



DIALOGUE AND DEBATE: SYMPOSIUM

Constitutional identity vs fundamental rights: a false tension?

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Abstract

The concept of constitutional identity has recently been invoked to impose limits on fundamental rights. In this article, I explore the relation between constitutional identity and fundamental rights and argue that constitutional identity – when properly understood – does not stand in tension but rather presupposes respect for fundamental rights. In the first part of the article, I develop a conception of constitutional identity as a set of normative commitments of a community that reflects its shared experience of establishing, and being subject to, a constitutional form of authority. In the second part, I argue that, while different constitutional identities can be idiosyncratic, they must incorporate respect for fundamental rights if their claim to reflect such common experience is to be credible. The upshot of the argument is that fundamental rights should not be understood as external constraints that limit the scope of constitutional identity, but as internal requirements inherent to the concept of constitutional identity. Although this understanding does not eliminate the difficulties which arise from different interpretations of fundamental rights, it does allow for a more productive engagement with constitutional identity claims, and for analysing them in light of fundamental rights standards they must already accept.

Keywords: EU law; constitutional law; constitutional identity; fundamental rights; constitutionalism; collective agency

1. Introduction

The relation between fundamental rights and constitutional identity is puzzling. Invocations of constitutional identity, at least in European constitutional space, tend to go hand in hand with underlining deep commitment and allegiance to the idea of fundamental rights. Paradigmatic instances of the judicial use of the concept delineate the core constitutional principles which cannot be encroached upon, and – within this core – protection of fundamental rights takes pride of place.¹ In *Solange I*, the German Constitutional Court (GCC) sought to shield the ‘basic structure of the constitution, which forms the basis of its identity’, and considered fundamental rights to be an ‘inalienable essential feature’ of such identity²; in *Solange II*, the GCC stated that it would not exercise review of the community law as long as it secures fundamental rights in a ‘substantively similar’ manner.³ Fundamental rights were also the driving force behind the

¹*Frontini v Ministero delle Finanze* (1974) 2 CMLR 372; *Internationale Handelsgesellschaft von Einfuhr-und Vorratsstelle für Getreideund Futtermittel* (1974) 37 BVerfGE 271, [1974] CMLR 540; *Re Wünsche Handelsgesellschaft* (1986) 73 BVerfGE 339, [1987] CMLR 225.

²*Internationale Handelsgesellschaft* (n 1) paras 22 and 23.

³*Re Wünsche Handelsgesellschaft* (n 1) para 48.

development of the Italian *controlimiti* doctrine: in *Frontini*, the Italian Constitutional Court retained the right to protect ‘the fundamental principles of . . . constitutional order or the inalienable rights of man’ from potential encroachment by the European Economic Community.⁴ And the list of more contemporary examples is vast: the Polish Constitutional Tribunal holds that constitutional identity includes ‘the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights’⁵; the Spanish Constitutional Tribunal sees constitutional identity as protecting the ‘core values and principles set forth in our Constitution, where fundamental rights acquire their own substantive nature’⁶; and the Court of Justice of the European Union (CJEU) takes values from Article 2 TEU, including human dignity, freedom, equality and respect for human rights, to ‘define the very identity of the European Union as a common legal order’.⁷

Against this background, it is not unwarranted to presuppose that there is a strong link between constitutional identity and fundamental rights. Yet, constitutional identity is sometimes invoked to undermine fundamental rights, and the concept is criticised because of its alleged propensity to do so.⁸ For example, before Russia ceased to be a member of the Council of Europe, its Constitutional Court relied on constitutional identity to oppose the judgements of the European Court of Human Rights (ECtHR).⁹ Another example is the Constitutional Court of Hungary, which held that the exercise of constitutional authority ‘must not be in violation of human dignity or the essential content of fundamental rights’, stated that the content of constitutional identity includes protection of freedoms, equality of rights, and protection of minorities, and – in the same breath – used the idea of constitutional identity to undermine the right of refugees to settle in

⁴*Frontini v Minister delle Finanze* (n 1) para 21.

⁵Polish Constitutional Tribunal, Judgement of 24 November 2010, Ref. No. K 32/09, para III.2.1.

⁶Cited in JMY Pérez de Nanclares, ‘Constitutional Identity in Spain: Commitment to European Integration without Giving Up the Essence of the Constitution’ in C Callies and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 268–83, 282.

⁷Case C-156/21 *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2022:97, para 127. There is an ongoing debate on whether Art 4(2) of the Treaty on European Union, which states that ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional’, refers to national or constitutional identity. See, generally, SW Schill and A von Bogdandy, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ 48 (2011) Common Market Law Review 1417, G van der Schyff, ‘The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU’ 37 (2012) European Law Review 563, and E Cloots, *National Identity in EU Law* (Oxford University Press 2015). In addition – even if it is accepted that Art 4(2) refers to specifically ‘constitutional’ identity – there is an open question of whether it merely refers to constitutional ‘structures’ or also to provisions about fundamental rights. Monica Claes makes a powerful, although primarily doctrinal, case for the proposition that the CJEU should restrict the application of Art 4(2) to constitutional ‘structures’, and deal with the diversity in fundamental rights protections via other means (M Claes, ‘National Identity and the Protection of Fundamental Rights’ 27 (2021) European Public Law 517). While it might be the case that the divergence in fundamental rights protections could doctrinally be dealt with outside of the scope of Art 4(2), my argument seeks to show that fundamental rights are actually intrinsic to the concept of constitutional identity, and it could be used to more directly address the claims of a number of constitutional courts that typically do see fundamental rights as falling within the scope of this concept.

⁸See, in the context of the rule of law, RD Kelemen and L Pech, ‘The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland’ 21 (2019) Cambridge Yearbook of European Legal Studies 59.

⁹Sometimes also because the judgements of the ECtHR ostensibly curtailed the rights and freedoms fundamental to the Russian constitutional order. See, for example, Decision of the Constitutional Court of the Russian Federation on the Review of Constitutionality of Art 1 of Federal Law ‘On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Additional Protocols Thereto’, No. 21-P (July 14, 2015) paras 1.2 and 2.2, discussed in M Aksanova and I Marchuk, ‘Reinventing or Rediscovering International Law? The Russian Constitutional Court’s Uneasy Dialogue with the European Court of Human Rights’ 16 (2018) International Journal of Constitutional Law 1322, 1332. See also A Zotéeva and M Kragh, ‘From Constitutional Identity to the Identity of the Constitution’ 54 (2021) Communist and Post-Communist Studies 176.

