

## The Unimportance of Identities. Vindicating the Constitutional Place of Morality\*

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### *1. The three-pronged question of collective identity*

The question of identity engages deeply with fundamental philosophical dilemmas, challenging long-held convictions about the self and its place in society. Questions like “Who am I?” and “How is my identity distinct from others?” remain central to human existence, while Nietzsche’s paradoxical exhortation, “You should become who you are”<sup>1</sup>, invites reflection on whether identity is shaped by personal agency or determined by external forces.

This tension becomes even more complex when viewed in the context of collective identity, where shared traits often obscure individual distinctiveness. Schopenhauer, for instance, criticized nationalism as «the cheapest form of pride»<sup>2</sup>, suggesting that reliance on collective identity may mask a lack of meaningful individual qualities.

In today’s pluralistic societies, where the facts of pluralism and disagreement<sup>3</sup> are inherent realities, these questions take on renewed significance. Within political communities that ground their legitimacy in

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<sup>1</sup> F. W. Nietzsche, *The Gay Science*, New York, 1974, p. 270.

<sup>2</sup> «The cheapest form of pride is national pride; for the man affected therewith betrays a want of individual qualities of which he might be proud, since he would not otherwise resort to that which he shares with so many millions» (A. Schopenhauer, *Aphorisms on the Wisdom of Life*, Oxford, 1974, 360).

<sup>3</sup> For the fact of (reasonable) pluralism, see J. Rawls, *Political Liberalism*, New York, 2005. For the fact of disagreement, see J. Waldron, *Law and Disagreement*, Oxford, 1999.

the constitutional democratic framework of the nation-state, the debate over collective identity centres on three closely connected concepts: national identity, constitutional identity, and constitutional patriotism.

This article bridges constitutional theory with moral and political philosophy to propose a framework for reconciling national and constitutional identity with the universal moral principles that underpin liberal democracy. It seeks to address pressing contemporary questions: How can national identities, deeply rooted in cultural, partial, and historical traditions, coexist with universal and impartial moral principles enshrined in constitutional frameworks? Moreover, how can national constitutions - designed to express universal values within specific temporal and spatial contexts - adapt to the inherently fluid and transcendent nature of those principles?

A symbolic expression of the ongoing questioning of collective identity, which at the same time echoes the above concepts, can be inferred from Justice Marshall's speech on the bicentennial of the U.S. Constitution: «The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the “more perfect Union” it is said we now enjoy. I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever “fixed” at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound [...]. When contemporary Americans cite “The Constitution”, they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago»<sup>4</sup>.

In concluding his speech, after reflecting on the deliberate ambiguities and compromises made by the Framers on the issue of slavery, he affirmed the enduring value of the Constitution in light of its remarkable evolution over time. He emphasized that although we refer to the Constitution drafted two centuries ago, its transformation is rooted in the reinterpretation of its identical core principles, now understood in a fundamentally different spirit: «We the People no longer enslave, but the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of “liberty”, “justice”, and “equality”, and who strived to better them [...]. I plan to celebrate the Bicentennial of the Constitution as a living document,

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<sup>4</sup> T. Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, in *Vanderbilt Law Review*, 1987, p. 1338.

including the Bill of Rights and the other amendments protecting individual freedoms and human rights»<sup>5</sup>.

Justice Marshall's speech simultaneously evokes all three of the contemporary notions associated with the current discussion of collective identity. Consequently, a fundamental question is triggered: in the context of modern constitutional democracies, what or whom do we have in mind when we speak of collective identity?

The only way to provide an adequate reply that transcends a mere restatement or a description of the current state of affairs is to delve deeply into the issue, articulating criteria and justifying a framework that grounds a coherent order among the concepts.

Two major underlying assumptions inform the development of the present work and drive its unfolding. First, although the three concepts under discussion are distinct, they are bound together by what Wittgenstein described as family resemblance, «a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail»<sup>6</sup>. Secondly, the consistency of these concepts, and what underlies their family resemblance, lies in their potential to be unpacked into four more primitive concepts: identity, patriotism, nation(-alism), and constitution(-al).

Building on these initial premises, the article is structured as follows. After this introductory section, Section 2 provides a succinct conceptual analysis of nationalism and patriotism, before exploring in greater depth the moral implications tied to these concepts. Sections 3-4 expand the discussion by introducing two additional primitive concepts and employing the notion of constitutional identity as an analytical and critical tool to examine its inherent indeterminacy and related challenges. In Section 5, the focus shifts to a deeper investigation of the constitutional identity-problem, with the aim of proposing an alternative normative framework that highlights and justifies its relative unimportance. Finally, Section 6 proposes a theoretical framework aimed at enriching the broader discourse in constitutional and democratic theory. It provides a rationale for developing a coherent hierarchical relationship between national identity, constitutional identity and constitutional patriotism, seeking to appraise the desirability of a European constitutional identity.

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<sup>5</sup> *Ivi*, p.1341-2.

<sup>6</sup> L. Wittgenstein, *Philosophical Investigations*, Oxford, 1963 p. 32.

*2. Nationalism and patriotism: conceptual complexity behind a moral dilemma*

The conceptual four-legged framework at the core of our research - nationalism, patriotism, identity and constitution - represents profound and historically significant notions, intricately woven into both scholarly discourse and everyday language. These concepts are deeply interconnected: both nationalism and patriotism entail a form of collective identity and a process of identification, while also raising moral, political and constitutional questions that, though not the primary focus of this analysis, remain crucial to the article's central argument.

Before considering their moral implications, it is useful to address a more terminological issue, since the blurring of the distinction between patriotism and nationalism often results in a lack of clarity in the discussion.

The terms nationalism and patriotism<sup>7</sup> are often used interchangeably by scholars, and even when distinctions are attempted, these efforts frequently lack productivity. As a result, conventional definitions struggle to articulate a clear or meaningful differentiation between the two concepts. This ambiguity is evident in the established literature on the subject.

For instance, Renan's classic definition fails to provide theoretical clarity for distinguishing nationalism from patriotism. In his view, a nation is rooted in a shared past but is actualised in the present through the ongoing desire to maintain a collective existence. He famously describes the existence of a nation as akin to «an everyday plebiscite»<sup>8</sup>, much like an individual's continual affirmation of life.

Gellner's framework explicitly connects the national dimension to the state, making this linkage central to his definition. He describes nationalism as «primarily a political principle, which holds that the political and the national unit should be congruent»<sup>9</sup>. To fulfil this national principle, Gellner argues, legitimate state borders should align as closely as possible with national boundaries<sup>10</sup>.

Similarly, Hobsbawm's definition emphasises the nexus between nation and state. He defines a nation as «the body of citizens whose collective sovereignty constituted them a state which was their political

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<sup>7</sup> As the discussion is extensive, for the bibliography please refer to N. Miscevic, *Nationalism*, plato.stanford.edu/, 2023 and I. Primoratz, *Patriotism*, plato.stanford.edu/, 2020.

<sup>8</sup> E. Renan, *What is a Nation? And other political writings*, New York, 2018, p. 261-2

<sup>9</sup> E. Gellner, *Nations and Nationalism*, New York, 1983, p. 1.

<sup>10</sup> *Ivi*, p. 1.

expression»<sup>11</sup>, further arguing that the concept of the nation is only meaningful in relation to the modern nation-state<sup>12</sup>. In his influential work, Anderson provides no explicit distinction between nationalism and patriotism. He defines a nation as «an imagined political community - and imagined as both inherently limited and sovereign»<sup>13</sup>. Meanwhile, MacIntyre, a prominent advocate of patriotism, conflates the two concepts in his attempt to offer a consistent definition. He describes patriotism as «kind of loyalty to a particular nation which only those possessing that particular nationality can exhibit»<sup>14</sup>. Other scholars emphasised the use of the two concepts according to a double standard: patriotism is expressed in a moderate form, without hostility toward others; nationalism, however, becomes unbridled, often fostering negative attitudes and aggressive actions toward those outside the national group.

In more recent decades, Miller has provided a nuanced account, defining national identity and nationalism in both objective and subjective terms. Objectively, it is based on shared physical or cultural traits that fellow-nationals share, while subjectively, it reflects a common belief in membership or will to belong. The analysis of the field of nationalism and national identity has two internal subdivisions: civic nationalism and ethnic nationalism. As stated by Greenfeld, «nationalism may be distinguished according to criteria of membership in the national collectivity, which may be either “civic”, that is, identical with citizenship, or “ethnic”. In the former case, nationality is at least in principle open and voluntaristic it can and sometimes must be acquired. In the latter, it is believed to be inherent - one can neither acquire it if one does not have it, nor change it if one does it has nothing to do with individual will, but constitutes a genetic characteristics»<sup>15</sup>. These two perspectives on nationalism carry distinct political implications. The objective view aligns with cultural nationalism which emphasises the importance of fostering the cultural life of a nation.

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<sup>11</sup> E. J. Hobsbawm, *Nations and nationalism since 1780. Programme, myth, reality*, Cambridge, 1990, p. 18-9.

<sup>12</sup> The nation is «a social entity only insofar as it relates to a certain kind of modern territorial state, the “nation-state”, and it is pointless to discuss nation and nationality except insofar as both relate to it» (*Ivi*, p. 10).

<sup>13</sup> B. Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism*, London, 2006, p. 6. Furthermore, in his chapter 8 titled «Patriotism and Racism», he provides little, if any, discussion that meaningfully differentiates these two concepts.

<sup>14</sup> A. MacIntyre, *Is Patriotism a Virtue?*, in D. Matravers - J. Pike (eds), *Debates in Contemporary Political Philosophy. An Anthology*, London, 2003, p. 287.

<sup>15</sup> L. Greenfeld, *Nationalism. Five Roads to Modernity*, Cambridge, 1993, p. 11.

In contrast, the subjective view is more closely associated with civic nationalism, which defines the nation as a collective entity entitled to self-governance and territorial sovereignty.

While more sophisticated re-elaboration of nationalism seeks to reconcile it with modern liberal values and the realities of contemporary life<sup>16</sup>, scholars like Smith and Greenfeld, in contrast to Miller, highlight the significant challenges posed by ethnic nationalism in relation to liberalism and democratic ideals. While some political theorists assert that civic nationalism can be reconciled with liberal principles and thereby gain a measure of legitimacy, ethnic nationalism remains morally indefensible<sup>17</sup>.

In recent years, a more refined distinction between nationalism and patriotism has emerged, emphasising different objects of attachment. This shift arises from a critical reassessment of the traditional civic and ethnic nationalism framework, questioning its adequacy and appropriateness in capturing their complexities. In line with this approach, and to enhance the analytical clarity of the present discussion, we will adopt Primoratz's now widely recognised conceptualisation: «both patriotism and nationalism involve love of, identification with, and special concern for a certain entity.

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<sup>16</sup> The seminal books about liberal nationalism are: Y. Tamir, *Liberal Nationalism*, Princeton, 1993; D. Miller, *On Nationality*, Oxford, 1995; W. Kymlicka, *Multicultural Citizenship*, Oxford, 1995.

Liberal nationalists argue that liberal democratic principles and national sentiments are closely intertwined. Since Miller's perspective will be covered in the text, a short sketch of the main arguments presented by the other two exponents of liberal nationalism is useful. Kymlicka's stance is developed in two key steps. First, he contends that individual freedom requires both the freedom to choose and the freedom to revise one's life plan. Second, he emphasises the necessity of a social culture for this conception of freedom, defining such a culture as one that provides its members with a wide range of meaningful life options in a variety of spheres - social, educational, religious, recreational, and economic - across both public and private domains. These cultures are typically territorially concentrated and united by a common language, akin to national cultures. In contrast, Tamir understands the nation-state both as a mental construct in the minds of its members and as the ideal meeting point of liberalism and nationalism. She acknowledges, however, that there is a trade-off between the depth of communal meaning and openness: achieving one requires some compromise on the other. Tamir offers two main reasons for the special political status of nations: 1) no other political entity is as effective as the state in promoting ideas in the public sphere, and 2) the nation requires ongoing creative input to maintain its functionality and appeal. Kymlicka and Tamir differ in their views on multiculturalism: while Kymlicka sees it as integral to liberalism, Tamir contends that national particularism should take precedence - just as real love is always specific, as contrasted with the abstract, albeit noble, love of humanity.

<sup>17</sup> See, for example, A. D. Smith, *Nationalism. Theory, Ideology, History*, Cambridge, 2010, p. 44.

In the case of patriotism, that entity is one's patria, one's country; in the case of nationalism, that entity is one's nation (in the ethnic/cultural sense of the term). Thus patriotism and nationalism are understood as the same type of a set of beliefs and attitudes, and distinguished in terms of their objects, rather than the strength of those beliefs and attitudes, or in terms of theory vs. its emotional underpinnings. Patriotism, then, is love of one's country, identification with it, and special concern for its well-being and that of compatriots [...]. There is, obviously, considerable overlap between country and nation, and therefore between patriotism and nationalism: much that applies to one will also apply to the other. But when a country and polity is not ethnically homogeneous, the two may part ways»<sup>18</sup>.

With the terminological distinctions clarified, we can now shift our focus to the philosophical dimension of the analysis. Within this domain, the discussion unfolds across both the moral dimension (the issue of special concerns for compatriots and co-nationals) and the political dimension (the right to self-determination, the institutional provision of certain cultural goods and the right to the minority group's own institutional structure). To further refine these two theses, we can adopt the conceptual framework proposed by Moreso. Within this framework, the cultural-ethical thesis underscores the ethical significance of nationality and patriotism by arguing that membership in a cultural society is indispensable for fostering individual autonomy and enabling the development of personal life plans in accordance with one's conception of the good. By contrast, the political thesis asserts that all cultural-based nations possess a claim-right to establish a sovereign state over a specific territory<sup>19</sup>. This framework raises two fundamental questions: What is the philosophical relevance of nationalism and patriotism, primarily in moral terms and, consequently, in political terms? Furthermore, how do these two theses interact, and what implications arise from their relationship within this philosophical discourse? For now, we will set aside the political implications, which will be addressed in Section 5, and focus instead on the cultural and moral dimensions of this analysis.

Nationalists and patriotists raise important philosophical problems in that they refer to «a cluster of beliefs about the normative significance»<sup>20</sup> of their nations or countries, contrasting with the widely accepted moral

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<sup>18</sup> I. Primoratz, *op. cit.*, p. 18.

<sup>19</sup> J. J. Moreso, *De Secessione. Los escondites de la vía catalana*, in Las Torres de Lucca, 2021, p. 58.

