”<sup>370</sup> or “disability.”<sup>371</sup> The European judges might be particularly inclined to harmonize the meaning of constitutional identity given the lessons of what the *ultra vires* tool has done in the hands of disobedient national courts. But even as they try to do that, and the same would be true in the case of American federalism, they themselves would be forced to use the category of identity. The tendency to shape conflict between different levels of jurisdiction as identity versus identity is specific to what is referred to above as the vortex that identity produces within a legal system.

### B. Regionalism

The above discussion has assumed the existence of a binary of states within a federal system, whether that system is of a traditional kind such as the United States or of an arguably *sui generis* kind such as the European Union. Yet, for all the complexities that we have identified in relation to the formation of identity,<sup>372</sup> it seems both contrived and inaccurate to assume that identity lines up neatly within these two levels of government. In fact, identities might defy those

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367. I discuss this possible solution in Perju, *On the (De-)Fragmentation of Statehood in Europe*, *supra* note 163, at 432–34.

368. Bogdandy & Schill, *supra* note 67, at 1430.

369. *Id.*

370. Case 53/81, D.M. Levin v. Staatssecretaris van Justitie, 1982 E.C.R. I-01035.

371. E.C.J. Case C-13/05, Chacón Navas v. Eurest Colectividades SA, 2006 E.C.R. I-6467.

372. *See supra* Part I.A.

preexistent structures and cluster instead in the in-between spaces. Moving to theorize these developments, scholars of American federalism have focused on “the region as a subnational area encompassing all or part of multiple states” and thus “depart[ing] from established state and federal jurisdictional lines to form a supra state yet subnational area.”<sup>373</sup> It is in these in-between spaces that much of the politics is focused, whether in the area of immigration, environmental regulations, or education.<sup>374</sup>

While regions have a pronounced territorial aspect, a focus on identity makes it possible to entertain a deterritorialized network of interests. When states sue the federal government in order to enjoin action or to prevent it, they are creating a network that occupies a space their action creates between the states and the national government. Sometimes that space does have a more pronounced regional aspect, as is the case when states along the southern border seek to put pressure on the federal government’s immigration policies.<sup>375</sup> But in other cases, most prominently environmental cases, identity creates regions of common interest that do not have a territorial representation.<sup>376</sup> This complicates the neat picture of the overlap between structure and interests.

This issue is also present in the European context. Scholars of European integration have explored if the EU can be understood as a number of different unions, rather than one, all-encompassing organization.<sup>377</sup> The constitutive treaties are full of opt outs and particular derogations. More importantly, the treaty itself permits member states to engage in “enhanced cooperation,” that is, to establish and pursue initiatives only within a subset of all the EU members.<sup>378</sup> The Eurozone is one such example, as is the Schengen visa-free area. The treaty rules require only that, in addition to not violating the general principles of the EU, such smaller unions be open under equal conditions to other states that might later decide to join.<sup>379</sup>

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373. Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 383 (2017).

374. *Id.* at 381–82 (“Regionalism has long been associated with state resistance to the federal government, but it has also been a potent tool of federal bureaucracy. If regional coordination has sometimes enabled states to compete with, or to repel the expansion of, federal administration, the federal government’s own reliance on regional accommodation and organization has facilitated its entry into new policymaking space . . . . When considering the critical influence of regionalism on Our Federalism, then, regions cannot be placed on either the state or the federal side of the balance.”).

375. See Briefs for Amici Curiae, *Arizona v. U.S.*, 567 U.S. 387 (2012).

376. See, e.g., Young, *The Volk of New Jersey?*, *supra* note 6.

377. See, e.g., Richard Bellamy & Sandra Kröger, *Differentiated Integration as a Fair Scheme of Cooperation* (Robert Schuman Ctr. for Adv. Stud., Working Paper No. 2019/27, 2019).

378. See TFEU Arts. 326–34. For analysis, see PIRIS, *supra* note 33, at 98.

379. See TEU Art. 20(1) (“Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.”).

Conditions for access, such as stringent economic criteria in the case of the Eurozone or a reliable immigration enforcement mechanism for the Schengen area, are, at least in theory, not discriminatory. Many see this variable geometry in Europe, or an EU with different speeds, as the necessary future for a continent that grew from its original six to its current twenty-eight members, among which there are vast differences. Current proposals for reform consider strengthening the “core” Eurozone states through the creation of a common parliament, a fiscal union, and other such measures of deeper integration.<sup>380</sup> EU member states that are not in the Eurozone generally oppose this model of European integration for fear that it might put them in a second-class category.<sup>381</sup> Identity is sometimes invoked in these debates, with the argument being that the institutional structure should reflect the unitary, as opposed to the fragmented, nature of the European identity of member states.<sup>382</sup> Whatever specific form these mini unions might take, they occupy a space in between the nation-states and the supranational institutions. Identity will play a somewhat different, though equally impactful role, in these debates.