Hungary.¹⁰ The ECtHR has also accepted constitutional identity as a potential legitimate aim that can be used to limit the scope of rights and freedoms from the Convention.¹¹ Not surprisingly, these developments attract criticisms: for instance, Fabbrini and Sajó note that fundamental rights ‘should be regionally or even universally the same’,¹² and that the differences between concrete national constitutional identities are highly problematic ‘in matters of universal human rights’.¹³

One does not have to be particularly critical of courts and judicial reasoning to notice that they can advance political projects while concealing them in the vocabulary of fundamental rights or constitutional identity as potential legitimating mechanisms. So, the varying relation between constitutional identity and fundamental rights need not be puzzling as a matter of judicial behaviour and strategic considerations. I am, however, interested in another dimension of this issue: I want to explore the connections, and potential tensions, between constitutional identity and fundamental rights on a conceptual level. I will argue that respect for fundamental rights is one of the preconditions that makes the claims of constitutional identity viable.

There is now a growing number of voices which suggest that there is a conceptual link between constitutional identity and constitutionalism. As put by Julian Scholtes, ‘constitutional identity can necessarily only evolve within a space where the normative constraints of constitutionalism already have a bearing’.¹⁴ My own approach shares affinities with these types of views but seeks to expand upon them in two primary ways. First, I focus on fundamental rights as one specific dimension of this issue. The importance of this question lies in the tensions between constitutional identity and fundamental rights which occur in practice, and which give rise to arguments which deny the connections between them. Second, in focusing on the relation between constitutional identity and fundamental rights, I aim to shed additional light on the notion of constitutional identity.¹⁵

The argument is as follows. In Section 2, I identify the key elements of the idea of constitutional identity. I suggest that constitutional identity is best understood as a set of normative commitments that arise in virtue of the fact that a community is subject to a constitutional form of authority, as well as a condition that enables the collective agency necessary to establish and facilitate the exercise of such authority. In Section 3, I explain why any plausible claim of constitutional identity must be grounded in respect for fundamental rights. Both the notion that constitutional identity needs to be authentic and embedded in constitutional experience, and the notion that it enables the possibility of collective agency, presuppose fundamental rights protections. The key implication is that the respect for fundamental rights is an internal requirement of the concept of constitutional identity, and not merely an external normative commitment against which the claims of constitutional identity need to be balanced: because fundamental rights form a part of the justificatory grounds of the claims of constitutional identity, they cannot be abandoned for the sake of protecting constitutional specificities. Finally, I conclude by briefly suggesting that there are good reasons to think that the connection between fundamental rights and constitutional identity also runs in the opposite direction, and that fundamental rights can be reinforced by understanding them as an integral part of constitutional identity.

¹⁰Hungarian Constitutional Court, Decision 22/16 (XII.5.) of 30 November 2016. For an analysis and translation of main parts of the decision, see G Halmai, ‘Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article (E) (2) of the Fundamental Law’ 43 (2018) *Review of Central and East European Law* 23, paras 47, 56 and 65.

¹¹*Savickis and Others v Latvia*, App no 49270/11, Judgement of 9 June 2022.

¹²F Fabbrini and A Sajó, ‘The Dangers of Constitutional Identity’ 25 (2019) *European Law Journal* 457, 461.

¹³*Ibid.*, 472.

¹⁴J Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023) 91. See also M Kumm, ‘Un-European Identity Claims: On the Relationship between Constituent Power, Constitutional Identity and its Implications for Interpreting Article 4(2) TEU’ in K Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart Publishing 2023) 173–86.

¹⁵And, in so doing, add nuance to existing views, including the ones I defended in earlier work. See B Tripkovic, ‘Constructing the Constitutional Self: Meaning, Value and Abuse of Constitutional Identity’ 11 (2) (2020) *Union University Law School Review* 359 and B Tripkovic, *The Metaethics of Constitutional Interpretation* (Oxford University Press 2017) chs 2 and 6.

2. Constitutional authority, community and identity

I have argued in other places that the concept of constitutional identity denotes the core normative commitments of a constitutional community which arise in virtue of the fact that such a community establishes, and is subject to, a constitutional form of authority.¹⁶ While I cannot provide a complete defence of this understanding here, I want to rehearse its key features, and consider how it fares in relation to the key explanatory requirement that an account of constitutional identity needs to satisfy. Such an account must explain the institutional effects of constitutional identity: the notion that some elements of the constitutional framework deserve special treatment, in the form of countering supremacy claims of other constitutional orders, affecting the process of constitutional change, or by being ascribed more weight in constitutional interpretation.¹⁷

These institutional effects are the primary reason to consider and illuminate the normative dimension of the concept of constitutional identity: when the claims of constitutional identity are put forward, they are meant to have some normative upshot that stands in need of an explanation. Although it is possible to elucidate the claims of constitutional identity in descriptive terms – and a lot of valuable work has been done on advancing such an understanding and demonstrating its explanatory power – this type of descriptive inquiry is separate to the question of whether there are any normative requirements that determine the success conditions of constitutional identity claims in terms of the effects that they purport to have.¹⁸ A normative inquiry necessary to answer this question can take an external form, whereby constitutional identity claims are assessed against competing normative principles, or an internal or immanent form, whereby such claims are assessed from the perspective of some commitments inherent in the very concept of constitutional identity. My own analysis will be of this latter, internal type, but this does not mean that we cannot speak of constitutional identity claims in descriptive terms: it only means that the claims of constitutional identity may rest on certain assumptions which can be absent, thus undermining their justificatory grounds and consequently their normative effects.¹⁹

To illuminate the elements of the concept of constitutional identity, let me start from a relatively uncontroversial, albeit distinctly modern sense of constitution as a fundamental framework of practices, rules, principles and values that establish, shape and limit the institutional-legal and political structures in a community, including the relation between government and citizens.²⁰ Whatever constitutional identity is, it cannot be the whole such framework. The idea – in each instance of a claim of constitutional identity being put forward – is

¹⁶*Ibid.*

¹⁷On the role of constitutional identity in constitutional change see S Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021) ch 3 and Y Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017). On its role in countering supremacy claims of other constitutional orders, see Scholtes (n 14) ch 6; C Callies and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019); F-X Millet, ‘Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way’ 27 (2021) *European Public Law* 571; and P Faraguna, ‘Constitutional Identity in the EU—A Shield or a Sword?’ 18 (2017) *German Law Journal* 1617. For a discussion in the context of constitutional interpretation, see Tripkovic, *The Metaethics of Constitutional Interpretation* (n 15) ch 2.