<sup>20</sup> J. McMahan, *The Limits of National Partiality*, in R. McKim – J. McMahan, *The Morality of Nationalism*, Oxford, 1997, p. 108.

cornerstone of impartiality<sup>21</sup>. This debate underscores a fundamental conflict between the liberal principles of justice and equality - grounded in the equal worth of all individuals - and the partial loyalties that nationalism and patriotism advocate toward one's conationals or compatriots<sup>22</sup>. By prioritizing these partial attachments over universal moral principles, nationalism and patriotism raise critical questions about their moral legitimacy, particularly within an increasingly globalized and multicultural world. Evaluating whether such partiality can be justified is essential for reconciling local loyalties with broader universal ethical commitments<sup>23</sup>.

But what is meant by impartiality? And why does it correlate with a moral problematization of nationalism and patriotism?

In his most well-known book, Barry states that «it is a commonplace that anglophone moral and political philosophy has for the past decade been the scene of a running battle between defenders and critics of impartiality»<sup>24</sup>. In the same period, Habermas, although coming from a different philosophical tradition, portrayed the contemporary panorama as one in which different relevant theoretical approaches, despite their differences, have a common concern: to explore the conditions under which it is possible to make impartial judgements on practical issues on the basis of strictly rational justifications<sup>25</sup>.

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<sup>21</sup> «What is the relation between morality and partiality? Can the kind of partiality that matters to us be accommodated within moral thought, or are morality and partiality rival sources of normative considerations? These are questions that moral philosophy has struggled with in recent decades» (S. Scheffler, *Morality and Reasonable Partiality*, in B. Feltham - J. Cottingham, *Partiality and Impartiality: Morality, Special Relationships, and the Wider World*, Oxford, 2010, p. 98).

<sup>22</sup> «Loyalty to one's family, community or country, for instance, is commonly regarded as a virtue. Yet such an attitude is a clear and indeed paradigmatic example of partiality, requiring that an agent feel and act differently toward one set of persons than she does toward humanity in general» (T. Jollimore, *op. cit.*).

<sup>23</sup> The vexed question of identity politics, particularly in relation to the injustices endured by marginalized groups and the instrumental role of nationalist claims in decolonization struggles, lies beyond the scope of this article. Nevertheless, the fact that identity claims emerge within contexts of injustice and domination lends them a pro tanto appearance of legitimacy. See, on that point, J. McMahan, *op. cit.*, p. 124 ss.

<sup>24</sup> B. Barry, *Justice as Impartiality*, Oxford, 1995, p. 191.

<sup>25</sup> «A number of significant current theoretical approaches, notably those of Kurt Baier, Marcus Singer, John Rawls, Paul Lorenzen, Ernst Tugendhat, and Karl-Otto Apel, derive from this Kantian tradition. All share the intention of analyzing the conditions for making impartial judgments of practical questions, judgments based solely on reasons» (J. Habermas, *Moral Consciousness and Communicative Action*, Cambridge, 1992, p. 43).



It is possible to identify three key issues around which debates on impartiality typically revolve<sup>26</sup>: a) what is meant by impartiality?; b) what does it demand from us?; and c) is it both desirable and feasible to meet these demands?

While there is considerable disagreement regarding the latter two issues, there is a broad consensus on the first<sup>27</sup>. Impartiality is typically understood as a commitment to the principle of equality, whether this is interpreted as formal equality, which focuses on equal treatment under and before the law, or substantive equality, which takes into account the fair distribution of resources and opportunities<sup>28</sup>. Consequently, Nagel, emphasising that ethics<sup>29</sup> is constantly faced with the conflict between the personal viewpoint of individual(s) and some requirement of impartiality, notes that «the requirement of impartiality can take various forms, but it usually involves treating or counting everyone equally in some respect - according them all the same rights, or counting their good or their welfare or some aspect of it the same in determining what would be a desirable result or a permissible course of action. Since personal motives and impartiality can conflict, an ethical theory has to say something about how such conflicts are to be resolved»<sup>30</sup>.

By building on and developing these insights, we can further unpack the issue by tying it more closely to the moral search warrant of nationalism and patriotism. Indeed, Barry recognizes how «the underlying assumption here is that claims to special advantages based simply upon membership of

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<sup>26</sup> For this part, I draw on and refer to the work of Mendus and Jollimore. See S. Mendus, *Impartiality*, in S. Dryzek - B. Honig - A. Phillips (eds.), cit., p. 423 ss. and T. Jollimore, *Impartiality*, [plato.stanford.edu/](http://plato.stanford.edu/), 2023. For a broader analysis, see S. Mendus, *Impartiality in Moral and Political Philosophy*, Oxford, 2002.

<sup>27</sup> «This widespread agreement about the centrality of impartiality, and about its grounding in equality, is coupled with widespread disagreement about the best way of realizing it» (S. Mendus, *Impartiality in Moral and Political Philosophy*, p. 7).

<sup>28</sup> Scanlon distinguishes basic moral equality from more substantive egalitarian claims. According to him, «basic moral equality is now widely accepted, even among people who reject more substantive egalitarian claims. Nozick, for example, accepts basic moral equality. When he writes, “Individuals have rights”, he means all individuals. But he denies that we owe it to people, morally speaking, to make their condition equal to that of others in wealth, income, or any other particular respect» (T. M. Scanlon, *Why Does Inequality Matter?*, Oxford, 2018, p. 4).

<sup>29</sup> Throughout Section I will use the terms ethics and moral (and their derivative cognates) interchangeably, without attaching a distinct normative substrate. However, the terms will be used in a more technical sense in Section 5.

<sup>30</sup> T. Nagel, *Moral Conflict and Political Legitimacy*, in *Philosophy & Public Affairs*, 1987, p. 215.

a certain bloodline, ethnic group or race are too transparently self-serving to form a basis of agreement that others can seriously be asked to assent to. More deeply, the whole idea that we should seek the agreement of everybody rests upon a fundamental commitment to the equality of all human beings. This kind of equality is what is appealed to by the French Declaration of the Rights of Man and of the Citizen and by the American Declaration of Independence. Only on this basis can we defend the claim that the interests and viewpoints of everybody concerned must be accommodated»<sup>31</sup>.

This tension arises from the understanding that any credible theory of justice is rooted in a foundational commitment to (moral) universalism. Indeed, as Pogge articulates, this cosmopolitan perspective holds that «individual human beings are what ultimately matter; they matter equally; and nobody is exempted by distance or lack of shared community from political demands arising out of the counting of everybody equally»<sup>32</sup>.

How, therefore, does the moral point of view relate to the concepts of nationalism and patriotism? Or to put it another way, how do the demands of a morality grounded in, and tending to emphasize, an impartial perspective interact with the particular claims inherent in these two concepts?

Both nationalism and patriotism, though in their different objects of attachment, claim the same attitudes and dispositions toward specific people as such. About nationalism, more particularly, the moral troubles «arise from the character of nationalism as a form of partiality. Nationalists care more about their own nation and its members than about other nations and their members; in that way nationalists are partial to their own national group»<sup>33</sup>. From the patriotic side, it refers to a special concern with, and attachment to, compatriots, that is, «it involves sentiments and aspirations for the security and well-being of the political community, and an attachment to, or special obligations toward co-citizens, that is, people who share a common citizenship arrangement. It involves attachment to co-citizens united in common allegiance to shared political ideals and practices and to the particular political or institutional project in which they are united»<sup>34</sup>.

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<sup>31</sup> B. Barry, *op. cit.*, p. 8.

<sup>32</sup> T. Pogge, *Cosmopolitanism and sovereignty*, in C. Brown (ed.), *Political structuring in Europe: Ethical perspectives*, London, 1994, p. 89.

<sup>33</sup> T. Hurka, *The Justification of Partiality*, in R. McKim – J. McMahan, *op. cit.*, p. 139.

<sup>34</sup> M. Moore, *Is Patriotism an Associative Duty?*, in *The Journal of Ethics*, 2009, p. 385.

Although Miller sometimes tends to blur the lines between nationalism and patriotism, he effectively underlines the normative significance of these particular attitudes and attachments. He puts forward a compelling argument that national boundaries can have ethical relevance, arguing that «the duties we owe to our compatriots may be more extensive than the duties we owe to strangers, simply because they are compatriots»<sup>35</sup>.

In explaining the rationale behind this position and claim, Miller points to the tension between what individuals and political actors are actually doing - for instance, implementing welfare policies intended exclusively for citizens of specific nations, such as Americans or Italians - and the prevailing impartial stance of moral philosophy<sup>36</sup>. Indeed, the nationalist-patriotic perspective argues that recognising the equal moral worth of all individuals does not preclude acknowledging special moral obligations arising from specific relationships. Rather, the ethical significance of nationalism and patriotism lies in the suggestion that one should show greater concern for particular individuals and, all things being equal, favour the interests of those with whom one holds a special relationship over the interests of those who are outside that relationship<sup>37</sup>. If, echoing Nagel, we conceive the ethical field as the battleground between personal and impartial motives, and if we apply this in relation to our specific ethical problem, then the central task of moral and political philosophy is «to seek a coherent, determinate, and stable reconciliation of the competing demands that issue from these divergent sources. It is important to determine, in particular, what sorts of relation are capable of legitimizing partiality as well as how extensive the justified departures from strict impartiality are»<sup>38</sup>.

The justification for partiality - or, more precisely, a reasoned and well-grounded deviation from strict impartiality - is not inherently unrelated to, nor in opposition to, the principles of impartiality.

While consequentialist theories impose a strict demand for impartiality, requiring individuals to disregard most considerations of how

<sup>35</sup> D. Miller, *The Ethical Significance of Nationality*, in *Ethics*, 1988, p. 647.

<sup>36</sup> D. Miller, *The Ethical Significance*, cit., p. 647.

<sup>37</sup> Miller claims that «nationalists have pointed to the logical gap between the claim that every human is of equal worth and the claim that every agent, individual or collective, has equal responsibilities to every other. We owe something to every person - respect for their human rights, for instance - but we also owe more to some than to others, by virtue of our past histories, the practices we are involved in, our communal relations, and so forth» (D. Miller, *Nationalism*, cit., p. 540).

<sup>38</sup> J. McMahan, *op. cit.*, p. 110.

their actions might differently affect the interests of those they care about most, many deontological frameworks provide justifications for partiality in everyday life. These latter perspectives allow for preferential treatment toward oneself, friends, and family by grounding such exceptions in impartial principles that legitimize these forms of partiality.

Developing this differentiation between the two different normative ethical theories that refer to impartiality, Mendus might affirm that «the defenders of impartiality are insistent that any sensible set of moral principles will allow discretion and some will even enjoin partiality: the commandment “honor thy father and thy mother” applies impartially to all children, but it permits (indeed requires) partial behavior with respect to one’s own parents. It requires that each and every child honor his parents, but not thereby everyone else’s parents. However, even if we agree that impartiality, properly understood, does not extend to all our everyday decisions and actions, it nonetheless sets limits to the extent to which, and the contexts in which, we can favor our friends and family over strangers»<sup>39</sup>.

Moreover, in certain deontological frameworks, such as those proposed by Rawls, Habermas, and Scanlon, the principle of impartiality hinges on the crucial question of whether all individuals subject to the chosen principles and rules can reasonably accept them. In other words, their defence depends on distinguishing between two levels of impartiality: impartiality at the level of ordinary decision-making (level 1 impartiality) and impartiality at the level of principle selection (level 2 impartiality). And the argument is that, while impartiality is indeed important in moral and legal principles, those principles can (and should) be ones that themselves allow room for personal attachments<sup>40</sup>. Thus, principles grounded in second-order (or level) impartiality, as established through a contract, agreement or consensus, permit a significant degree of first-order (or level) partiality in the realm of individual choice and action in the everyday situations.

The feelings of partiality and the related special obligations towards certain individuals arise from the different relationships one may have with them and different types of interpersonal relationships can give rise to partiality, although not all instances of partiality are valid<sup>41</sup>. For example,

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<sup>39</sup> S. Mendus, *Impartiality*, cit., in S. Dryzek - B. Honig - A. Phillips (eds.), cit., p. 426.

<sup>40</sup> *Ivi*.

<sup>41</sup> «Although we have countless interpersonal relationships, we have reason for partiality only in some. Why is this? Why is there reason for friendship and love of family, but not for racism or omertà? Without an answer, without a principled distinction

partiality towards one's own family is a paradigmatic case of permissible and even morally required partiality. In contrast, racism is a clear case of arbitrary, unjustified and harmful partiality. As noted above, certain forms of partiality are defensible if, at the level of principles selection (level 2), it is reasonable to permit partial actions at the level of everyday and/or individual choice (level 1), subject to certain limits.

In this context, it is crucial to explore the reasons and justifications for nationalism and patriotism in order to situate their claims to partiality along a continuum, ranging from justified familial loyalty to unjustified racial favouritism. The literature identifies five key reasons for supporting nationalism and/or patriotism, arranged along a spectrum from intrinsic to instrumental justifications<sup>42</sup>:

- a. Intrinsic Value Argument: Every culture holds inherent value and should be promoted as an end in itself due to its uniqueness.
- b. Flourishing Argument: Humans thrive within communities beyond their immediate family, where they learn essential cultural concepts and values, enriching both individual and collective lives.
- c. Moral Understanding Argument: While universal moral values like freedom and equality are abstract, richer and more meaningful values are embedded in specific cultural traditions tied to nations or countries.
- d. Self-Determination and Reparations Arguments: The self-determination argument upholds individuals' moral right to form self-governing associations, while the reparations argument emphasizes nationhood as a tool for addressing historical injustices.
- e. Pluralism and Identity Arguments: Cultural diversity enriches the world, and the unique contributions of each national culture should be valued and celebrated, even if some cultures are deemed superior to others.

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between the relationships that support partiality and the relationships that don't, a creeping scepticism sets in about partiality as a whole» (N. Kolodny, *Which Relationships Justify Partiality? General Considerations and Problem Cases*, in B. Feltham – J. Cottingham (eds.), *op. cit.*, p. 170).

<sup>42</sup> In drawing up the sketch, I have cross-referenced, clarified, extended and integrated insights and classifications found in the relevant literature. I refer, among others, to the following works: N. Miscevic, *op. cit.*; I. Primoratz, *op. cit.*; J. McMahan, *op. cit.*, p. 112 s., J. Lichtenberg, *Nationalism, For and (Mainly) Against*, in R. McKim – J. McMahan (eds.), *op. cit.*, p. 160 s.

To identify the key issues at stake, we will start with a seminal article by MacIntyre, which explores the ethical tension between partiality and impartiality from a perspective that, as it hinges on a shared ethical core and the required attitudes, is applicable to both nationalism and patriotism.