### C. Populism

Identity federalism seems tailor-made for the age of populism. As already seen, the Hungarian, Polish, and Romanian courts rely on that concept in order to articulate their opposition to the project of European unification. In these jurisdictions, identity has empowered autocratic populists to use as they wish the authority that constitutional pluralism as a theory of European constitutionalism recognizes as theirs.<sup>383</sup> While these jurisdictions are notable for their radicalism, identity poses a broader and, at times, subtle challenge to liberal constitutionalism in the age of populism. The refugee crisis in Europe and the immigration debate in the United States have shaped

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380. See, e.g., EUR. COMM'N, SCENARIO 3 OF THE WHITE PAPER ON THE FUTURE OF EUROPE: THOSE WHO WANT MORE DO MORE (2018); see also Eurozone Budgetary Instrument Proposal (Feb. 21, 2019), <https://www.euractiv.com/wp-content/uploads/sites/2/2019/02/French-German-Contribution-on-a-Eurozone-Budgetary-Instrument-2.pdf> [<https://perma.cc/K9EB-K4B9>] (archived Jan. 13, 2020).

381. See Marcin Gocłowski & Marcin Goettig, *Polish president says 'multi-speed' EU will lead to break-up of bloc*, REUTERS, Sept. 5, 2017, <https://www.reuters.com/article/us-poland-eu-duda/polish-president-says-multi-speed-eu-will-lead-to-break-up-of-bloc-idUSKCN1BG2AJ> [<https://perma.cc/G3XD-J9SF>] (archived Jan. 13, 2020).

382. These arguments were particularly forceful in the context of EU expansion. See, e.g., SENEM AYDIN-DÜZGİT, CONSTRUCTIONS OF EUROPEAN IDENTITY (Palgrave 2012).

383. For an illuminating study, see R. Daniel Kelemen & Laurent Pech, *Why Autocrats Love Constitutional Identity and Constitutional Pluralism: Lessons from Hungary and Poland* 6 (Reconnect Eur., Working Paper No. 2, 2018).

the landscape of contemporary politics.<sup>384</sup> From “*le grand débat sur l’identité nationale*” in France to the Muslim ban in the United States, and from the British-ness debate in the Brexit context to the search for the Dutch or Belgian national identity, the discursive category of identity has become central to political discourse.<sup>385</sup>

Central features of identity make it appealing, available, and dangerous in this charged political context. As Jan-Werner Müller has argued, populism feeds on the problems of political representation to moralize a discourse of antipluralism that is quintessentially opposed to the values of openness of liberal democracy.<sup>386</sup> The leader claims to represent the people, identified as unity of purpose and meaning. It is easy to see how this particular understanding of the nature of the political community can use a conception of identity. As recent political experiences from Hungary to Venezuela and from Turkey to the United States show, the identitarian discourse enables populist leaders to claim access to the essence of a political community and to claim legitimacy for political projects that are oftentimes both sectarian and divisive. At a time of ever-deeper political polarization, under the pressures of an information economy that continues to elude state regulation and control, the effect of identity in political discourse can be far-reaching.

It is still too early to determine the exact scope and depth of the challenge that poses to liberal constitutionalism.<sup>387</sup> The effects of the upheavals that have gripped politics in the United States and have added even greater complexity to Europe’s processes of “self-constituting”<sup>388</sup> are still difficult to determine. Identity may outlast populism, should the latter start to fade. Or, perhaps a more likely alternative, identity might become a mechanism for fragmentation of a world that only recently seemed bound towards greater convergence.

## VI. CONCLUSION

To paraphrase Kafka, identity is a cage in search of a bird.<sup>389</sup> However glitzy or otherwise appealing it might seem at first blush,

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384. For a study of the United States, see generally ARLIE HOCHSCHILD, *STRANGERS IN THEIR OWN LAND* (2016). For a study of Europe, see generally IVAN KRASSTEV, *AFTER EUROPE* (2017).

385. Faraguna, *Constitutional Identity in the EU — A Shield or a Sword?*, *supra* note 10, at 1621 (identifying in these debates “a new trend”, rather than isolated manifestations of nostalgic feelings).

386. JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (Univ. of Pa. Press 2016).

387. See, e.g., DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* (2018); AZIZ HUQ AND TOM GINSBURG, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

388. Philip Allott, *Epilogue: Europe and the Dream of Reason*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, *supra* note 35, at 202.

389. FRANZ KAFKA, *APHORISMS 16* (Schocken Kafka Library, 2015).

that cage is still a cage. This Article has pointed to the darker side of identity federalism. If recent upheavals in American politics and law suggest that some fundamental rearrangements might be in the offing, then federalism will be part of any project of rethinking American constitutionalism. For all the significant differences between the two legal systems, the EU experience serves as a cautionary tale for placing federalism under the spell of identity. Resisting such a development, while not easy given the politics and culture of our time, might be just what fidelity to the values of constitutionalism—in Europe, the United States or elsewhere—requires.