¹⁸A seminal work of this descriptive-explanatory kind is GJ Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).

¹⁹Jacobsohn argues that the content of constitutional identity may be in tension with constitutionalism, although this tension is then defused because of inherently ‘disharmonic’ properties of constitutional identity. In this way, the concept retains its explanatory potential and can account for a variety of existing constitutional identities which do not respect the normative requirements of constitutionalism. See for example GJ Jacobsohn, ‘The Exploitation of Constitutional Identity’ in K Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart Publishing 2023) 33–56, 35. My view – explained further below – is that we can distinguish the claims of constitutional identity understood in a descriptive sense from the idea of constitutional identity in a fuller, normative sense, which can plausibly generate the institutional effects constitutional identity aspires to have.

²⁰M Loughlin, ‘The Constitutional Imagination’ 78 (2015) *Modern Law Review* 1, 2.

that this concept picks out only some parts of constitutional framework which are considered so fundamental that they deserve a special status.²¹ The key question is: what makes them fundamental?

An answer to this question can be relatively formal. Sometimes the text of the constitution will make the relevant distinction. This can, for example, take the form of a special amendment procedure or explicit designation of certain values and principles as taking priority over other parts of the constitution.²² The courts will often use such formal criteria to work out the content of constitutional identity in their constitutional system, and this has led some to believe that constitutional identity denotes the core identity of the constitution as a text.²³ But it would be a mistake to confuse any such formal mapping of constitutional identity, which may be used as a way of knowing it as a matter of legal doctrine, with the entirety of the notion.²⁴ For in that case we would lack an account of the reasons why these elements of the constitution are ascribed special relevance. A complete account of constitutional identity must explain what makes it the case that certain parts of constitutional framework have a superior normative status.

The reason why constitutional identity acquires such special status is because it arises as an expression of the more fundamental ambition to establish a constitutional form of *authority* and *community*. An account of the authority of constitutions in general fixes ‘the principles of political morality that underpin the constitution’ and ‘the condition under which citizens have a duty to obey it’.²⁵ As such, it has at least two dimensions. The first one concerns the grounds – or justification – of constitutional authority. The second relates to the directedness of political obligation towards a specific framework of institutions and practices, and asks how they can have authority for a particular community.²⁶ Here the question concerns the relation between a concrete constitutional order and the people that have obligations to it. To oversimplify, suppose that the authority of German constitutional order is justified by reference to some general principles, such as the rule of law, democracy, and equal concern and respect for all subject to it.²⁷ The vexing question is how – based on such principles which are presumably applicable anywhere – German constitutional order establishes its authority over German constitutional community only and not, say, over constitutional community in the UK. There are of course multiple possible answers to this problem, but my point is that only by attending to both dimensions we can begin to understand how constitutional authority can take shape, and that only by focusing on the latter issue we can make full sense of the former.²⁸

Constitutional identity is located at the intersection between these questions: it refers to the specific answer of a particular community to the question of constitutional authority, and in so

²¹Tripkovic, *The Metaethics of Constitutional Interpretation* (n 15) chs 2 and 6.

²²See for example Art 3 of the Croatian Constitution: ‘Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution’.

²³See for example T Drinóczi, ‘Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach’ 21 (2020) *German Law Journal* 105.

²⁴For a rich analysis of the ways in which constitutions determine the content of constitutional identity, see E Méribeau, ‘“(A-)Religious & Democratic” Militant Dual Constitutional Identities and the Turn to Illiberalism: the Case of France’ in R Hirschl and Y Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024) 113–24.

²⁵J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 328.

²⁶For an excellent overview of different positions, see WA Edmundson, ‘State of the Art: The Duty to Obey the Law’ 10 (2004) *Legal Theory* 215.

²⁷For example, the German constitution includes ‘world peace’ (Preamble), human dignity (Art 1) and its nature as a democratic and social federal state (Art 20(1)) among its legitimating principles, but also adds that ‘all state authority is derived from the people’ (Art 20(2)).

²⁸See for example J Waldron, ‘Special Ties and Natural Duties’ 22 (1993) *Philosophy and Public Affairs* 3 and R Dworkin, *Law’s Empire* (Harvard University Press 1986) 193.

doing seeks to both determine the grounds of such authority and tie them to those that are subject to it.²⁹ Consequently, the references to constitutional identity perform a dual task.

First, constitutional identity designates the evaluative core of the constitutional framework: its most fundamental principles and their justificatory basis. Constitutional authority in general claims to settle the framework within which political and legal institutions gain the right to be obeyed, and – if successful – it affects the downstream political obligation of those subject to such institutions, providing them with a reason to act in accordance with the directives of institutions. The key principles and values that ground such authority are frame-setting only: they create the space, means and boundaries for resolution of political and legal conflicts and disagreements, and are an important part of the explanation of any specific instance of institutional authority.³⁰ Given that constitutional identity does not cover the whole constitutional framework, it is supposed to single out only the most fundamental values and principles which perform this function of setting the boundaries within which an instance of institutional authority is considered legitimate.³¹

Second, the reference to constitutional identity makes a claim that such values and principles are embedded: they obtain in a particular community and claim to define and establish it, as well as reflect and enable the exercise of its collective agency. The idea is not only that these values and principles are fundamental, but also that they are widely shared, connected to the sense of the self of a constitutional community, and form an important part of how its members recognise themselves as being a part of it.³²

This is partly a consequence of the nature of constitutional authority. While the question of the grounds of constitutional authority is complex and far from settled, any principle that would count as such a ground is bound to be indeterminate.³³ One way to understand such principles is to see them as enabling a number of potentially valuable options for a constitutional community, but that the actual options that ground constitutional authority in a particular community are activated through the exercise of its agency.³⁴ Constitutional form of authority is thus not free-floating, in the sense of only being dependent on some general principles applicable everywhere, but is an embedded or situated form of normativity, which is realised in the context of a particular community.³⁵ As such, the notion of constitutional authority is partly based on general ideas about justified sources of political authority, and partly based on the contingent fact that such sources are rooted in practices and experiences of the members of a political community. In other words, the constitutional form of authority, as a form of embedded normativity, arises when the question of what grounds political authority is settled for a particular community, as a specific mix and

²⁹See, similarly, M Rosenfeld, 'Constitutional Identity' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 756–76, 761–2. Rosenfeld understands constitutional identity as addressing the questions of justification, content and addressees of the constitution.