MacIntyre's main argument is the division of the moral debate around two different positions, which he labels liberal and patriotic. Their peculiarity, and what makes them distinctive, is that they require different social and personal backgrounds and provide different reasons, solutions and concerns in day-to-day life. While for «the liberal account of morality where and from whom I learn the principles and precepts of morality are and must be irrelevant both to the question of what the content of morality is and to that of the nature of my commitment to it», for the patriotic account «the questions of where and from whom I learn my morality turn out to be crucial for both the content and the nature of moral commitment»<sup>43</sup>.

He further contends that the liberal conception of morality, defined by its impartiality and universality, is fundamentally at odds with a positive evaluation of the patriotic account. In fact, the two are not simply divergent but in direct antagonism, with each undermining the other by rejecting its core assumptions: «two rival and incompatible moralities, each of which is viewed from within by its adherents as morality-as-such, each of which makes its exclusive claim to our allegiance»<sup>44</sup>.

MacIntyre emphasises, more or less explicitly, the higher status of the patriotic standpoint on the basis of a basic assumption: «what the morality of patriotism at its best provides is a clear account of and justification for the particular bonds and loyalties which form so much of the substance of the moral life»<sup>45</sup>.

In response to MacIntyre's defence of robust patriotism, the recent moral thought has succeeded «in constructing a middle-of-the-road position that avoids both sweeping universalism that leaves no room for patriotic

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<sup>43</sup> A. MacIntyre, *op. cit.*, p. 291 (for both quotes). The five central thesis MacIntyre attributes to the moral-liberal standpoint include: 1) morality consists of rules that any rational person would agree to under ideal conditions; 2) these rules impose constraints and are neutral between competing interests; 3) they are also neutral between differing views on how humans should live; 4) individual human beings are the focus of morality, with each person counting equally; and 5) the moral agent's perspective is universal, independent of social particularities.

<sup>44</sup> A. MacIntyre, *op. cit.*, p. 293.

<sup>45</sup> *Ivi*, p. 297.

attachment and loyalty, and extreme patriotism that acknowledges no universal moral considerations»<sup>46</sup>.

McMahan seeks to deconstruct traditional justifications for partial attachments while simultaneously examining arguments that might support their plausibility. He argues that such partiality arises from duties of gratitude for the benefits conferred by one's nation/country. These duties involve preserving the local culture, institutions, and values for future generations and are comparable to political obligations founded on reciprocity<sup>47</sup>.

To reconcile national partiality with moral impartiality, Primoratz proposes the concept of ethical patriotism. This perspective emphasises a moral responsibility to uphold the integrity and justice of one's society, requiring individuals to confront immoral practices and unjust policies within their community. Unlike a generalised concern for global moral values, ethical patriotism reflects a deeply personal and sustained commitment to ensuring that one's community adheres to principles of justice and morality.

Wrapping up the discussion of the moral relevance of patriotism and nationalism, many insights can be drawn that constitute the conceptual building blocks for the development of the present work and the claim it seeks to carry forward. The examination of the partial perspective of morality reveals several key elements that intersect and influence both nationalist and patriotic thought. While MacIntyre identifies three fundamental insights, an additional one is provided by a shared intuition from both Primoratz and McMahan

In the first place, for MacIntyre, the liberal, universal and impartial morality is lacking in self-sufficiency and motivational force. Second, the idea of the morally impartial individual as a «citizen of nowhere»<sup>48</sup> is both conceptually untenable (as an artificial, impractical stance) and practically unfindable, since such a figure is neither rooted in nor identifiable within any real community. Third, the moral framework shared by patriotism and nationalism revisits Hegel's critique of Kant, configured as *Sittlichkeit v. Moralität*<sup>49</sup>. Fourth, and finally, MacIntyre's arguments closely align with a

<sup>46</sup> I. Primoratz, *op. cit.*, p. 25.

<sup>47</sup> J. McMahan, *op. cit.*, p. 130-1.

<sup>48</sup> A. MacIntyre, *op. cit.*, p. 294.

<sup>49</sup> «Sittlichkeit is the customary morality of each particular society, pretending to be no more than this. Moralität reigns in the realm of rational universal, impersonal morality, of liberal morality» (A. MacIntyre, *op. cit.*, p. 300).

core intuition highlighted by both Primoratz and McMahan: partiality can be justified only if it is grounded within the same normative framework that legitimizes political authority. This perspective underscores the coherence between the principles that validate individual and collective obligations and those that underpin the legitimacy of political power, effectively bridging the cultural and political theses.

### 3. *The quandary of constitutional identity*

This section introduces two additional fundamental concepts into the debate: constitution and identity, which, when considered in conjunction, underpin what is referred to as «constitutional identity»<sup>50</sup>. Given the vast literature on the subject and the impossibility of comprehensively addressing its academic discourse and political significance, we will focus on a more specific - though equally important - task. After briefly sketching the semantic range of the concept, we will use its polemical potential to interrogate it further, this time starting from the particular notion of identity and how it has been shaped and used.

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The *Sittlichkeit v. Moralität* debate is rescued in the in the English-speaking context as the debate on the priority of right over good.

<sup>50</sup> The bibliography on the concept is growing exponentially. The classical works on the subject are cited throughout this paper. This footnote merely refers to those contributions not cited, but nevertheless considered: M. Claes – J.-H. Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, in *German Law Journal*, 2015, 918-970; P. Cruz Mantilla de los Ríos, *La identidad nacional de los Estados miembros en el Derecho de la Unión Europea*, Madrid, 2021; P. Faraguna, *Taking Constitutional Identities Away from the Courts*, in *Brooklyn Journal of International Law*, 2016, p. 491-578; G. J. Jacobsohn, *The Disharmonic Constitution*, in J. K. Tulis – S. Macedo (eds.), *The Limits of Constitutional Democracy*, Princeton, 2010, p. 47-65; S. Martin, *L'identité de l'État Dans l'Union Européenne: Entre 'identité Nationale' et 'identité Constitutionnelle'*, in *Revue française de droit constitutionnel*, 2012, p. 13-44. F. X. Millet, *L'Union Européenne et l'identité constitutionnelle des Etats membres*, Paris, 2013; M. Rosenfeld, *Modern Constitutionalism as Interplay between Identity and Diversity*, in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy*, Durham, 1994, p. 3-35; J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford, 2023; T. Wischmeyer, *Nationale Identität Und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven*, in *Archiv des öffentlichen Rechts*, 2015, p. 415-460; A. von Bogdandy, *Identidad constitucional exploración de un fenómeno ambiguo con ocasión de lapolítica de identidad europeade lege lata y lege ferenda*, in *Revista Española de Derecho Constitucional*, 2005, p. 9-32.

In addition, see the following recent special issues: *European Public Law*, Volume 27, Issue 3, 2021, p. 411-628; *German Law Journal*, *Special Issue: Constitutional Identity in the Age of Global Migration*, Volume 18, Issue 7, 2017, p. 1587-1822.



The concept of constitutional identity, while widely debated, is open to diverse interpretations, «as there is no agreement over what it means or refers to»<sup>51</sup>. Furthermore, its contested nature underscores its political significance. As Waldron explained<sup>52</sup>, a concept is deemed essentially contested for three primary reasons: 1) disputes over its meaning are fundamental to its essence; 2) its contested nature is integral to its definition; and 3) ongoing disagreements highlight its persistent relevance.

It is crucial to emphasise, though often neglected, that the individual components of this discourse - constitution and identity - are themselves inherently contested and fluid concepts. Their definitions are not fixed but are constantly reshaped by ongoing debates over interpretations and meanings. This has a profound implication: these two concepts are not merely interconnected but also evolve independently, each exerting a distinct influence on the broader construct of “constitutional identity”. Consequently, we encounter a complex web of conceptual interrelations, rendering this notion both difficult to navigate and susceptible to diverse interpretations and applications across various contexts.

In examining this concept more concretely within the current debate, a variety of distinct focuses and meanings come to light<sup>53</sup>. This nuanced framework underscores not only the constitutional text itself but also its broader cultural and societal dimensions, illustrating how identity both influences and is influenced by these interconnected elements. Despite the diversity of its implications, these perspectives are unified by a common underlying principle: the ideal of constitutionalism. This ideal embodies the fundamental normative requirements for defining and limiting governmental powers, ensuring commitment to the rule of law, and safeguarding fundamental rights. It serves as the essential thread weaving

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<sup>51</sup> M. Rosenfeld, *Constitutional Identity*, in M. Rosenfeld – A. Sajo, *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 756.

<sup>52</sup> J. Waldron, *Vagueness in Law and Language. Some Philosophical Issues*, in *California Law Review*, 1994, p. 529. For the first use of this notion, see W. B. Gallie, *Essentially Contested Concept*, in *Proceedings of the Aristotelean Society*, 1956, p. 167-198.

<sup>53</sup> In terms of focuses, the following are concerned: 1) the actual features and provisions of a constitution; 2) the relationship between the constitution and its cultural operative background; 3) the relationship between the identity of the constitution and other relevant identities actually presents in its scope of application.

In terms of its significance, they branch out in the following directions: 1) the fact of the existence of a constitution; 2) the specific content of a constitution concretizing its own identity; 3) the context surrounding the constitution and its significant role in shaping the identity.

through the various interpretations, providing coherence to the otherwise diverse and multifaceted nature of constitutional identity.

As an intersection of political philosophy, constitutional theory and the case-law of constitutional/supreme courts, the very concretization of the constitutional identity is the result of a geographic crossover: while the most specific and precise philosophical theorizing comes from American scholars<sup>54</sup>, its explicit conceptualization and typification in the courts comes from the German Federal Constitutional Court (hereinafter GFCC)<sup>55</sup>, while its most tangible, disruptive and famous implementation in practice is the effort of the Indian Supreme Court<sup>56</sup>.

A diverse range of theories has emerged to give shape to the concept of constitutional identity, with three of them now standing as paradigmatic. These theories can be mapped along a spectrum whose central organizing principle is the relationship between constitutional documents and (how to construct and/or understand) constitutional identity.

The first perspective is advanced by Troper<sup>57</sup>, who argues that identifying a country's constitutional identity involves distilling the indispensable principles of its constitution - those without which the constitution would lose its essential character and fail to perform its core political function. In this way, constitutional identity is rooted in the oversight of constitutional texts and plays the limited role of directing faithful constitutional interpretation and adjudication.

In contrast, Fletcher<sup>58</sup> posits a fundamentally dualistic relationship between constitutional documents and constitutional identity, where the latter is an unwritten legal framework that shapes both the drafting and interpretation of constitutional texts. This approach views constitutional identity as grounded in supra-constitutional values, suggesting that

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<sup>54</sup> On that point, see O. Bassok, *Interpretative theories as roadmaps to constitutional identity: The case of the United States*, in *Global Constitutionalism*, 2015, p. 289-327.

<sup>55</sup> See L. M. Besselink, *National and Constitutional Identity Before and After Lisbon*, in *Utrecht Law Review*, 2010, p. 36-49, T. Drinóczi, *Constitutional Identity in Europe. The Identity of the Constitution*, in *German Law Journal*, 2020, p. 105-130 and M. Polzin, *Identity and Eternity: The German Concept of Constitutional Identity*, in K. Kovács (ed.) - *The Jurisprudence of Particularism. National Identity Claims in Central Europe*, Oxford, 2023, p. 57-77.

<sup>56</sup> For a brief overview of the Indian case, see V. Nayak, *The Basic Structure of the Indian Constitution*, <https://constitutionnet.org/>.

<sup>57</sup> M. Troper, *Behind the Constitution? The Principle of Constitutional Identity in France*, in A. Sajó - R. Uitz (eds.), *Constitutional Topography: Values and Constitutions*, The Hague, 2010, p. 187-203.

<sup>58</sup> G. P. Fletcher, *Constitutional Identity*, in *Cardozo Law Review*, 1993, p. 737-746.

addressing questions of constitutional coherence requires inward reflection on the legal culture that underpins the relevant dispute.

Rosenfeld and Jacobsohn offer a middle-ground view, situating constitutional identity in the ongoing reinterpretation of constitutional documents by political, including judicial, actors. For them, constitutional identity is neither a fixed essence enshrined in the culture of a society nor an invented construct, but rather a concept that evolves through continuous political and legal engagement.

For Jacobsohn, in particular, the constitution enshrined a set of fundamental pre-commitments and it «acquires an identity through experience [...]». Identity emerges dialogically and represents a mix of political aspirations and commitments that is expressive of a nation's past, as well as the determination of those within the society who seek, in some ways, to transcend that past<sup>59</sup>. In his understanding, the identity-building process is triggered by constitutional disharmony, creating the need to adapt and cope with conflict and dissonance, where constitutional identity is shaped dialogically to overcome the causes of such disharmony within a range delimited by the actual constitutional prescriptions and the prevailing historical and socio-political conditions.

Finally, Rosenfeld conceptualises the constitutional identity as the «belonging to an imagined community that must carve out a distinct self-image»<sup>60</sup>. Furthermore, its place and function «is determined by the need for dialectical mediation of existing, evolving, and projected conflicts and tensions between identity and difference - or, more precisely, identities and differences - that shape the dealings between self and other within the relevant polity committed to constitutional rule and favourably disposed toward the aims of constitutionalism»<sup>61</sup>.

Having established the broader theoretical framework of constitutional identity, it is essential to examine the notion of identity itself. This concept, as interpreted in the present work, is structured into two distinct levels: a first-order level and a second-order level. This bifurcation allows for a nuanced understanding of identity, enabling a distinction between foundational self-conceptions and their reflective interpretations within constitutional discourse. The first-order level pertains to the substantive meaning of identity - what it concretely entails and demands -

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<sup>59</sup> See G. J. Jacobsohn, *Constitutional Identity*, in *The Review of Politics*, 2006, p. 363. See also G. J. Jacobsohn, *Constitutional Identity*, Cambridge, 2010.

<sup>60</sup> M. Rosenfeld, *Constitutional Identity*, cit., p. 759.

<sup>61</sup> *Ivi*, p. 761.

thus addressing the core questions that arise within the inquiry into the concept of identity. The second-order level, by contrast, concerns questions about the identity, focusing on more abstract, meta-level considerations that distinguish it from the first-order analysis.

In line with this distinction<sup>62</sup>, the second-order level addresses normative questions such as who should be responsible for constructing and defining constitutional identity, which methods are most appropriate for doing so, the extent to which the constitution can be amended in relation to its own identity and other identities, and who should ensure consistency between constitutional identity and constitutional change.