³⁰This caveat 'part of an explanation' is to account for instances of legal authority that can occur outside of the framework of legitimate constitutional authority, which may, for example, be grounded in reasons of stability and coordination. Such possibility is, however, best understood as exceptional. For a recent discussion see S Hershovitz, *Law is a Moral Practice* (Harvard University Press 2023) ch 5.

³¹On different models of constitutional legitimacy, see A Harel and A Shinar, 'Two Concepts of Constitutional Legitimacy' 12 (2023) *Global Constitutionalism* 80.

³²Tripkovic, 'Constructing the Constitutional Self: Meaning, Value and Abuse of Constitutional Identity' (n 15).

³³Raz – together with many others – holds the view that, to the extent that morality underdetermines such constitutional principles, and to the extent that constitutions remain within the limits posed by them, 'constitutions are self-validating in that their validity derives from nothing more than the fact that they are there'. Raz (n 25) 348. See also J Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press 2011) chs 11 and 12.

³⁴J Raz, 'Incommensurability and Agency' in R Chang (ed), *Incommensurability, Incomparability and Practical Reason* (Harvard University Press 1997) 110–28.

³⁵Of course, the question is whether all normativity is of this embedded kind, but that issue does not affect the argument. For a discussion of how political normativity might (not) be distinct from other forms of normativity, see JL Maynard and A Worsnip, 'Is There a Distinctively Political Normativity' 128 (2018) *Ethics* 756.

elaboration of more general ideas about the sources of political authority.³⁶ This settlement does not merely arise from the act of constitution-making but – more importantly – from the continuous practice of embedding of more general values and principles in a constitutional community which then begins to have its own, specific answer to the puzzle of political authority. So understood, the notion of constitutional authority explains how constitutions can, at the same time, be both reasonable and ours, or how they establish a form of rationality which is attached and specific to a particular community.³⁷

For the ideals of political authority to be attached to the lived experience of the constitutional community, there must be a sense of ownership and authorship. And for this to be so, the specific answer to the question of constitutional authority will necessarily be subject to historical contingencies and some form of (presupposed) deeper acceptance that is captured by the notion of identity. In short, for the constitutional form of authority to emerge, not as a set of rootless ideals but as a lived experience of constitutional community, there must be an ambition and assumption about the acceptance of the specific constitutional settlement it creates. This idea of embeddedness in experience is crucial to forging the connection between abstract constitutional principles – purportedly justifying authority – and a specific community to which such principles apply. So, the notion of constitutional identity occurs at the intersection between the general principles grounding constitutional authority and their concrete instantiations in specific constitutional practices, which embed them in a particular community, thus aspiring to constitute it *qua* community capable of collective action.

This understanding explains both the notion that constitutional identity does not extend to the whole constitutional framework and the idea that it acquires special normative force. In relation to the first question, constitutional identity refers only to core constitutional principles and practices which answer the question of the grounds of constitutional authority.³⁸ In other words, the concept of constitutional identity makes a distinction between what Margaret Gilbert calls ‘basic’ and ‘derived’ joint commitments: the former establish the conditions under which other, derived evaluative commitments can be recognised as commitments of a particular constitutional community.³⁹ In relation to the second question, the special status of such identity – its role in constitutional amendment, interpretation or establishing supremacy – is tied to the assumption that it presents fundamental commitments of a constitutional community, and to the notion that the encroachment upon such commitments could be considered not only as a negation of the very existence of the constitutional framework of authority, but also of the kind of community which it seeks to create. This is because constitutional identity is meant to provide a framework for the exercise of agency of a community and – at the same time – constitute such a community as an entity capable of action.⁴⁰

Constitutional identity thus specifies the foundational principles upon which the edifice of a constitution is based, and its importance arises from the fact that it needs to be embedded to establish the community in a specifically constitutional manner. At least from the internal

³⁶While there is considerable disagreement on the best account of political obligation, most constitutions will draw upon various such grounds, including but not limited to consent, common good, associative or communal obligations, or natural duties (including the ones generated by human rights; see, for example, A Buchanan, ‘Political Legitimacy and Democracy’ 112 (2002) *Ethics* 689).

³⁷Tripkovic, *The Metaethics of Constitutional Interpretation* (n 15) ch 6. See also J-W Müller, ‘A General Theory of Constitutional Patriotism’ 6 (2008) *International Journal of Constitutional Law* 72.

³⁸This need not mean that there is an unchangeable and absolute core or essence of constitutional identity, but that the principles, values and commitments that resolve the question of constitutional authority are considered more important and stable over time and are purportedly constitutive of identity of a constitutional community. See more, in the context of personal identity, in K MacKay, ‘Authenticity and Normative Authority: Addressing the Agency Dilemma with Values of One’s Own’ 51 (2020) *Journal of Social Philosophy* 349, 361.

³⁹M Gilbert, *Sociality and Responsibility: New Essays in Plural Subject Theory* (Rowman & Littlefield 2000) 82.

⁴⁰*Ibid.*, 87.

perspective of the constitutional system – notwithstanding the issue of the existence of a proper justification of constitutional authority or the veracity of the claim that such a community is indeed created through the embedding of abstract values and principles – there is a *prima facie* reason to treat the core constitutional identity in a normatively distinctive way. It is, of course, an altogether different question whether these normative effects are truly justified. Nevertheless, this understanding of constitutional identity offers a potential explanation of such effects – an explanation that is plausible to the extent that the claims about constitutional authority and community are borne out.

3. From constitutional identity to fundamental rights: authenticity and agency

My thesis is that this idea of constitutional identity presupposes respect for fundamental rights.⁴¹ Recall that the notion of constitutional identity arises because of the ambition to establish values and principles that ground constitutional authority in a particular community. The thought is that a community can act as an agent, and bring about normative authority, that is, that it can somehow determine its own values and practical commitments. This kind of normative power is not peculiar,⁴² but it implies that the values, principles and commitments constitutive of identity can be somehow ascribed to a constitutional community.⁴³ The key question then becomes: when is this warranted?

There are two dimensions to this question. The first concerns the normative commitments and attitudes of the members of a constitutional community. Call this the question of *authenticity*. The second concerns the conditions that must be in place so that it is justified to think of ‘community’ as being able to exercise collective agency, which both underlines the notion of constitutional identity and is supposed to be further enabled by it. Call this the question of *agency*. The idea is that the capacity to establish normative authority – the ability of a community to determine its own reasons for action, values and practical commitments – is connected to its practical identity and evaluative perspective, as well as to its ability to act as an agent.⁴⁴ In other words, constitutional identity is at the same time supposed to reflect the evaluative perspective of the community and enable its capacity to act together and determine

⁴¹As I mentioned, this thesis does not take fundamental rights to pose merely external boundaries to the idea of constitutional identity. Another approach would be to consider constitutional identity as being expressive of normative commitments of a constitutional community, potentially captured by the ideas of popular will and constituent power, which then deserves to be respected if it also adheres to some basic normative principles, including the respect for fundamental rights. See Kumm (n 14). This approach is sometimes coupled with noting the limits that international law may pose on constitutional identity, and it thus needs to rely on an account of the authority of international law to motivate its claims. See, for example, Y Roznai, ‘The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments’ 62 (2013) *International and Comparative Law Quarterly* 557. This is a plausible way of working out the limits of justified constitutional identity claims, particularly in Europe, where there is a viable route to argue that the respect for fundamental rights is a part of a common European constitutional identity. But this approach misses the opportunity to explore the internal connections between the two notions, which can both illuminate the conceptual underpinnings of constitutional identity and avoid the unnecessary juxtaposition between constitutional identity and fundamental rights.

⁴²See, generally, J Raz, ‘Normative Powers’ in U Heuer (ed), *The Roots of Normativity* (Oxford University Press 2022) 162–78, and R Chang, ‘Do We Have Normative Powers?’ 94 (2020) *Aristotelian Society Supplementary Volume* 275.

⁴³There is of course a long and lively debate on how to understand collective agency and whether it can be reduced to individual agency. See, for example, M Gilbert, *On Social Facts* (Routledge 1987), M Bratman, *Faces of Intention* (Cambridge University Press 1999), and C List and P Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press 2011). While I cannot engage with the intricacies of that debate here, I do want to suggest that thinking about constitutional identity requires us to think about the conditions under which agency can be ascribed to a constitutional community as a whole.

⁴⁴See, for example, C Mackenzie, ‘Relational Autonomy, Normative Authority, and Perfectionism’ 39 (2008) *Journal of Social Philosophy* 512, and C Mackenzie, ‘Three Dimensions of Autonomy’ in A Veltman and M Piper (eds), *Autonomy, Oppression, and Gender* (Oxford University Press 2014) 15–41.

its other commitments. Both dimensions engage or presuppose respect for fundamental rights, albeit in different ways.

A. Authenticity

The assumption about authenticity, embedded in the notion of constitutional identity, is that there are certain normative attitudes and commitments that are widely shared, to the extent that they are inseparable from the constitutional community's sense of the self. For this reason, the question of authenticity may seem purely empirical: constitutional identity could be seen as referring to normative commitments and attitudes that actually prevail in a constitutional community. However, while there is an important factual component to the authenticity condition, the question is not best understood as merely empirical.

First, the relevant set of commitments and attitudes that fall within the extension of the concept of constitutional identity needs to be related to the question of constitutional authority (which is what the reference to 'constitutional' is supposed to pick out). This need not completely negate the importance of traditions that arise outside of constitutional context: it would be a mistake to see the process of constructing constitutional identity in purely rationalist terms, completely detached from any pre- or extra-constitutional experiences of a specific community. In fact, the project of creating a constitutional community is likely to build on such experiences, but also – and more importantly – aim to overcome them. Most accounts of constitutional identity recognise this. Jacobsohn suggests that constitutional identity 'represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past'.⁴⁵ For Rosenfeld, the process of moving beyond the past in creating new constitutional identity involves a more radical project, captured by the idea of negation of the previous self-image and of building 'a frame of reference and a narrative that will allow it to perceive itself as a constituted imagined community'.⁴⁶ These different ways of conceptualizing the emergence of constitutional identity can of course be pertinent to different constitutional contexts, but they do share the idea that the project of setting constitutional identity into existence can refer to pre-existing experiences and traditions, in the form of building up on them or negating them. For this reason, the importance of narratives, symbolic elements and political culture on what Laughlin calls 'constitution's integrative capacity' should not be underestimated.⁴⁷ However, this integrative ambition of constitutions does not merely incorporate previous experiences and traditions, but it also seeks to transcend them.

Thus, while it is important to acknowledge the role of the past, it would be an even greater mistake to think that there can be a distinctly constitutional identity which predates the constitutional form of authority. The distinguishing feature of this form of authority is the claim of acceptance or embeddedness of core values and principles from the constitution (further elaborated in constitutional practices). It is important to recognise this claim for what it is: a claim that need not correspond to reality, and I will say more about this below. But to be able to accomplish its goal of community-building around a set of core values and principles, constitutional identity cannot be detached from the population which it claims to integrate.⁴⁸ The idea of deeper acceptance of constitutional principles is a crucial component of any claim

⁴⁵GJ Jacobsohn, 'Constitutional Identity' 68 (2006) *The Review of Politics* 361, 363.

⁴⁶Rosenfeld (n 29) 759.

⁴⁷As noted by Loughlin, '[a]mong the many uncertainties in constitutional method, one claim that can be made with some conviction is that neither the technical brilliance of its design nor its efficacy as law offers much guidance on a constitution's integrative capacity. That quality rests not on a constitution's status as law but on its symbolic power. Its integrative capacity is a product of political culture'. Loughlin (n 20) 15.

⁴⁸As Raz puts it, '[c]onstitutions are meant to provide a framework for the public life of a country, giving it direction and shape. For this to be achieved, widespread knowledge of the constitution must be secured. This requires knowledge not only of

of constitutional identity, and it is implicit in this idea that the authority of constitutional settlement rests on the assumption that the community somehow accepts or internalises these principles.

Second, and related, the relevant commitments and attitudes need to be widely shared and deeply embedded (which is what the reference to ‘identity’ is supposed to pick out). The question is what counts as evidence for this claim? On the one hand, it is tempting to connect this condition to the normative idea of consent. On the other, it seems sensible to think of it in terms of a real, existing consensus in a constitutional community. But neither of these options work on their own, and, instead, this claim is best evidenced by demonstrating that there are preconditions in place which allow for dynamic alignment between actual commitments and attitudes of the members of constitutional community and its presupposed constitutional identity. Let me explain.