Conversely, the first-order level focuses on the various referents of constitutional identity as discussed in both academic literature and jurisprudence. These include the identity of the constitutional text itself, the identity of constitutional practices or traditions, the core values and principles embodied in the constitution, the identity of the constitutional subject, national identity, the (potentially non-national) identity of a political community, and the religious, ethnic, or cultural identity of society as a whole or of particular subgroups within it.

However, maintaining this analytical distinction in practice is challenging due to the frequent overlap between the two levels. As Martí suggests, the concept of constitutional identity can be unpacked into two basic yet interrelated strands that, for the purposes of this discussion, can be referred to as the constitutional identity-problem: the identity of the constitution and the identity of the people<sup>63</sup>. Accordingly, the questions raised by the first-order and the second-order levels necessarily merge when dealing with the identity of the constitution or of the people.

Starting with the first form, the identity of the constitution, the term identity seems to refer to certain characteristics that specifically define this

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<sup>62</sup> See also J. L. Martí, *op. cit.*, p. 18-19

<sup>63</sup> For this distinction, see also D. Grimm, *Three Meanings of Constitutional Identity and Their Prospects in the European Union*, in J. de Poorter – G. van der Schyff – M. Stremmler – M. De Visser – I. Leijten – C. van Oirsouw (eds), *European Yearbook of Constitutional Law 2022 A Constitutional Identity for the EU*, 2022, p. 14. Grimm identifies three distinct meanings of constitutional identity. The first, termed “banal”, denotes the basic idea that one constitution can be distinguished from others. The second meaning pertains to those provisions that are essential, given that without them the constitution would fundamentally change. In contrast, numerous other provisions could be modified or even abolished without altering the core constitutional identity. Finally, the third meaning operates at a symbolic level, reflecting how individuals governed by a particular constitution perceive it as a lasting embodiment of the popular will regarding the organization of their political governance and social relations.

something and not some other things<sup>64</sup>. In particular, and in the first place, here it seems to refer to the identity of the constitution itself, not to other forms of collective identity, and secondly, it is what makes a particular constitution (e.g. the German constitution or the US constitution) that constitution as distinct from other constitutions.

It is possible to define the identity of the constitution as a specification of the identity-problem related to the legal system. Synchronically, the question focuses on the criteria that determine when norms are classified as part of a singular legal system, the delineation of the boundaries of these systems, and their interactions with external norms. Diachronically, the continuity of legal systems over time prompts critical inquiries into how one can identify the moment an existing legal system is replaced by a new one, the conditions under which a single legal system may divide into two distinct entities, or the scenarios in which two legal systems converge into a unified framework. A legal system is not a mere technical issue, but it becomes the target of identification and attachment due to its importance for demarcating which law is the own law and for identifying its distinctive characteristics<sup>65</sup>.

When one attempts to delineate more precisely and deeply the object of inquiry and to get to the heart and bedrock of any legal system, that is, the constitution and its fundamental core, one is confronted with a proliferation of challenges. The first step involves determining whether to conceptualise the constitution as a text or as a norm. If we conceive the constitution as a constitutional text, three further challenges emerge: a) the issue of unwritten constitutions; b) the question of rewording or making minor structural changes to essential constitutional provisions; and c) the problem of crystallised practices and the necessity of interpretation.

To gain a deeper understanding of constitutional identity as the essence of a constitution, it is more insightful to conceptualise the constitution as a constitutional norm - an intricate framework consisting of

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<sup>64</sup> «The identity of a thing consists in those constitutive features that define it as this thing or this kind of thing rather than some other, and distinguish it from others» (B. Parekh, *A New Politics of Identity*, New York, 2008, p. 8).

<sup>65</sup> For example, «the Scottish legal system is referred to by the then Scottish Justice Minister as “proudly independent”, “a cornerstone of Scottish life for centuries”, and the rest of the factsheet elaborates on that legal system’s “integrity and independence” in terms of its historical roots, legal sources, and institutional structure, which distinguish it from other legal systems including (and perhaps especially) the legal system of England and Wales, despite this latter co-existing in the same state (the UK) as the Scottish legal system» (J. Dickson, *Towards a Theory of European Unions Legal Systems*, in J. Dickson – P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law*, Oxford, 2012, p. 32 ss.).

values, principles, and rules that require interpretation<sup>66</sup>. Within this structure, constitutional identity is formed by a subset of elements deemed essential and critically important to the overall constitutional endeavour. However, even if we can successfully pinpoint this core subset, we must establish an additional criterion for properly determining its identity: specifically, what level of change to these elements is necessary to effect a transformation in constitutional identity. This is crucial because different clauses and principles carry varying degrees of significance, meaning that not every alteration to the constitution results in a transformation of its identity. Moreover, an added layer of complexity arises from the fact that identifying these essential elements is largely dependent upon moral and political judgments regarding the values and principles in question.

This distinction is essential to the very concept of constitutional amendment, which presupposes a constitution whose identity endures over time. The element being amended – constitution x – remains the same both before and after the amendment, despite the change. In contrast, the notion of constitutional revolution entails the decoupling and replacement of identities, where constitution x is superseded by constitution y. This can occur in two ways: by simply discarding constitution x and adopting a new constitution y, or by implementing such profound changes to constitution x that the resulting document constitutes a new constitution altogether. On this basis, and for these reasons, Jacobsohn argues that a radical interpretation of the fundamental principles and purposes underlying the basic constitutional provision implies an attempt to replace its basic and underlying commitment with something fundamentally different, effectively yielding a new constitution<sup>67</sup>.

Going further in the exploration, it is possible to note how the most defying challenge arises from the constitution as a set of values and principles that are perceived as the true identity of a constitution (take the constitutional identity as considered by Troper as a reference). In a highly interconnected global context, with the emergence of international

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<sup>66</sup> «The constitutional text needs to be interpreted. The text is just a collection of words, but these words need to be interpreted to generate norms. And it is the norms, not just the words, what embody the essence of a constitution and can be seen as its identity. Any constitution is a text plus a set of crystallized practices, including a variety of things like different interpretations of the text, the particular jurisprudence set by the courts as to how interpret such text and some basic interpretive assumptions shared by the legal community, including some basic normative values and principles, etc.» (J. L. Martí, *op. cit.*, p. 24).

<sup>67</sup> G. J. Jacobsohn, *Constitutional Identity* (2006), *cit.*, p. 383-4.

documents incorporating values and principles<sup>68</sup> that are now widely shared, there is very little difference between many constitutions or, at least, the differences are reasonable limited in a way that are not able to raise highly significant substantive normative quarrels<sup>69</sup>.

As Martí notes, the constitutions of Spain and Germany share a common basis of fundamental values and principles. But does this imply that the Spanish and German constitutional identities are identical? If it were, the counterintuitive scenario would occur whereby two or more constitutions referring to two or more different jurisdictions share the same identity, which is precisely the one that should «individuate the constitution and mark it out from others»<sup>70</sup>. To counter this paradoxical notion, we could consider that constitutions are inherently crafted for and by distinct peoples within distinct territories, meaning they are always the constitutions of something specific and unique. In her endeavour to formulate a new understanding of legal systems, Dickson emphasised that they cannot be examined in isolation from the political and social structures to which they belong. A legal system is not a self-contained normative system; rather, it is always the legal system of something, and a crucial aspect of its identity is

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<sup>68</sup> For the difference between values and principles at the constitutional level, see G. J. Jacobsohn, *Constitutional Values and Principles*, in M. Rosenfeld – A. Sajo, *op. cit.*, p. 777 ss.

<sup>69</sup> As an example, the Italian Constitutional Court, in its famous judgment 269/2017, acknowledging the essentially constitutional status of the CFREU, underlined that «the principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by other Member States' constitutions)» (Para. 5.2, Italian Constitutional Court, Judgment 269/2017). Similarly, the Austrian constitutional framework showed this problematic convergence between the national constitutional norms, the ECHR (which has the rank of a constitutional source in Austria) and the equivalent norms of the Charter (Austrian Constitutional Court, U 466/11–18, U 1836/11–13). See G. Martinico, *The Tangled Complexity of the EU Constitutional Process*, London, 2023, p. 180 ss.

For the constitutional commonality, see, among others, The Court of Justice of the European Union, *EUUnited in diversity: between common constitutional traditions and national identities*, Riga, 2021; M. Fichera, O. Pollicino, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, in *German Law Journal*, 2019, p. 1097-1118; A. Pizzorusso, *Common constitutional traditions as Constitutional Law of Europe?*, in *STALS Research Paper*, 2008; O. Pollicino, *Common Constitutional Traditions in the Age of the European Bill(s) of Rights: Chronicle of a (somewhat prematurely) death foretold*, in L. Violini - A. Baraggia (eds.), *The Fragmented Landscape of Fundamental Rights Protection in Europe. The Role of Judicial and Non-Judicial Actors*, Cheltenham, 2018, p. 42-71.

<sup>70</sup> E. Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlands Journal of Legal Philosophy*, 2016, p. 91.

rooted in the nature of that entity and the relationship the legal system maintains with it<sup>71</sup>. Is this remark meaningful? Does our constitutional identity, in the end, stem from our unique identity as a people?<sup>72</sup>

Accordingly, allowing constitutional identity to be understood primarily as the identity of the constitution, rather than as the expression of the people's identity, risks undermining the normative core of the constitution and the people's will it embodies. The core of the constitutional identity-problem, what we are talking about and what is at stake in the preservation of identity, seems irreducibly to be the specific constitution of a particular country and its citizens. In essence, the very constitutional identity lies in the identity of the people themselves, albeit the latter «will rather remain latent most of the time. There is no need to resort to it as long as the identity of a constitution can be taken for granted. Conversely, if it comes to the fore, this will often indicate that the integrity of a constitution is questioned or threatened»<sup>73</sup>.

Rather than offering a clear solution, this conceptual shift introduces new challenges, as it necessitates a substantive definition of We the People. This inevitably draws attention to the boundary problem, «the general paradox of founding for democracy»<sup>74</sup> or, in legal terms, «a persistent puzzle in constitutional theory»<sup>75</sup>, which is deeply intertwined with the troublesome notion of constituent power<sup>76</sup> as the (ultimate) constitutional authority and authorship of the people<sup>77</sup>.

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<sup>71</sup> J. Dickson, *op. cit.*, p. 38

<sup>72</sup> See J. L. Martí, *op. cit.*, p. 30.

<sup>73</sup> D. Grimm, *op. cit.*, p. 14.

<sup>74</sup> D. Owen, *Constituting the polity, constituting the demos: on the place of the all affected interests principle in democratic theory and in resolving the democratic boundary problem*, in *Ethics & Global Politics*, 2012, p. 130.

<sup>75</sup> M. Tushnet, *How Do Constitutions Constitute Constitutional Identity*, in *International Journal of Constitutional Law*, 2010, p. 672.

<sup>76</sup> «The idea that there exists a sovereign people, endowed with the unlimited power to enact a constitution when ever and however it wishes, should be rejected, for it makes no sense for both conceptual and normative reasons» (V. Ferreres Comella, *The Death of Constituent Power*, in R. Hirschl – Y. Roznai, *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity*, Cambridge, 2024, p. 63)

<sup>77</sup> «Constitutional identity in the sense that the people who live under a certain constitution regard it as a lasting expression of the popular will as to how their political rule and social relations should be ordered» (D. Grimm, *op. cit.*, p. 14). The point appears in more genuinely terms in Tushnet's formulation, so that the bond between the two forms of identity becomes clearer: «the preamble to the Irish Constitution, like the preamble to the United States Constitution, raises questions about who “the people” are who govern themselves in modern constitutionalist systems» (M. Tushnet, *op. cit.*, p. 672)



Four potential approaches may be identified as viable candidates for addressing this issue.

The first is what Jacobsohn refers to as the deeply constitutive view<sup>78</sup>, in which constitutional identity is seen as the identity of the people constituted by the very parameters of the constitution itself. However, this view is inherently paradoxical and counterintuitive, as it implies that a society's identity would fundamentally change whenever its constitution changes.

A second approach, termed “political” by Martí<sup>79</sup>, asserts that the legitimacy of a particular constitution is rooted in the constitutional authority of its people, defined as the collective will of that people to form a cohesive polity. Yet, this perspective encounters a significant challenge: how to reconcile the will of those who do not unanimously consent to constitute the same people or adhere to the same rules? The introduction of any decision-making mechanism, such as majority rule, presupposes a prior definition of collective agency, which inevitably circles back to the boundary problem and its inherent paradox.

The third potential solution, on the other hand, points back to nationalism and the identity that derives from it, where the boundary problem is settled by those features that were previously associated with the ethno-cultural nationalist.

Finally, the last possible solution, constitutional patriotism (labelled “moral” by Martí<sup>80</sup>) configures the constitutional authority of the people as being constituted by a set of common political and moral values and principles, ideally expressed and protected by the constitution and, consequently, the people constituted and subject to this constitution would also be identified by these values and principles.

This theoretical approach requires a brief explanation. Its earliest articulation can be traced back to political scientist Sternberger<sup>81</sup>. Originating in Germany and shaped in part by the German unique historical experiences, this concept has gained global influence through the work of

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<sup>78</sup> G. J. Jacobsohn, *Constitutional Identity* (2006), *cit.*, p. 364.

<sup>79</sup> J. L. Martí, *op. cit.*, p. 33.

<sup>80</sup> J. L. Martí, *op. cit.*, p. 34.

<sup>81</sup> D. Sternberger, *Verfassungspatriotismus*, in *Frankfurter Allgemeine Zeitung*, 23 May 1979. For an overview on Sternberger's perspective, see P. Molt, *Dolf Sternbergers Verfassungspatriotismus*, in *Zeitschrift für Politikwissenschaft*, 2006, p. 875–900.

Habermas and, more recently, through a broader theorisation by Müller<sup>82</sup>. The concept can be deconstructed to reveal its two distinct components: “it is constitutional in that it revolves around the work of making, criticizing, and reflecting on the constitution, which takes place in the public sphere. It is patriotic in that it has a binding effect on the community of citizens, furnishing them with civic solidarity and a collective identity as makers of the constitution. The formation of constitutional-patriotic identity, significantly, takes place at the level of opinion and will formation in the public sphere»<sup>83</sup>.