The advantage of thinking about authenticity in terms of acceptance and consent is that it dovetails with the idea of constitutional authority which is implicit in the notion of constitutional identity. There is no doubt that consent can be normatively significant and ground authority in general, and it is not surprising that it is considered a key candidate justification of constitutional authority.⁴⁹ The normative pull of agency and autonomy – underlying both the notion of consent and fundamental rights – is such that it would be difficult to argue that a system that does not protect them succeeds in establishing constitutional authority and community presupposed by the idea of constitutional identity. The problem, however, is that the ideas of actual or hypothetical consent face numerous challenges.

Actual consent is often neither expressly given nor implicit in the mere fact that a constitutional system exists.⁵⁰ The claims of constitutional authority can also be actively resisted. And there can also be more benign ways in which this idea of consent comes under pressure. It is plausible that at least in some systems constitutional principles do play a role in forging an identity and shaping public life to such an extent that this amounts to a form of continuous consent or acceptance. But can we say the same of all constitutional systems? For example, what about new constitutional systems where the proclaimed identity is almost entirely aspirational and marks a rupture with the previous constitutional settlement?⁵¹ It is likely that constitutional identity is at least to some extent a projection into the future, and that it assumes that a community can be justifiably thought of as accepting it.

But there are also problems with this idea of hypothetical consent. We may think of hypothetical consent in terms of agreement that would be reached among people under some idealised conditions, for instance if they were perfectly rational and well-informed.⁵² But then it seems that the idea of consent does not matter in the first place: all that is needed are reasons to accept the authority of the constitution stated in abstract. To put it more precisely, if the conditions for the hypothetical consent are defined robustly enough to yield a relatively clear set of criteria for when the assumption of hypothetical consent is justified, then consent may be thought to play no role in such justification, and all the normative work is done by the reasons one would have to consent to authority regardless of whether such reasons are internalised. One scenario in which the idea of hypothetical consent does make a normative difference, while not being

the text but of its significance – that is, knowledge of the constitutional practices in the country. Until people absorb and adjust to it, a radical constitutional change upsets these practices’. Raz (n 25) 350.

⁴⁹Gilbert (n 39) ch 6.

⁵⁰AJ Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979) chs 3 and 4.

⁵¹Note, however, that Jacobsohn and Roznai seem to suggest that there is always an element of identity that survives constitutional change (GJ Jacobsohn and Y Roznai, *Constitutional Revolution* (Yale University Press 2020). For an analysis and critique, see S Gardbaum, ‘Constitutional Identity and Constitutional Revolution’ in R Hirschl and Y Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024) 56–62.

⁵²J Rawls, *A Theory of Justice* (Harvard University Press 1971) ch 6. In the context of constitutional identity, see M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (Routledge 2010) 25.

detached from the notion of consent, is precisely when there is a deep connection with identity, which allows for treating people in line with their deeper convictions as opposed to superficial desires. As Enoch puts it, ‘in those cases, it’s important to treat [people] in such a way because treating them differently can amount to an assault on their self.’⁵³ But in political matters, even in these types of scenarios, the idea of hypothetical consent can be highly problematic: we should care about the notion of autonomy which grounds the importance of actual consent or resolving political disagreements democratically.⁵⁴

It is similarly difficult to evidence authenticity by understanding it as a claim about the actual commitments of the members of a constitutional community. There is an important factual component to any identity claim: we do not necessarily think, at least on individual level, of identity as something that must arise as merely a consequence of our reflective choices or agency, and we can of course imagine a constitutional community which shares certain values even if there is a lack of meaningful channels to shape, develop and influence them. For there to be constitutional identity, there must also be a sense of sharing some actual evaluative common ground in a community: the future and interests of the members of any constitutional community are bound up in such substantial ways that – if such a community is to function at all and not disintegrate – there is always some bedrock agreement on how and under what conditions they can be taken to have exercised their political agency. But notice that this only goes so far: under the circumstances of pluralism and disagreement, there just does not seem to be a way to corroborate this claim, without allowing for the possibility of meaningful exercise of consent and agency, which would facilitate dynamic alignment between actual commitments of the constitutional community and its presupposed constitutional identity.⁵⁵ It is not a coincidence that many claims of constitutional identity that are intuitively felt to be abusive of the concept seek to fabricate homogeneity in evaluative attitudes which rarely exists under circumstances of pluralism.⁵⁶

The condition of authenticity is then neither best understood solely as a claim about consent, nor as a merely factual claim about the existence of agreement or consensus on fundamental values and principles, but as a combination of both. As such, it is evidenced by showing that there are mechanisms in place that allow for a multitude of individual normative attitudes and commitments to be reflected in the claimed constitutional identity. And – coming to the key point – these mechanisms presuppose protection of fundamental rights. For a community to be able to make the claim about embeddedness of the basic precepts of constitutional settlement, there must first be some safeguards in place to ensure that there indeed is such embeddedness, a continuous connection between the content of constitutional identity and the community it seeks to establish, as well as an opportunity for dynamic alignment of constitutional identity to the commitments of such community. These safeguards must then incorporate fundamental political rights and freedoms, which allow for such processes to take place.⁵⁷

But even more importantly, this idea of political agency and associated political rights cannot be neatly separated from broader protections that secure the conditions for the exercise of individual agency in general.⁵⁸ As Waldron puts it, ‘one cannot meaningfully exercise the right to vote in conditions of terror or starvation’.⁵⁹ This means that a whole array of other rights must be

⁵³D Enoch, ‘Hypothetical Consent and the Value(s) of Autonomy’ 128 (2017) *Ethics* 6, 27.

⁵⁴*Ibid.*, 34–5.

⁵⁵See Scholtes (n 14) chs 4 and 5 on the perils of presupposing homogeneity in the face of disagreement.

⁵⁶For a crisp argument along these lines and a thorough discussion of contemporary European examples, see J Scholtes, ‘Abusing Constitutional Identity’ 22 (2021) *German Law Journal* 534. See also Tripkovic, ‘Constructing the Constitutional Self: Meaning, Value and Abuse of Constitutional Identity’ (n 15).