At its core, this idea provides a straightforward model of political identification that «can take the place originally occupied by nationalism»<sup>84</sup>, so addressing the challenge of justifying and sustaining democratic governance for culturally pluralistic democracies. This approach encourages identification with core constitutional principles and practices, arguing that «self-governing political communities, or the constitutional principles on which they are based, can provide sufficient focus for forms of loyalty and patriotism that do not presuppose prior cultural commonalities»<sup>85</sup>. In this process, it fosters a political culture that is distinct from various cultural identities - whether national, subnational, traditional, or religious - by providing a «distinctive interpretation of those constitutional principles that

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<sup>82</sup> The principal and crucial works on the subject are from J. Habermas and J.-W. Müller. Among others, see especially: J. Habermas, *The Inclusion of the Other*, Cambridge, 1998 and J.-W. Müller, *Constitutional Patriotism*, Princeton, 2007. For further relevant literature on the subject, which does not purport to be comprehensive, that either supports or opposes constitutional patriotism, see the following references: K. A. Appiah, *Cosmopolitan Patriots*, in *Critical Inquiry*, 1997, p. 617-639; A. Baumeister, *Diversity and Unity. The Problem with ‘Constitutional Patriotism’*, in *European Journal of Political Theory*, 2007, p. 483-503; V. Breda, *The Incoherence of the Patriotic State: A Critique Of ‘Constitutional Patriotism’*, in *Res Publica*, 2004, p. 247-265; C. Calhoun, *Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere*, in *Public Culture*, 2002, p. 147-171; A. Ingram, *Constitutional patriotism*, in *Philosophy and Social Criticism*, 2006, p. 1-18; S. Macedo, *Just patriotism?*, in *Philosophy and Social Criticism*, 2011, p. 1-11; P. Markell, *Making Affect Safe for Democracy?: On “Constitutional Patriotism”*, in *Political Theory* 2000, p. 38-63; P. Nanz, *Europolis, Constitutional patriotism beyond the nation-state*, Manchester, 2006; M. Tushnet, *Forms of Judicial Review as Expressions of Constitutional Patriotism*, in *Law and Philosophy*, 2003, p. 353-379.

<sup>83</sup> D. Huw Rees, *Constitutional Patriotism*, in A. Allen – E. Mendieta (eds.), *The Cambridge Habermas Lexicon*, Cambridge, 2019, p. 66-68.

<sup>84</sup> J. Habermas, *The Inclusion*, cit., p. 118;

<sup>85</sup> C. Cronin, *Democracy and Collective Identity: In Defence of Constitutional Patriotism*, in *European Journal of Philosophy*, 2003, p. 1.

are equally embodied in other republican constitutions - such as popular sovereignty and human rights - in light of its own national history»<sup>86</sup>.

In conclusion, it can be asserted that the concept of constitutional identity, due to its intrinsic vagueness and indeterminacy, necessitates two key considerations. First, constitutional identity underscores the constitutional identity-problem, inevitably calling for an underlying and more enduring identity that exists independently of the constitution itself. This implies the existence of a pre-constitutional criterion that somehow defines the people as a collectivity that remains recognizable even in the midst of constitutional transformations<sup>87</sup>. Second, the question of how to define and articulate this identity revolves around two more primitive competing frameworks: nationalism and constitutional patriotism

In a nutshell, the examination of constitutional identity has displayed not only the intricate challenges involved in defining the people in legal, political, and moral dimensions, but also the fundamental tension between two competing answers to the constitutional identity-problem. On one hand, there is the more partial and culturally embedded conception of national identity, while, on the other, the more impartial and universal conception of constitutional patriotism. In this light, after a long journey, the three-pronged question of collective identity – encompassing national identity, constitutional identity, and constitutional patriotism - comes into focus as a particular form of identity-problem.

#### *4. Unpacking the family resemblance*

After distinguishing between nationalism and patriotism and analysing the moral dilemmas they present, constitutional identity was also defined as a specific manifestation of the broader identity issue, with two plausible potential resolutions: national identity and constitutional patriotism. Although the conceptual tensions among constitutional identity, national identity, and constitutional patriotism are theoretically complex, these do not necessarily translate into direct practical consequences. In fact, constitutional identity can often be employed independently of its

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<sup>86</sup> J. Habermas, *The Inclusion*, cit., p. 118.

<sup>87</sup> «An independent, non-constitutional criterion to identify the people that are giving themselves a constitution, a people that must be pervasive even in the case of a change of constitution» (J. L. Martí, *op. cit.*, p. 32).

underlying complexities, rendered unproblematic by tradition, established practices, or a broad social consensus.

However, the conceptual affinities among national identity, constitutional identity, and constitutional patriotism merit closer examination. The aim of this section is to clarify the “family resemblance” among these three concepts by mapping their interrelations and areas of overlap.

To achieve this objective, we will first examine the interplay between national identity and constitutional identity, subsequently delving into the relationship between constitutional identity and constitutional patriotism. Ultimately, this section, along with the following one, will culminate in a comprehensive reflection on the overarching question of collective identity and its relevant domains. Close attention will be dedicated to the particularly complex interplay between the foundational logic of the national identity discourse and constitutional patriotism, as this relationship may eclipse critical aspects of the deontological framework that is central to Habermas’ philosophy.

In exploring the relationship between national and constitutional identity, the United States exemplifies this interplay, particularly illustrated by the debate surrounding the use of foreign law in constitutional adjudication. This discourse notably featured the opposing viewpoints of Justice Kennedy and Justice Scalia, reflecting broader tensions between a commitment to national legal traditions and an openness to the international community in interpreting constitutional principles. Justice Kennedy, in an interview on the matter, emphasised this connection by stating that «we have a legal identity, and our self-definition as a nation is bound up with the Constitution»<sup>88</sup>.

At the European level, a similar dynamic appears to be at play. As noted by four constitutional judges, «Article 4 paragraph 2 TEU, which obliges the EU to respect the Member States’ national identities, provides the CJEU with a lever to address possible misuses of this institution. Since the CJEU cannot decide on the contents of the respective constitutional identity by itself - Article 4 paragraph 2 TEU is a provision of EU law, but refers in substance to the specifics of national constitutional law - it must make a serious effort to ascertain the content of the respective national

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<sup>88</sup> The New Yorker, September 12, 2005, 45. Cited in G. J. Jacobsohn, *Constitutional Identity (2006)*, cit., p. 384. As argued by Jacobsohn, «the American Constitution, as the embodiment of the political ideas that provide definition to the nation, is constitutive of the society» (G. J. Jacobsohn, *Constitutional Identity (2006)*, cit., p. 368).

provisions»<sup>89</sup>. This biunivocal interpretation of the relationship between constitutional and national identity is not an isolated phenomenon, rather, it reflects a broader trend in contemporary discourse on identity within legal and political frameworks: «it is commonplace among European legal scholars nowadays to speak of “national identity inherent in the Member States’ constitutional structures” and “constitutional identity” as if both phrases denoted the same object»<sup>90</sup>.

At a more theoretical level, both Jacobsohn and Rosenfeld adopt a loosely defined position regarding the relationship between national and constitutional identity. Rosenfeld acknowledges that, even when constitutional identity is distinguished from national identity, «they may overlap and though they may comprise the same exact membership or closely intertwined ones. As will be elaborated below, constitutional identity is constructed in part against national identity and in part consistent with it. More generally, constitutional identity must constantly remain in dynamic tension with other relevant identities»<sup>91</sup>. In a certain sense, both the identities shared a same structural core, given that «constitutional identity like national identity can be conceived as belonging to a collective self. Self-identity, moreover, can either connote sameness or selfhood»<sup>92</sup>.

This inherent ambiguity also extends to the justification of constitutions, which Rosenfeld categorises into three principal types: first, justifications grounded in shared history or traditions; second, those based on hypothetical or actual consent; and third, those derived from normative principles deemed universally valid or compelling for those governed by the constitutional regime. While the first type of justification relies on national-based reasoning, the latter two are more closely aligned with the idea of constitutional patriotism.

Jacobsohn’s perspective is even more nuanced and draws inspiration from Burke’s thought. He emphasises the “prejudices of the community” as the cornerstone of a constitutional vision rooted in the principle of inheritance, or “prescription.” For Jacobsohn, prescription implies a presumption in favour of established frameworks, signifying continuity and

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<sup>89</sup> C. Grabenwarter – P. M. Huber – R. Knez – I. Ziemele, *The Role of the Constitutional Courts in the European Judicial Network*, in *European Public Law*, 2021, p. 59.

Grabenwarter is still serving at the Austrian Constitutional Court, while Ziemele is current judge at the Court of Justice of the European Union. Huber and Knez have completed their terms at their respective constitutional courts.

<sup>90</sup> E. Cloots, *National Identity in EU Law*, Oxford, 2015, p. 165.

<sup>91</sup> M. Rosenfeld, *Constitutional Identity*, cit., p. 758.

<sup>92</sup> *Ivi*, p. 757.

the endurance of a constitution through social changes. He views constitutional identity as evolving over time, in harmony with the habits and experiences of the polity, rather than being forged through abstract reasoning<sup>93</sup>. Thus, Jacobsohn associates constitutional identity with continuity rather than radical revision, asserting «as a conservative presence, constitutional identity should, therefore, be resistant to change but not necessarily by posing an insuperable obstacle to it»<sup>94</sup>. Moreover, he seems not at odds with a conflation between the two identities, also if it can imply the import of specific religious contents as part of its socio-cultural-economic environment<sup>95</sup>.

The relationship between constitutional patriotism and constitutional identity is notably intricate, as both concepts intersect yet serve distinct purposes in political theory and practice. Rosenfeld addresses this in the context of the European Union's constitutionalisation, exploring whether the failure of formal ratification of a European constitution was due to the absence of a transnational constitutional identity. He raises critical questions about whether such an identity is even feasible, and if not, what could replace it at the supranational level: «was that primarily because of a lack of transnational constitutional identity? Can such identity be envisaged? Could supranational constitutions do without it? And, if so, what would replace it at the supranational level?»<sup>96</sup>.

Answering these questions, he contends how the lack of a European ethnos has been made up for with the idea of constitutional patriotism. Yet here a dichotomy emerges, a paradox that calls into question the very possibility of seeing constitutional patriotism as an actual alternative to an ethno-cultural identity in general and national specifically: «constitutional patriotism, which essentially seeks to redirect patriotism - an affective bond usually directed toward one's own nation-state - toward the ideals of constitutionalism, on the other hand, seems highly problematic. Can one profoundly and affectively identify with a conceptual ideal? And even if one could, would that provide a thick enough layer of identity to glue together all those coming within the sweep of a global or transnational constitution?»<sup>97</sup>. He concludes by denying this possibility, invoking the

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<sup>93</sup> See G. J. Jacobsohn, *Constitutional Identity* (2006), cit., p. 371 ss.

<sup>94</sup> *Ivi*, p. 387.

<sup>95</sup> In Ireland, where, in contrast with India, a constitutional identity developed in more harmonious accord with the socio-cultural-economic environment within which it came into being (*Ivi*, p. 384).

<sup>96</sup> M. Rosenfeld, *op. cit.*, p. 773.

<sup>97</sup> *Ivi*, p. 774.

combination of constitutional culture and practice for the sake of establishing a European constitutional identity: «whether a genuine European constitutional identity and a European constitutional model will emerge depends on the EU's will and capacity to generate a genuine constitutional practice and culture - which is very much an open question. Be that as it may, constitutional identity may find new vessels of expression and transmission, but its relational dialectical engagement with concretely grounded pre- and extra-constitutional constructs seems unlikely to be transcended or replaced by disembodied ideals such as constitutional patriotism»<sup>98</sup>.

The focus on constitutional culture serves as the common thread linking Michelman's and Müller's distinctive interpretations of constitutional patriotism, who argue that the universalism inherent in constitutional patriotism requires a more tangible foundation to bridge the gap between the universal and the particular. Michelman addresses this need through his peculiar concept of constitutional identity, which involves a shift in the locus of potential disagreement in constitutional interpretation - from the meaning of principles themselves to the context within which those principles are understood and applied. For him, the central object of public concern when we are dealing with hard constitutional cases is constitutional identity, framed as the identity of the people. This identity forms the basis of an ongoing discourse about «who we think we are and aim to be as a politically constituted people, where we think we have come from and where we think we are headed». However, Michelman qualifies this interpretative struggle by emphasising that it unfolds within a collective identity that is already established and recognised<sup>99</sup>.

Müller, on the other hand, regards the specific constitutional culture that mediates between the universal and the particular as the very object of constitutional patriotism. He favours the terms culture over identity, as the latter «suggests too static a picture and tends to narrow the focus to an actual written document, whereas “culture” points to the fact that we ought to

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<sup>98</sup> *Ivi*, p. 775.

<sup>99</sup> «The answer to that must be that conditions then and there warrant a level of confidence that the struggle over corporate identity occurs within a corporate identity that is already incompletely, but to a sufficient degree, known and fixed. The answer is, in other words, a cultural contingency-the cultural contingency, when and where it exists, that the corporate identity in question, however contested it may be in other respects, is already perceived by all concerned to fall within the class of morally conscientious (hence, in a Habermasian view, democratic-proceduralist) constitutional identities» (F. I. Michelman, *op. cit.*, p. 269).

include shared symbols, rites and rituals of membership, and venerated institutions, such as constitutional courts, that are associated with and, at least partially, express constitutional essentials<sup>100</sup>.

Despite his explicitly differentiating constitutional culture from national identity, in order to respond to criticisms of the Habermasian version of constitutional patriotism, he must reintegrate concrete and peculiar elements into his own version. In accordance with this requirement, Müller makes two moves. Primarily, he claims that «to fulfil the specificity requirement, we must enlarge the object of attachment to include what I refer to above as a constitutional culture. The kinds of conversations, controversies, and disagreements that characterize constitutional cultures are necessarily related to particular national and historical contexts. These contexts inform the judgments citizens make about the constitution and the forms of reasonable disagreements that can emerge»<sup>101</sup>.

Second, it blurs the Habermasian dividing line between ethics and morality<sup>102</sup>, taking up Michelman's argument that the fundamental political question, and one that requires and sustains the loyalty of citizens, is who we want to be, the «authentic and coherent self-descriptions under which collectives can properly recognize themselves»<sup>103</sup>. In this context, Müller emphasizes that «rather than being merely a universalist response to a nationalist past, constitutional patriotism always relied on “supplements of particularity” to become effective as a form of political attachment»<sup>104</sup>. Consequently, within the German context, constitutional patriotism is inherently linked to, or more aptly accompanied by, militancy (Sternberger)

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<sup>100</sup> J.-W. Müller, *A General Theory of Constitutional Patriotism*, in *International Journal of Constitutional Law*, 2008, p. 80.

<sup>101</sup> *Ivi*, p. 82. He understands the specificity requirement as the task of the theory to explain why those committed to universal principles should attach themselves to a specific political community rather than another.