⁵⁷On ensuring this in the context of judicial review, see JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1981).

⁵⁸K Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2015) 107.

⁵⁹J Waldron, *Law and Disagreement* (Oxford University Press 1999) 284. See also H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press 1980) ch 1.

in place in order for political rights to be able to perform their function in generating or at least approximating the kind of bedrock agreement that is presupposed by the notion of constitutional identity.⁶⁰ This is quite obvious in the case of the right to life, freedom from torture, respect for private life or freedom of thought and religion, but – although I cannot make the case for it here – effective protection of such agency is likely to require socio-economic guarantees as well.⁶¹ The reason for this is that the same notion of normative agency underlines both the political agency of individuals and their ability to autonomously form a conception of good life, liberty from unjustified interference and welfare provisions necessary for its exercise.⁶² In other words, if the claim that constitutional identity is widely shared rests on the idea that people have exercised their normative agency in particular ways, then it is not possible to merely safeguard their political agency without at the same time guaranteeing the fundamental rights protections which enable them to exercise such agency in the first place.

B. Agency

Note that even with such mechanisms in place there is no guarantee that constitutional identity will reflect the normative commitments of a community. Fundamental rights mechanisms – running from the protection of individual agency to guaranteeing expression of such agency in the domain of constitutional politics – go a long way in ensuring that members of a constitutional community can affect the basic precepts of constitutional authority, but by no means secure that it will be authentic. This can be for a variety of reasons. Many people are born and live their lives under a framework of constitutional identity without many opportunities to shape it. Nor is it possible to infer their consent or acceptance of such framework from their implicit engagement with it, through taking part in institutional processes or by making demands on the system of government and grounding their claims in some principles or values central to constitutional identity.⁶³ And – even if there is some foundational agreement on constitutional identity – such agreement is likely to be either too thin or too abstract to fix concrete interpretations of values and principles that constitute it.⁶⁴ Yet, the claim of constitutional identity is that it is possible for a community to create the *we*-perspective and to act as a collective agent, by virtue of generating some principles and values which ground constitutional authority and facilitate its exercise.

The question of agency is connected in two different ways to the concept of constitutional identity. The first is the already mentioned claim of acceptance or embeddedness of constitutional identity in a constitutional community. This condition need not necessarily presuppose that agency is exercised in establishing constitutional identity, but as explained above, there is no evidence to support the claim of authenticity unless it is also corroborated by meaningful mechanisms – such as fundamental rights – that enable individual commitments to be reflected in joint commitments constitutive of constitutional identity. The second way concerns the framing of constitutional identity as a way of establishing constitutional authority and generating further commitments that can be properly ascribed to constitutional community. The assumption here is that, to the extent that constitutional authority is exercised in line with principles and values constitutive of constitutional identity, and is constrained by them, further evaluative

⁶⁰See also Habermas' argument for 'co-originality' between basic rights and democracy (or private and public autonomy), according to which neither takes priority, or is reducible to the other, and rights are a necessary prerequisite for democracy and vice versa (J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 104, 314 and 409). I am reluctant to rely on this idea, for some of the familiar reasons, including Habermas' claim that his account does not assume any moral content prior to democratic deliberation. See more in S Rummens, 'The Co-originality of Private and Public Autonomy in Deliberative Democracy' 14 (4) (2006) *The Journal of Political Philosophy* 469.

⁶¹See, for example, J Griffin, *On Human Rights* (Oxford University Press 2008) ch 10.

⁶²*Ibid.*, 33.

⁶³Simmons (n 50) chs 3 and 4.

⁶⁴See more in Tripkovic, *The Metaethics of Constitutional Interpretation* (n 15) ch 2.

commitments and actions can properly be seen as an exercise of the collective agency of that particular constitutional community. As Korsgaard puts it:

the main purpose of a literal political constitution is precisely to lay out the [community's] mode of deliberative action, the procedures by which its collective decisions are to be made and carried out . . . The constitution in this way makes it possible for a group of citizens – who without the constitution would be *a mere heap* of individual people – to function as a single collective agent.⁶⁵

This is precisely what constitutional identity is meant to facilitate. But when the focus moves to the question of collective agency, the relevant relation between fundamental rights and constitutional identity needs to be explained from a normative perspective, for the issue then becomes when it is legitimate to attribute such agency to the community in question. This is so because the exercise of collective agency becomes a matter of transforming power into authority, rather than merely being an expression of what is authentic to a community: the claim here is that common commitments, and directives based on such commitments, can be justifiably imposed upon everyone, and not simply that they are reflective of their individual commitments. If this is the case, then there will be certain normative conditions that must be satisfied if constitutional identity is to be able to generate institutional effects that it is supposed to have. These normative conditions are typically represented as rights held by those who are incorporated into the framework of identity which generates collective agency, and who are subject to the authority it seeks to establish, perhaps against their wishes and their personal evaluative outlook.⁶⁶ It is only when there is respect for this sphere of individual agency that the imposition of authority based on the deep commitments of the collective self can be justified.⁶⁷

The question can also be approached from the perspective of the character of the community that has a justified claim to have established a collective mode of agency, which goes above and beyond the statistical sum of individual agencies of its members, and by virtue of which such a community can exercise normative authority and create obligations.⁶⁸ Constitutional identity aims to furnish the circumstances which make the existence of collective agency possible and its exercise legitimate. In Dworkin's terms, a precondition for this type of agency is a thicker, normative notion of membership in a community – which he calls 'moral' – which is not based on social and psychological determinants only.⁶⁹ For Dworkin, this type of membership is relational, and is possible only in so far as individual members are treated in a certain way: they must be given an equal part in collective decision-making and an appropriate degree of independence from such decisions (allowing for a protected sphere of individual moral agency), while their interests and needs must be treated with equal concern.⁷⁰

These preconditions can be translated into the vocabulary of fundamental rights which serve to secure them, from political rights that ensure participation, to negative freedoms that allow for independence, and socio-economic rights that facilitate equitable distribution of wealth and benefits. In other words, for there to be a community of this kind, there must also be a

⁶⁵CM Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford University Press 2009) 142.

⁶⁶Waldron (n 59) 284. The question goes beyond the issue of legitimacy of ordinary political decisions, important as it is, for – given the centrality of constitutional identity to the construction of collective agency of the constitutional subject – it concerns the most fundamental basis of the framework of constitutional authority and corresponding political obligation. Constitutional identity makes a claim that such basis is not merely an abstract idea of reason, but the fact that constitutional community is established by virtue of identifying with that basis. For a Kantian interpretation of this thought, see Korsgaard (n 65) 154–8.