<sup>102</sup> Specifically, he stated that «it is reasonable to presume that much political debate - even constitutional debate - will take place in the realm of the ethical. Especially in increasingly diverse societies, debates about values and traditions cannot be expected to be resolved, once and for all, in the light of moral discourses. Instead, ‘Who do we want to be?’ might well be a question subject to persistent and reasonable disagreement» (*Ivi*, p. 84). Furthermore, he concluded asserting that «I do not see what would be lost, analytically or normatively, if Habermas and some of his followers made concessions on this point — especially as the sympathetic critics are, by and large, framing their criticism as a point about the empirical conditions of present-day societies» (*Ivi*, p. 84).

<sup>103</sup> *Ivi*, p. 84.

<sup>104</sup> J.-W. Müller, *On the Origins of Constitutional Patriotism*, in I. Primoratz - A. Pavković (eds.), *op. cit.*, p. 96.



and memory (Habermas), that works as a «supplementary constitutional identity formation ex negative»<sup>105</sup>.

The dynamic articulated by Müller and Michelman becomes clearer when we examine the third relationship – national identity and constitutional patriotism – through the lens of Habermas’s unique reconstruction. This framework allows for a deeper understanding of how national identity interacts with constitutional patriotism, illuminating the complexities within this relationship and raising the (un-)importance of identity-problem.

The central tenet and starting point of Habermas’s thought is the distinction between two models of the nation. The first is grounded in ethnic membership (nationalism), envisioning the nation as a pre-political community united by shared ancestry, destiny, and kinship ties. The second, in contrast, conceives the nation as a community of citizens defined by democratic rights and principles (republicanism). In this framework, individuals can invoke these rights to alter their legal status, and the nation is understood as a voluntary political order, legitimated through the collective will and rational deliberation of its members. The Habermasian constitutional patriotism, as a matter of fact, is closely tied to the second conception of nation and citizenship. In this framework, the democratic process functions as both a guarantor of political legitimation and a means of fostering social integration, without relying on pre-existing ethno-cultural bonds. It allows for a shared political identity grounded in democratic values and participation, rather than in ethnic or cultural homogeneity, thereby supporting a pluralistic and inclusive understanding of national unity.

In his work on the subject, Habermas consistently emphasizes that the «nationalism is not a necessary or permanent precondition of a democratic process. The progressive extension of the status of citizenship to the whole population does not just provide the state with a new source of secular legitimation; it also produces a new level of abstract, legally mediated social integration»<sup>106</sup>.

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<sup>105</sup> Ibidem.

<sup>106</sup> J. Habermas, *The Inclusion*, cit., p. 132.

5. *The unimportance of the (constitutional) identity-problem*

«A national identity which is not based predominantly on republican self-understanding and constitutional patriotism necessarily collides with the universalist rules of mutual coexistence for human beings»<sup>107</sup>.

A closer examination of Habermas's discourse in light of the previous observations reveals a dual objective for this section: first, to further investigate the problematic aspects of the identity question, and second, to propose an alternative normative framework that emphasizes and substantiates its relative unimportance.

In borrowing part of the title of the present work from Parfit's thought<sup>108</sup>, we refer specifically to his famous passage in which he asks the same question at the personal level: «my targets are two beliefs: one about the nature of personal identity, the other about its importance. The first is that in these cases the question about identity must have an answer [...]. Against this second belief my claim will be this. Certain important questions do presuppose a question about personal identity. But they can be freed of this presupposition. And when they are, the question about identity has no importance»<sup>109</sup>.

While identity undeniably holds importance, it is far from being the sole factor that demands our attention. Indeed, identity alone cannot encapsulate the full spectrum of what truly matters. How, then, can we articulate this idea in a way that captures its deeper implications? The crucial insight lies in recognising that, despite their differences, personal and

<sup>107</sup> J. Habermas, *Die Zeit*, 30 March 1990.

<sup>108</sup> Parfit makes an explicit distinction between the importance of the question at the personal level and at the national level: «the first is that in these cases the question about identity must have an answer. No one thinks this about, say, nations or machines» (D. Parfit, *Personal Identity*, in *The Philosophical Review*, 1971, p. 3). In addition, in the final section of the article, he differentiates between the common understanding of personal identity and national identity, specifying that: 1) «to give an analogy: The unity of a nation is, in its nature, a matter of degree. It is therefore only a superficial truth that all of a man's compatriots are equally his compatriots. This truth cannot support a good argument for nationalism» (*Ivi*, p. 26-7); and 2) «The unity of a nation we seldom take for more than what it is. This is partly because we often think of nations, not as units, but in a more complex way» (*Ivi*, p. 27, footnote).

<sup>109</sup> D. Parfit, *op. cit.*, p. 3-4.

collective identity share a common language, normative characteristics, and certain overlapping concerns<sup>110</sup>.

The core of Habermas' argument does not rest on a categorical rejection of national identity. Rather, it underscores the importance of recognising that the political dimension introduces additional claims to validity, which must be reconciled with the universality and objectivity intrinsic to moral principles. These claims warrant careful consideration in constitutional interpretation and legislative decision-making, ensuring that the primacy of morality remains uncompromised. Such a synthesis aligns with the views of scholars like Rawls, who argues for the importance of principles of justice as a basis for social cooperation, with Scanlon, who defends the idea that the right principles are those which no one could reasonably reject, given the aim of finding principles which could be the basis of general agreement among persons similarly motivated, and with Dworkin, who links legal principles, morality and political policies<sup>111</sup>.

Building on the moral discourse initiated in Section 2, which examined the implications of impartiality in the context of nationalism and patriotism, we can now broaden our exploration by considering two additional dimensions. First, we will address the foundational debate between the right and the good. Second, we will investigate the implications of this debate for the concept of constitutional patriotism.

Williams begins his book on with the Socrates's Question, that is, conceiving the fundamental core of ethics as the question «how should one live?». Going further, Williams notes that his contemporaries are usually concerned with a specific and distinctive issues of morality, rather focused around the question “what is our duty?”. But although the narrower ethical conception of morality «has a special significance in modern Western culture,» it is «something we should treat with a special skepticism»<sup>112</sup>. In

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<sup>110</sup> Among others, see A. Margalit – J. Raz, *National Self-Determination*, in *Journal of Philosophy*, 1990 and C. Taylor, *The Politics of Recognition*, in A. Gutman [ed.], *Multiculturalism. Examining the Politics of Recognition*, Princeton, 1994.

<sup>111</sup> For the debate between Rawls and Habermas, see J. G. Finlayson – F. Freyenhagen (eds.), *Habermas and Rawls. Disputing the Political*, London, 2011 and J. G. Finlayson, *The Habermas-Rawls Debate*, New York, 2019. For Scanlon, see T. M. Scanlon, *What We Owe to Each Other*, Cambridge, 1998 and E. Kelly, *Habermas and Moral Justification*, in *Social Theory and Practice*, 2000, p. 223-249. For a comprehensive discussion, see S. Chambers, *Reasonable Democracy. Jürgen Habermas and the Politics of Discourse*, New York, 1996.

<sup>112</sup> B. Williams, *Ethics and the Limits of Philosophy*, London, 2011, p. 6. The critique of morality identifies four main issues: 1) its significant weight demands priority over other considerations, permeating all aspects of life; 2) its emphasis on impartiality and universality

this context, ethics is understood as encompassing more than just morality, extending to considerations of personal growth and the development of those we care about.

According to this historical shift, moral philosophers came to distinguish between two primary families of concepts: the evaluative and the deontic. The evaluative family includes concepts like good and evil, while the deontic family consists of notions such as right and wrong, obligation, duty, reasons for action, and what ought to be done. These two families of concepts reflect two fundamental questions in moral philosophy: 1) What kind of person should one aspire to be? and 2) What kinds of actions are right or wrong?

These questions give rise to two central branches of ethical theory: the theory of value and the theory of right. The latter focuses on specifying which actions are morally right or wrong, whereas the theory of value addresses what states of affairs are intrinsically good or evil. Although distinct in focus, the two theories are deeply interconnected. In fact, the theory of value plays a pivotal role in supporting and informing central claims within the theory of right.<sup>113</sup>

Unlike consequentialist approaches, deontological theories - advocated by thinkers like Rawls, Scanlon, and Habermas - distinguish between normative and evaluative concepts, emphasising that moral action is determined by multiple factors beyond outcomes. While consequences remain relevant, they are not the sole criterion: an act may be morally forbidden despite yielding the best results. Instead, deontological theories provide a refined understanding of what constitutes right action, emphasising the foundation of morality in specific duties and obligations that are contextually tied to the agent.

Elaborating his position from these distinctions, Habermas saw his discourse ethics as «deontological, cognitivist, formalist, and universalist»<sup>114</sup>. Habermas thus interprets the fundamental practical question «What should I do?» as encompassing pragmatic, ethical, or moral significance - depending

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can lead to alienation, distancing agents from themselves, others, or the true justifications of their actions; 3) it struggles to justify special obligations toward close relationships, such as family and friends; 4) its commitment to action-guiding principles assumes morality can be systematically codified.

<sup>113</sup> For example, consequentialists argue that one ought to pursue the best outcomes, which requires a clear understanding of what constitutes a good outcome. Even non-consequentialists recognize certain moral duties to promote good outcomes, and this recognition necessitates an account of what makes outcomes good.

<sup>114</sup> J. Habermas, *Moral Consciousness*, cit., p. 196.

on its framing - and as requiring the justification of decisions among alternative courses of action. Within this framework, moral tasks necessitate a distinct form of reasoning and action, differentiating them from ethical or pragmatic considerations. In this way, he can argue that «the deontological distinction between the right and the good corresponds the distinction between normative judgments about what we ought to do and evaluative judgments about something in the world that is more or less good or bad for us»<sup>115</sup>.

At the same time, the moral questions are underlined by the idea that they can be rationally justified under conditions of impartial judgment. The impartiality requirement, as concretisation of the moral point of view, implies that «the general structure of the relations of recognition that make the understanding of self as a person and as a member of a community simultaneously possible is presupposed in communicative action and is preserved in the communicative presuppositions of moral argumentation»<sup>116</sup>. The conclusion of this complex reasoning is the priority of the right over the good due to the epistemic and normative advantages that it enshrined<sup>117</sup>. Through this approach, «the universalization principle acts like a knife that makes razor-sharp cuts between evaluative statements and strictly normative ones, between the good and the just. While cultural values may imply a claim to intersubjective acceptance, they are so inextricably intertwined with the totality of a particular form of life that they cannot be said to claim normative validity in the strict sense. By their very nature, cultural values are at best candidates for embodiment in norms that are designed to express a general interest»<sup>118</sup>.

As Habermas pointed out, while moral questions rely on principles like justice and generalizability for resolution, evaluative questions about self-realisation and the good life are understood only within specific historical or personal contexts. However, this emphasis on justice does not preclude rational discourse on questions concerning the good life, that is

<sup>115</sup> J. Habermas, *Justification and Application*, cit., p. 62.

<sup>116</sup> *Ivi*, p. 48.

<sup>117</sup> «Discourse ethics could be considered a form of universalist ethics of justice, that is, an ethics of normative reasoning based on abstract principles and focused on matters concerning the regulation of the common good. The distinction between “the just” (understood in a deontological sense) and “the good” (in an axiological sense) as two separate objects of reflection, as well as the possible priority of the former over the latter (in the sense that “the just” restricts which precepts can be considered part of virtuous behavior and, consequently, that conceptions of “the good” are constrained by notions of “the just”» (J. C. Velasco, *Para leer a Habermas*, Madrid, 2003, p. 62).

<sup>118</sup> J. Habermas, *Moral Consciousness*, cit., p. 104.

personal and collective identities. The most striking example is represented by abortion which, at one and the same time, is a moral and ethical issue, that is, it displays an internal connection between the ethical and the moral domain<sup>119</sup>.

In detaching morality and moral judgments from the local conventions and historical particularities of specific forms of life, they «retain only the rationally motivating force of insights. Along with the naive self-certainty of their lifeworld background they lose the thrust and efficacy of empirical motives for action»<sup>120</sup>. This abstraction, achieved by morality as impartiality, underscores two critical dimensions. On the one hand, it enhances rationality, understood as the cognitive or epistemic force that emerges when questions of justice are isolated from ethical and pragmatic considerations<sup>121</sup>. On the other hand, it raises significant challenges regarding the authority of morality in everyday life, particularly its ability to sustain motivational force<sup>122</sup>.

Habermas sought to reconcile these two dimensions by developing a democratic theory that integrates the ethical facticity of the lifeworld with the principles of moral universalism, thus affirming the primacy of the just or right over the good, even in the political realm. This ambition is fulfilled through the democratic deliberative theory, where the source of legitimacy

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<sup>119</sup> Although the substantive evaluation of abortion is inherently and inextricably intertwined with personal values and individual self-perception, «the moral question, properly speaking, would first arise at the more general level of the legitimate ordering of coexisting forms of life. Then the question would be how the integrity and the coexistence of ways of life and worldviews that generate different ethical conceptions of abortion can be secured under conditions of equal rights» (J. Habermas, *Justification and Application*, cit., p. 60).

<sup>120</sup> Ivi, p. 109.

<sup>121</sup> «Now the exclusion of ethical questions from the sphere of moral questions or questions of justice no doubt makes sense because the question of what is good for me or for us, all things considered, is already formulated in such a way that it invites an answer whose claim to validity is relativized to prior life projects and forms of life» (J. Habermas, *Justification and Application*, cit., p. 107).

<sup>122</sup> It is not up to the discourse ethics «the task of generating subjective or personal motives that determine the decision for a given option. It understands that it is precisely questions of validity, and not those concerning the subjective motivation to act in accordance with certain rules, that define the individual's own sphere of action: it is only possible to determine the validity of a rule in a linguistically mediated exchange between different subjects, and not the subjective motivation to act in accordance with certain rules» (J. C. Velasco, *op. cit.*, p. 63-4). This task shifts from the discourse of justification (that is, the discourse ethics) to the discourse of application governed by the principle of appropriateness and able to address the issues of care and responsibility for our special relations (J. Habermas, *Justification and Application*, cit., p. 153 ss.).

resides in processes of opinion and will formation that do not draw their validity from ethical-political questions and convictions, but only in «the communicative presuppositions that allow the better arguments to come into play in various forms of deliberation and, on the other, procedures that secure fair bargaining conditions»<sup>123</sup>. If ethical-political questions emerge from individuals reflecting on their shared way of life and the ideals that should guide it in response to significant challenges, then collective identities - such as national or sub-national ones - are not merely extensions of individual identity. Rather, they represent a complementary dimension, arising in moments when members can authentically affirm a collective “we”, as exemplified by expressions like “We the People”. It involves making native traditions and forms of life personally meaningful by selectively shaping and developing them, which in turn defines our cultural identity and sense of belonging and citizenship. In this way, the answers to this kind of questions come as «arguments based on a hermeneutic explication of the self-understanding of our historically transmitted form of life. Such arguments weigh value decisions in this context with a view toward an authentic conduct of life, a goal that is absolute for us»<sup>124</sup>. As Habermas points out, ethical-political questions are also an important component of politics, but are subordinate to moral questions and connected with pragmatic questions<sup>125</sup>.

In light of this reconstruction, we can more clearly grasp the nuanced and widely discussed Habermasian position: «the universalism of legal principles manifests itself in a procedural consensus, which must be embedded through a kind of constitutional patriotism in the context of a historically specific political culture»<sup>126</sup>. Cronin is clearly on the right track when he underlines the legal character of constitutional principles, i.e., the fact that they are construed «not as moral abstractions but as juridical principles that define the rights constitutive of citizenship: they can shape citizens’ identities only insofar as they are embodied in particular legal and political cultures»<sup>127</sup>. But he is not fully right when he goes on to state that «unlike moral norms, constitutional principles are addressed in the first instance to individuals as citizens and legal subjects and define obligations toward fellow-citizens. They command loyalty and attachment under the specific interpretations given them in particular legal traditions and political

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<sup>123</sup> J. Habermas, *Between Facts*, cit., p. 278-9.

<sup>124</sup> *Ivi*, p. 161.

<sup>125</sup> *Ivi*, p. 282.

<sup>126</sup> J. Habermas, *The Inclusion*, cit., p. 226.

<sup>127</sup> C. Cronin, *op. cit.*, p. 4.

cultures»<sup>128</sup>. Indeed, in order to preserve the legitimacy gained from the democratic deliberative process, Habermas stated that «the making of norms is primarily a justice issue, subject to principles that state what is equally good for all. Unlike ethical questions, questions of justice are not inherently related to a specific collectivity and its form of life. The law of a concrete legal community must, if it is to be legitimate, at least be compatible with moral standards that claim universal validity beyond the legal community»<sup>129</sup>.

The question raised in Habermas's text is quite intricate. While its content leans toward cosmopolitanism, his position remains somewhat ambiguous. Although Habermas acknowledges and understands that «special obligations, which arise from the fact that one belongs to particular communities, can be understood as socially ascribing, and substantively specifying, such naturally indeterminate duties»<sup>130</sup>, he appears reluctant to fully adopt a cosmopolitan stance. Indeed, de Greiff refers to this ambiguity in Habermas' reflection as «the missed opportunity»<sup>131</sup>.

With this ambiguity in Habermasian thought in mind, a closer examination of Habermasian constitutional patriotism reveals the underlying stakes involved in the reinterpretations and criticisms directed toward his conception of constitutional patriotism. For Michelman and Müller, the force that reconciles constitutional interpretative contrasts and mediates between the universal and the particular - thereby offering tangible support for collective identification - is shifted from the moral to the ethical

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<sup>128</sup> Ibidem.

<sup>129</sup> J. Habermas, *Between Facts*, cit., p. 282.

<sup>130</sup> J. Habermas, *Between Facts*, cit., p. 510. This line of thought would place Habermas aligns with the natural duty account of political obligation, which is understood as obligations individuals have simply by virtue of their status as moral agents. These obligations do not depend on their occupying a particular role within a socially salient relationship and, importantly, are universal in scope (R. Dagger – D. Lefkowitz, *Political Obligation*, plato.stanford.edu/, 2021).

<sup>131</sup> P. de Greiff, *Habermas on Nationalism and Cosmopolitanism*, in *Ratio Juris*, 2002, 425. De Greiff emphasises how a strong reading of that passage, that he considers the most correct from the perspective of Habermasian thought and also normatively valid, underlines «a universalistic moral constraint inherent to the notion of legitimacy itself» where «legislative sovereignty, as it was classically understood, would be severely curtailed» (Ibidem).

The debate around cosmopolitanism and/versus nationalism is extremely extensive. Since it is impossible to provide a map of it here, for reasons of space, refer to the bibliography provided by P. Kleingeld – E. Brown, *Cosmopolitanism*, plato.stanford.edu/, 2019.



domain<sup>132</sup>. Mutatis mutandis, the contributions of Müller, Rosenfeld, Cronin, and Michelman reflect an effort to adopt a mediating stance, striving to bridge the universal with the particular. However, in pursuing this reconciliation, the normative-deontological framework established by Habermas falters, as the constructivist, objective, and universal morality surrenders to localized ethical aspirations. Having already recognized and addressed this challenge, Habermas directly engages with Michelman's interpretation - and, by extension, Müller's elaboration - by critically emphasizing that their framework relies on «the common identity of the political community, or the ethos of a certain patriotism that citizens share as members of their political community, to provide an undisputed context of application “that can help decide the norm's application”»<sup>133</sup>. Habermas' reply to Michelman's objections (and then also to the others) hinges on the idea that «this response is the reversal of the priority of the right over the good. On Michelman's assumption citizens are required to share a priori, as their common point of reference, a set of “thick” ethical beliefs»<sup>134</sup>.

The allegation of reversing normative ranking, however, does not suggest a desire to eliminate one of the factors entirely. While some of Habermas' remarks might create the impression that the shift from a nationalist to a post-national constitutional order entails a decisive break with national political traditions, the term postnational does not imply that constitutional democracies must entirely abandon the importance of ethical-based claims. In this light, Habermas strives to establish a conceptual framework in which ethical issues are approached through moral reasoning, rather than resolving moral dilemmas through an ethical perspective. When problems, misunderstandings, and disagreements arise and manifest in the public sphere, the solution lies not in descending into concrete specifics but in ascending to a higher level of abstraction. In the context of the constitutional debate, applying this conceptual framework to constitutional disagreements implies that resolution should avoid devolving into a downward spiral toward constitutional identity. Instead, it should strive to ascend into an upward spiral, engaging with the core constitutional

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<sup>132</sup> F. I. Michelman, *op. cit.*, p. 270.

<sup>133</sup> J. Habermas, *On Law and Disagreement. Some Comments on “Interpretative Pluralism”*, in *Ratio Juris*, 2003, p. 192.

Habermas already emphasized this point against Michelman in his most important legal work: «the exceptional features of the normatively privileged democratic process stem from the fact that Michelman, like other “communitarians”, understands citizenship not primarily in legal but in ethical terms» (J. Habermas, *Between Facts*, cit., p. 279).

<sup>134</sup> J. Habermas, *On Law and Disagreement*, cit., p. 192-3.

principles that underpin all modern constitutions. This approach draws on «the performative meaning of the practice of constitution-making, once it had begun with the two great examples of the late eighteenth century»<sup>135</sup>, embracing a commitment to equality that ought to be enshrined by morality understood in terms of impartiality. The strength of this recourse to constitutional patriotism lies in «the universalist meaning of the core of this kind of patriotism, thus providing an implicit overlap with the patriotism of other communities. On this basis we might even hope to develop further interculturally acceptable interpretations of human rights»<sup>136</sup>.

To mitigate the potential conflict highlighted in the quote at the beginning of this section, Habermas seeks to relativise the significance of the claims associated with patriotism and nationalism. What is at stake is the necessity to say something, to strike a reasonable and justified equilibrium, given that, as Nagel pointed out, «the clash between impartiality and the viewpoint of the individual is compounded when we move from personal ethics to political theory»<sup>137</sup>.

Indeed, the Habermasian position, better characterised as postnationalist rather than postnational, seeks to reject chauvinistic interpretations of national identity while retaining the possibility of distinct national characters, understood through his normative framework, which prioritises the just/right over the good from a universal perspective. Here, constitutionalised moral principles are emphasised over culturally specific conceptions of the good, aiming to foster a pluralistic and inclusive political community rooted in universal democratic norms. It suggests that modern democracies can embrace cultural and religious pluralism fully, distancing themselves from their chauvinistic histories without necessitating the complete erasure of the cultural elements that define their national (or other ethno-cultural based form of) identity. This transformation facilitates the coexistence of a shared constitutional framework alongside the reallocation (and, for this reason, also their preservation) of national traditions, all within a more inclusive and pluralistic political context and culture. For substantiating this architecture, he differentiates political culture from cultural forms of life, asserting that «certainly the democratic right to self-determination includes the right to preserve one's own political culture, which forms a concrete context for rights of citizenship, but it does not

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<sup>135</sup> J. Habermas, *On Law and Disagreement*, cit., p. 193.

<sup>136</sup> Ibidem.

<sup>137</sup> T. Nagel, *Moral Conflict*, op. cit., p. 215.

include the right to self-assertion of a privileged cultural form of life»<sup>138</sup>. If constitutional patriotism represents a moral commitment, and morality is understood as the expression of an impartial perspective, the core challenge lies in articulating a more abstract justification for higher-order impartiality. This endeavour is not merely an intellectual pursuit but carries profound practical significance. In a world fraught with divisions, it is imperative to «find a way of living together despite our conflicting beliefs about the right way to live. It also matters because, in finding that way, we must at least try to go beyond mere *modus vivendi*»<sup>139</sup>.

How can this thought be further elaborated? The first step is to juxtapose the title of one of Miller's seminal articles, which highlights the ethical significance of identity claims, with the title of the present paper, which emphasises their relative unimportance. The core issue does not lie in an outright rejection or a claim to their absolute insignificance, as suggested by Barry<sup>140</sup>. Rather, the unimportance referred to in the title reflects, à la Parfit, the idea that *Sittlichkeit*-based claims are not of overriding importance but instead hold a secondary status, subordinated to the *Moralität*, defined by impartiality and universality.

By taking up the political thesis introduced but left unresolved in Section 2, we can address the central problem and attempt to bring this article to a cohesive conclusion.

The political thesis, understood as a claim-right to self-determination grounded in national or patriotic identity, can be reinterpreted more abstractly as emphasising the necessary role of the partial (national-patriotic) element in justifying the legitimate authority of a political entity's institutions over its citizens. In particular, both radical nationalist theorists and certain proponents of non-radical justifications for nationalism - such as Miller (in specific cases), MacIntyre, the later Kymlicka, and, to varying degrees, Primoratz, McMahan, Raz, and Margalit—as well as radical anti-nationalists, most notably represented by Barry, converge on a key assumption: the cultural thesis, to varying degrees, implies the political thesis. Indeed, nationalist-patriotic theorists argue that if the cultural thesis is plausible or even moderately defensible, acceptance of the political thesis

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<sup>138</sup> J. Habermas, *Appendix II. Citizenship and National Identity*, in J. Habermas, *Between Facts*, cit., p. 514.

<sup>139</sup> S. Mendus, *Impartiality*, cit., p. 434.

<sup>140</sup> B. Barry (2001). *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Oxford, 2001. Barry views multiculturalism as a threat to liberal egalitarianism, arguing that it undermines liberal rights, fragments social cohesion, and diverts attention from the critical issue of socioeconomic inequalities.

logically follows. Conversely, anti-nationalist or anti-patriotic theorists adopt the opposite reasoning: as the political thesis is deemed unacceptable, the cultural thesis must likewise be rejected.

If we consider that even theorists seemingly less inclined to emphatically endorse the overriding importance of the cultural thesis, such as Habermas, can nonetheless recognize its significance under specific constraints, it follows that a potential solution may lie in disentangling the intertwined cultural and political dimensions while simultaneously clarifying the nature of their relationship.

A plausible and reasonable pathway to addressing this challenge lies in recognising that national and patriotic arguments can find legitimate room within a political entity only under two fundamental conditions: 1) the political entity rests on *an ultimately* independent and impartial justificatory basis, and 2) this independent basis remains insulated from identity-based and, therefore, partial arguments.

In this way, the legitimate authority of the democratic regime<sup>141</sup> can be safeguarded, as it is ultimately anchored in the moral authority of constitutional principles recognised as impartial, universally valid, and normatively compelling. Simultaneously, this approach facilitates a reconciliation between (reasonable) partiality and (moral) impartiality, preserving a deontological framework while acknowledging the intuitive significance of partial ties, provided that such ties do not impinge upon the ultimate justificatory foundation of the political order<sup>142</sup>.

However, the relationship between these two theses, particularly the interaction between their cultural and political dimensions, warrants further clarification. Accordingly, the following section will address this issue by considering the desirability of a European constitutional identity.

#### *6. Final remarks: the European-flavored identity problem*

The exploration of constitutional identity, national identity, and constitutional patriotism necessitates a rigorous examination of the

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<sup>141</sup> As stated by Christiano, the legitimacy of political authority relies on a moral justification: «legitimate political authority as a political authority that is justified in coercing the subjects of its authority. The notion of justification here is a moral one» (T. Christiano, Authority, [plato.stanford.edu/](https://plato.stanford.edu/), 2024). In Rawlsian terms, the political justification necessary for modern societies must be freestanding - detached from the constraints of dogmatic, comprehensive, metaphysically grounded, or ethically substantive frameworks.

<sup>142</sup> I am grateful to Josep Juan Moreso for drawing my attention to this point.

foundational ideas underlying these concepts. This inquiry illuminates the intricate interplay of identity at both individual and collective levels, while raising pivotal questions about the principles that underpin our shared existence. Such an analysis is crucial for understanding and addressing the challenges embedded in the relationship between identity, constitutional frameworks, and their role in contemporary political life. The complex issue of constitutional identity - here framed as the “constitutional identity-problem” - appears to lead to a theoretical impasse. The previous section, drawing on Habermas’ deontological framework, emphasised the rationale for prioritising the just/right over the good. Specifically, it advocated for the primacy of constitutional patriotism and its associated political culture over other dimensions of political and non-political life, which, while still significant, must be normatively constrained rather than eradicated. This article, as outlined in the introduction, aims to establish a hierarchical framework to untangle the complexities of constitutional identity. Grounded in principles of reasonableness and rationality, the analysis aspires to construct a clear and coherent hierarchy founded on explicitly articulated principles, drawing on Rawls’ concept of lexical order and his prioritisation of the right over the good. In doing so, the paper transcends a merely formal hierarchy, offering a principled foundation for comprehending the interplay and influence of these elements.

In light of the preceding analysis and adopting a deontological approach, the primacy of constitutional patriotism within the proposed hierarchy becomes self-evident. Positioned at the apex, constitutional patriotism is followed by constitutional identity, with national identity occupying the final tier. Indeed, constitutional identity plays a pivotal role in shaping the membership of an imagined community, facilitating the development of a distinctive self-image. It could strengthen what can be described as the “vertical dimension” - those aspects that nurture, sustain, and reinforce citizens’ culturally situated attachment to constitutional principles and their corresponding institutions. However, this reinforcement must not be achieved at the expense of the “horizontal dimension”, which reflects the normative underpinning of constitutional patriotism and its dedication to the universal moral principles enshrined in constitutions. Furthermore, constitutional identity offers a source of potential meanings for interpreting constitutions and ordinary law in hard cases, while also acting as a safeguard for fundamental principles against challenges posed by non-democratic forces.