⁶⁷See also Buchanan (n 36) 703–9.

⁶⁸R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996) 20.

⁶⁹*Ibid.*, 24.

⁷⁰*Ibid.*, 24–6.

commitment to non-domination and equal concern and respect for all, again typically articulated in the form of fundamental rights: if parts of the community are alienated or marginalised, then there is no community in the first place which can claim constitutional identity. From this vantage point, the nature of constitutional identity is – as Lindahl puts it – ‘representational or attributive’,⁷¹ in that it arises as an ex post facto normative judgement about whether it is justified to consider constitutional community as an entity capable of constitutional agency, rather than it being a question of social and psychological attitudes or the fact that one happens to be a member of such a community.

This is not to deny the possibility of explaining collective agency in descriptive terms, but to take seriously the claim that constitutional identity seeks to confer authority, generate obligations, and occupy a special institutional status, and then to work out the conditions under which such claim is plausible. It is, however, worth noting that this idea of collective agency as being subject to restrictions pertaining to respect for moral status of individuals, which can only be accessed and expressed if there are certain normative conditions in place that allow for it, is so deeply entrenched in constitutional imagination that there is almost no one openly denying it.⁷² In fact, one would be hard pressed to find a contemporary constitution that does not refer to fundamental rights to justify the assumption that the ‘people’ are constituted as an entity which can express its will.⁷³ I am not suggesting that these proclamations should be taken at face value, as many of them are false.⁷⁴ But I am suggesting that there is something about the project of attaching a constitutional source of authority to a community that requires reliance on a fundamental commitment to equal concern and respect, so much so that it finds its way even into constitutional systems which manifestly do not live up to it. And I am also suggesting that the claims of constitutional identity should be normatively assessed in virtue of this underlying commitment, internal to the idea of constitutional identity.

4. Conclusion

I have argued that constitutional identity involves a claim about community-creation in a distinctive, constitutional way: a claim about constructing an identity around values, principles, and core commitments that establish a specific, constitutional form of authority. It is partly based

⁷¹H Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in M Loughlin and N Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press 2007) 9–24, 23.

⁷²P Eleftheriadis, ‘Law and Sovereignty’ 29 (2010) *Law and Philosophy* 535, 556–7.

⁷³RS Kay, ‘Constituent Authority’ 59 (2011) *The American Journal of Comparative Law* 715, 737. Even constitutions which are explicitly based on a theistic source of authority, rely on similar notions. For example, the Constitution of Iran – which ‘sets forth the cultural, social, political, and economic institutions of Iranian society on the basis of Islamic principles and norms’ (The Constitution of the Islamic Republic of Iran, 1979, amended 1989, Preamble), recognises the ‘exclusive sovereignty and the right to legislate’ of Allah (Art 2.1), and seeks to establish a political community as ‘the crystallization of the political ideal of a people who bear a common faith and common outlook, taking an organised form in order to initiate the process of intellectual and ideological evolution towards the final goal, that is, movement towards Allah’ (Preamble) – recognises the ‘dignity and value of man, and his freedom’ (Art 2.6), is based on ‘negation of all forms of oppression’ (Art 2.6.c), and among its key goals lists ‘the elimination of all forms of despotism and autocracy and all attempts to monopolise power’ (Art 3.6), ‘ensuring political and social freedoms’ (Art 3.7), ‘the participation of the entire people in determining their political, economic, social, and cultural destiny’ (Art 3.8), and ‘the abolition of all forms of undesirable discrimination and the provision of equitable opportunities for all’ (Art 3.9).

⁷⁴There is a lot of sophisticated empirical work which shows how these types of provisions operate in authoritarian constitutional settings, including how they can perform a ‘window dressing’ role. For an excellent overview, see T Ginsburg and A Simper, *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 1–17. To underline, I am not making an empirical claim about the role such provisions actually play in authoritarian constitutional systems, but a more general claim that the gravitational pull of the connection between fundamental rights and constitutional identity is difficult to resist openly, and that it is very often (nominally) recognised even in (by and large) sham constitutional provisions in authoritarian constitutional systems.

on existing attitudes of constitutional community, and it partly seeks to furnish its ability to speak with one voice and stand behind the most basic values around which it is formed.

The key question is what else must be in place to make this claim plausible. I have suggested that unless there are basic guarantees of equal status and interests of individuals, there is no basis to support the notion that there is a community capable of settling on such values and principles, and thus of establishing a constitutional form of authority. While this conception does not eliminate the tensions between different understandings of fundamental rights, it does imply that constitutional systems which fail to guarantee such rights cannot make a plausible normative claim that their constitutional identity should have a superior normative status internally, or that it should externally command a special form of respect.

This account leaves room for a great diversity in interpretation of fundamental rights in different constitutional systems. The key objection, as we have seen, is that such diversity threatens the notion of universal human rights. But on any account of universality of human rights there is scope for their specification.⁷⁵ Such rights have reasonably determinate outer borders, and allow identification of actions which are clearly violating them, but are also indeterminate within these limits and require some form of settlement on their precise meaning.⁷⁶ I used the notion of fundamental rights to capture a certain kind of continuity between human and constitutional rights: while these notions are distinct, they do share the core intuition that some valuable features of individuals, such as their interests or status, ground a special, rights-based form of protection, and they do have a common history. Constitutional identity can perform a crucial role in making human rights more concrete and stronger, by embedding them in particular constitutional contexts and by granting them special institutional protections afforded to constitutional identity. So, if the universality of human rights allows for some indeterminacy of their normative content, if such rights need to be embedded in experience to be efficiently protected and respected, and if they benefit from an elevated institutional status, then human rights can leave the space for – and perhaps even require – something like constitutional identity.

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⁷⁵Even on the orthodox view of human rights that the critique seems to presuppose. See more in B Tripkovic, ‘A New Philosophy for the Margin of Appreciation and European Consensus’ 42 (2022) *Oxford Journal of Legal Studies* 207.

⁷⁶This settlement paradigmatically takes legal form and is subject to further principled and pragmatic constraints. See, for example, J Tasioulas, ‘Saving Human Rights from Human Rights Law’ 52 (2021) *Vanderbilt Law Review* 1167, 1175–6.