The question remains, however: what is the role of national identity within this framework? As we progress from constitutional patriotism to

constitutional identity and then to national identity, we observe a corresponding shift from greater impartiality to increasing degrees of partiality. This progression should not be viewed as a matter of constant balancing, but rather, in the Rawlsian sense of lexical order, as «an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply»<sup>143</sup>.

In light of these observations, we can address the concerns arising within the European Union, particularly as constitutional identity is being employed in a variety of unexpected, inconsistent, and potentially detrimental ways.

As previously noted, national supreme and constitutional courts at the European level have utilised constitutional identity as a defence against deeper European integration, often positioning the principle of national democracy in opposition to that of supranational democratic arrangements.

To delve deeper into this issue, one might inquire about the reasoning of German Federal Constitutional Court (GFCC) in finding a trade-off between the progress of European political integration and the German democracy<sup>144</sup>. The reasoning of the German Federal Constitutional Court is normatively very problematic.

What is at stake? As stated by P.M. Huber (former Justice at GFCC), «though the political, economic and institutional circumstances have shifted from the protection of human rights to the protection of the democratic institutions of the nation state and the maintenance of the Union's legal order, the cornerstones of the Court's approach to European integration have remained unaltered: national legislation as a basis of European integration, the principle of conferral as an emanation of national sovereignty and the maintenance of the national constitutional identity (constitutional law based approach)»<sup>145</sup>. However, if the essential contents to which Huber refers consist of a core set of universal principles

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<sup>143</sup> J. Rawls, *A Theory of Justice*, Cit., P. 38.

<sup>144</sup> See D Thym, *Attack or Retreat? Evolving Themes and Strategies of the Judicial Dialogue between the German Constitutional Court and the European Court of Justice*, in M Claes – M. de Visser – P. Popelier – C. Van de Heyning (eds), *Constitutional Conversations in Europe*, Cambridge, 2012, p. 235; C. Callies, *Constitutional Identity in Germany: One for Three or Three in One*, in C. Callies - G. von der Schyff (eds), *Constitutional Identity in Europa of Multilevel Constitutionalism*, Cambridge, 2020.

<sup>145</sup> P. M. Huber, *Federal Constitutional Court and European Integration*, in *European Public Law*, 2015, p. 86.

safeguarded by all European constitutions and even at the European level, this appears to lack a solid normative foundation. The democratic principle, understood as the most reasonable expression of popular sovereignty, transcends national boundaries and does not depend on a nationally based bond among citizens<sup>146</sup>. As such, it cannot be normatively or a priori confined to a national context. Within the parameters of the normative framework previously outlined, it is challenging to identify a compelling argument that could reasonably exclude the possibility of a democracy and constitution at the European level<sup>147</sup>. Consequently, it becomes challenging to understand why a genuinely democratic and constitutional European Union could not protect and promote these principles at least as effectively as the German state.

On the other hand, if the concern pertains not to values but to the preservation of German national identity, given that his statement conflates national and constitutional identity, one must question how such identity could be jeopardised by the formation of a common political framework alongside other Member States, given that many multinational states have successfully differentiated their constitutional structures from both national and sub-national identities without compromising either. If constitutional identity is narrowly defined by the German constitution without grounding it in underlying principles or values, the German Federal Constitutional Court must elucidate why such a constrained interpretation cannot coexist with a European political constitution while still maintaining a robust German constitution. Why is it valuable to preserve this form of identity if it lacks a normative foundation and justification? Given that this particular conception of the people's identity is inherently tied to specific constitutional frameworks and dissipates when constitutional amendments occur, it is essential to ask why such an identity, all things considered, should be prioritized over the development of a European constitutional framework that could foster a broader European identity.

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<sup>146</sup> The national underpinning of GFCC's idea of democracy was already emphasized and problematized by Weiler, Haltern and Mayer: «Is it mandated that demos in general and the European demos in particular be understood exclusively in the ethno-cultural homogeneous terms which the German Federal Constitutional Court has adopted in its own self-understanding? Can there not be other understandings of demos which might lead to different conceptualisations and potentialities for Europe?» (J. H. H. Weiler, U. Haltern, F. Mayer, *European Democracy and Its Critique*, in J. Hayward (ed.), *The Crisis of Representation in Europe*, Frank Cass, 1995, p. 17).

<sup>147</sup> See the famous debate between *Grimm and Habermas*: D. Grimm, *Does Europe Need a Constitution*, in *European Law Journal*, 1995, p. 282-302 and J. Habermas, *Does Europe Need a Constitution? Response to Dieter Grimm*, in J. Habermas, *The Inclusion*, cit., p. 155-161.

Moving one step further, Hirschl and Roznai point out that any construction of political or constitutional identity - even the most inclusive - inevitably relies, to some extent, on a sense of peoplehood or a collective meta-narrative of belonging and the common good<sup>148</sup>. As a result, constitutional identity risks becoming exclusionary rather than unifying. A relevant example is the Hungarian ethno-nationalist turn, where the concept of constitutional identity is employed to articulate «the constitutional self-identity of Hungary» as enshrined in Article 3 of the revised Hungarian Constitution. Jacobsohn critiques the Hungarian turn and abuse, emphasizing that it attempts to render the dynamic content of any constitution static. However, even a more dynamic and evolving conception of constitutional identity, in spite of the Hungarian static one, still admits some possibility of populist application, provided the concept is employed in such a way as to maintain a minimum of disharmony. For this reason, Fabbrini and Sajó<sup>149</sup> focus on the conceptual vagueness inherent in the notion of constitutional identity. They argue that this concept is indeterminate in two key senses: it lacks a formal, identifiable definition, and it could encompass commitments that include illiberal elements rooted in a country's constitutional history.

Scholtes challenges the abusive use of constitutional identity by authoritarian regimes, noting that these regimes transform the meaning of the concept by altering its relationship with other metaconstitutional concepts - such as constitutionalism, constituent power, or the notion of the people. He argues that «constitutional identity is not valuable in and of itself but only insofar as, and to the extent that, it gives concrete expression to a legitimate form of constitutionalism»<sup>150</sup>. Thus, constitutional identity must be constrained within a prior conception of constitutionalism, which provides a normative basis for its legitimacy.

This leads to the crucial question: if constitutional identity lacks an inherent normative basis and must rely on a broader metaconstitutional framework, why should it (the constitutional identity) be privileged? Scholtes contends that metaconstitutional arguments aim to establish

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<sup>148</sup> «Any political and constitutional identity must rely, at least to some extent, on a sense of “folk”, peoplehood, or other collective meta-narrative of belonging and the common good» (R. Hirschl – Y. Roznai, *op. cit.*, p. 7).

<sup>149</sup> F. Fabbrini – A. Sajó, *The Dangers of Constitutional Identity*, in *European Law Journal*, 2019, p. 457–473.

<sup>150</sup> J. Scholtes, *Abusing Constitutional Identity*, in *German Law Journal*, 2021, p. 551. He further states that «the normative claim from constitutional identity is tied to its appeal to a prior normative concept of the constitution and constitutionalism» (Ivi, p. 552).



sources of normativity and legitimacy beyond the national constitution<sup>151</sup>, grounded in practices and norms that enable the collective self-determination of equal citizens<sup>152</sup>. However, this raises two problems: first, it is difficult to explain what motivates one to join to that shared idea of constitutionalism, and second, to justify why this particular idea of constitutionalism deserves to be shared. Constitutionalism is, in fact, an essentially contested concept that itself needs to be justified<sup>153</sup>.

Consequently, the deontological account provided in this paper - the deconstruction of identity-problem through the definition of a lexical order - is able to provide a better answer to the use, or abuse, of constitutional identity. Indeed, the reflection on constitutional identity, as conceived from Troper to Ronsfeld through Jacobsohn, is failing to provide normative guidelines capable of delimiting the ethno-cultural elements of a political community.

A further problem with a constitutional identity-based approach lies in its potential conflict with a more normative approach, which posits that it is justifiable and even necessary to destabilise constitutional identity when constitutional amendments enhance the normative quality of the constitution<sup>154</sup>. To illustrate, consider a practical example: a constitution may be deemed legitimate to the extent that it attains a baseline level of reasonableness; however, there are often various pathways through which its legitimacy can be further enhanced. A continuous process of constitutional revision may facilitate this ongoing qualitative improvement, although it could potentially marginalise constitutional identity - echoing Jacobsohn's conception of the latter as a «conservative presence»<sup>155</sup>. Thus, political actions that are normatively permissible, desirable, or even necessary may conflict with the staticity demanded by constitutional identity. However, this process of continuous constitutional refinement remains consistent with Scholtes' assertion that constitutional identity holds no intrinsic value.

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<sup>151</sup> *Ivi*, p. 540 ss.

<sup>152</sup> *Ivi*, p. 551.

<sup>153</sup> The concept of constitution itself is complex and contested, as it invokes a plurality of interpretations that undermine its determinacy by revealing the open-ended nature of its possible concretisation. See M. A. Graber, *Essentially Contested Constitutional Revolutions*, in *Maryland Law Review*, 2021, p. 205-216.

<sup>154</sup> Scholtes asserted that «the active destabilization of an existing constitution, or replacement of a previous constitution with a fundamentally new one, appears at odds with the idea of a settled and firm constitutional identity to be asserted and defended» (J. Scholtes, *Abusing Constitutional Identity*, cit., p. 553).

<sup>155</sup> G. J. Jacobsohn, *Constitutional Identity* (2006), cit., p. 387.

Furthermore, any definition of identity - whether or not it is subject to abuse, national or European - inevitably entails what Scholtes critically describes as «epistemology of provenance»<sup>156</sup>. As MacIntyre has observed, the national-patriotic argument rejects the notion of normative claims emerging from nowhere, asserting instead that such arguments are intrinsically grounded in a specific cultural or historical context - always from somewhere. Therefore, an ethical argument, always rooted in a specific cultural context, will lack of the normative force necessary to achieve acceptance across opposing sides in ethical-political discourse, thereby reinforcing the inherent bias of provenance<sup>157</sup>.

Therefore, opposing the language of identity at the national level with a similar framework developed at the European level does not address the underlying issue, but it shifts and transposes the inherent biases to a different scale<sup>158</sup>. Scholtes responds to the criticism directed at the concept of constitutional identity - particularly concerning its European implications - by contending that the abuse of constitutional identity does not arise from its inherent nature but rather against its internal logic: «contrary to the anti-pluralist arguments, the populist and authoritarian appropriations of constitutional identity are not to be seen as the logical consequence of the use of an inherently dangerous concept»<sup>159</sup>. As MacIntyre observed, the reliance on identity-based discourse inherently carries a moral risk, as the

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<sup>156</sup> «Abusive constitutional identity claims espouse an “epistemology of provenance” that connects the claim to an identity with a “claim to an exclusive domain of knowledge”» (J. Scholtes, *Abusing Constitutional Identity*, cit., 554).

<sup>157</sup> See J. Habermas, *The Inclusion*, cit., p. 99 and C. Larmore, *The Morals of Modernity*, Cambridge, 1996 p. 216.

<sup>158</sup> See the twin judgments of the CJEU - Case C-156/21 and Case C-157/21. In the both judgment, the CJEU declared that «In that regard, it must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States» (CJEU, Case C-156/21, Para. 232 and Case C-157/21, para. 234).

Among others, see for further details: M. Bonelli, *Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation*, in *European Papers*, 2022, p. 507-525; P. Faraguna, *Unconstitutional Constitutional Identities in The European Union*, in R. Hirschl – Y. Roznai, *op. cit.*, p. 300-311; L. D. Spieker, *Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts*, in *Common Market Law Review*, 2020, 361-398.

<sup>159</sup> J. Scholtes, *Abusing Constitutional Identity*, cit., 555.

preservation of such identity could eventually demand, or at least encourage, irrational actions, thereby becoming morally perilous.

In conclusion, dismissing the moral framework of constitutional patriotism and remaining anchored solely in an identity-based discourse risks turning the “identity problem” into an “identity trap”. A solution to the misuse of constitutional identity lies in deconstructing identity-language by establishing a coherent lexical order. This approach emphasises normative principles and universal values, directly challenging the exclusionary tendencies embedded within identity-based frameworks, whether national or European.

As a final remark, Denniger described how the concept of constitutional patriotism was understood by Justice Kirchhof. The latter, in his famous constitutional textbook, asserted that Constitutional patriotism is «nothing but “the flight of idealists” from the “harsh demands of the reality” of politics. For him, the reality of democracy is the “idea of the nation”, which “takes responsibility for the people entrusted to the state”, connects them to the state and limits state power “to an existing community” »<sup>160</sup>.

Certainly, constitutional patriotism, or any other moral approach, seems too unrealistic.

Nevertheless, as remarked by Weber, one of Germany’s foremost political thinkers who can by no means be classified as a utopian, «politics means strong, slow drilling through hard boards with both passion and a sense of proportion. It is completely true, and all historical experience confirms it, that what is possible could never have been achieved if one had not constantly reached for the impossible in the world [...]. Only someone who is sure that it will not destroy him if the world, as he sees it, is too stupid or too base for what he wants to offer it, and that he is capable of saying, in the face of all this, “nevertheless!”, only such a one has the “vocation” for politics»<sup>161</sup>.

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<sup>160</sup> E. Denninger, *Verfassungspatriotismus und Integration*, in *Der Staat*, 2021, p. 498.

<sup>161</sup> M. Weber, *Politics as a Vocation*, in J. Dreijmanis (ed.), *Max Weber's Complete Writings on Academic and Political Vocations*, New York, 2008, p. 207.

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**ABSTRACT:** This work critically examines the constitutional identity-problem in constitutional democracies, focusing on national identity, constitutional identity, and constitutional patriotism. Through a normative analysis, it addresses the tensions between national partiality and moral impartiality, advocating for the primacy of moral principles over identity-based claims. Drawing on deontological theories and Rawls' notion of lexical order, the work proposes a hierarchical framework to reconcile these tensions, emphasizing the universality and impartiality central to Habermasian constitutional patriotism as a cornerstone of democratic legitimacy, with potential applicability to the European context.

**KEYWORDS:** Nationalism – Constitutional Identity – Morality – Impartiality – Constitutional Patriotism.

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