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The Constitutional Subject, Its Other, and the Perplexing Quest for an Identity of Its Own: A Reply to My Critics

Michel Rosenfeld

*Benjamin N. Cardozo School of Law, mrosnfld@yu.edu*

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THE CONSTITUTIONAL SUBJECT, ITS OTHER, AND THE PERPLEXING QUEST FOR AN IDENTITY OF ITS OWN: A REPLY TO MY CRITICS

Michel Rosenfeld∗

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INTRODUCTION

An author is fortunate when his or her ideas are taken seriously, and I am particularly privileged to have had such an outstanding and diverse group of scholars coming from several different countries and specializing in various disciplines engage with so many of the issues

∗ Justice Sydney L. Robins Professor of Human Rights and Director, Program on Global and Comparative Constitutional Theory, Benjamin N. Cardozo School of Law.
and ideas that I dealt with in my book, *The Identity of the Constitutional Subject*. It was a great pleasure to be able to react in person to the authors whose ideas are presented in the preceding pages at the conference focusing on my book that took place at the Cardozo School of Law on October 25, 2010.\(^1\) I am also grateful for this opportunity to grapple in greater depth with the rich insights, incisive comments, and deeply challenging criticisms that emerged throughout the preceding contributions.\(^2\) As these contributions collectively address many of the book’s facets from a number of different perspectives, it will be, of course, impossible to do justice to all of the valuable observations made and challenges raised. Accordingly, I will have to be selective. I will begin by briefly addressing my criteria of selectivity.

My book zeroes in on the question of constitutional identity and its relation to its proper subject in the dual sense of: (1) who does, or can, appropriate that identity as his/her/its own; and (2) to whom can, or should, that identity be ascribed. The book, moreover, addresses these questions at a conceptual level and conducts its work at various levels of analysis ranging from the macroanalytic level\(^3\) to the microanalytic one,\(^4\) as well as at different levels of abstraction.\(^5\) Consistent with this, criticism could be addressed to the conceptual project or conclusions as a whole, or against parts of it at all or some levels of analysis or abstraction. None of the contributions explicitly attack the conceptual project as a whole, though criticisms directed at certain discrete parts of the project may be understood as posing significant challenges to the soundness or coherence of the project as a whole. For example, Deborah Hellman takes issue with my conception of equality\(^6\) and Seyla Benhabib criticizes what she considers a lack of sufficient emphasis on the role of democracy in relation to constitutionalism.\(^7\) Other challenges, such as that by Sujit Choudhry regarding one of the constitution-making

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1. I wish to thank Cardozo’s dean, Matthew Diller, for suggesting and providing generous institutional support for the conference in question, as well as my colleagues, Peter Goodrich and Julie Suk, for their splendid realization and most successful organization of that conference. The conference was held under the auspices of the Floersheimer Center for Constitutional Democracy at Cardozo. I am grateful to the Center for hosting this project.

2. I wish to thank the *Cardozo Law Review* for inviting me to write this reply. Moreover, in addition to replying to the contributions made in the preceding pages, I will also address some of the criticisms made at the October 25 conference by Pierre Legrand and further developed in Pierre Legrand, *Jacques in the Book (On Apophasis)*, 23 LAW & LITERATURE 282 (2011).


4. See *id.*, ch. 3, at 73–126.

5. See *e.g.*, *id.* chs. 5–6, at 149–210 (discussing the construction of various constitutional models by comparing actual historical experiences at a certain level of abstraction).


models I elaborate (labeled the “Pacted Transition Model”) bear upon extrapolations that figure in an attempt to frame a proper level of abstraction for analytic and comparative purposes. Bernhard Schlink and Jan-Werner Müller raise historical issues that have a bearing on important theoretical assertions, respectively the relation between the constitution, the nation, and the state, and the contrast I draw between constitutional and human rights patriotism. Peter Lindseth poses a broad methodological and theoretical challenge concerning my treatment of the prospects of viable transnational constitutions. Finally, Pierre Legrand reads my entire enterprise in a way that, though entirely plausible, goes in part against the grain of what I intended to convey. By contrast, the remaining two contributions by Rosalind Dixon and Alec Stone Sweet seem to me consistent with the views I express in the book, and, at least as I read them, they also corroborate and further expand on certain of the conclusions that I reach in the book.

Consistent with the above observations, I will proceed as follows: Part I will address the arguments of Hellman and Benhabib that go to some of the foundations upon which my theory of the constitutional subject is built. Part II will tackle comments and criticisms that call into question the particular level of abstraction at which I have framed certain models and theoretical constructs that rely on historical fact or legal and political analysis as they arise in the contributions by Choudhry, Schlink, and Müller. Part III will briefly concentrate on the methodological and theoretical grounds on which I rely to engage in cautious speculation about the future prospects of transnational constitutionalism in view of Lindseth’s criticisms. Lastly, Part IV will respond to Pierre Legrand’s reading of my book as a departure from my previous engagement with Derrida, and thus as forsaking singularity in an overly eager move to achieve reconciliation. The relationship between the universal, the singular, and the plural has been a central focus of much of my work, and I will seek to stress contra Legrand that my dialectical

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12 See Legrand, supra note 2.
approach to the relationship in question does not contemplate eliminating, overcoming, or circumventing singularity.

I. **Equality, Democracy, and the Foundations of Modern Constitutional Identity**

Both modern constitutional identity and the question of its subject as they arose in the aftermath of the French Revolution bear an essential connection to equality and an indissoluble—though often problematic—link to democracy. Modern constitutionalism arose in eighteenth-century France and the United States upon the overthrow of feudal hierarchy and the establishment of equality among all human beings as the new baseline for all intersubjective dealings—a shift encapsulated in the American Declaration of Independence’s dictum: “All men are created equal.”

The embrace of the ideal of equality, however, bumped immediately against the reality of the glaring inequality of women in both France and the United States—and in the latter against the bane of race-based constitutionally enshrined slavery.

It is in this context that I made reference to the dialectic of equality and of the three stages of which it is comprised, namely, (1) difference as (justifying) inequality; (2) equality as identity; and (3) equality as difference. This dialectic, while historically rooted in the case of women in both France and the United States (and of African Americans in the latter), is posited as an account of the logic, but not necessarily the history or politics, of the Enlightenment-based conception of equality. As a matter of fact, whereas I consider the dialectical logic involved implacable, I have often insisted that historical and political attempts to move from stage-two to stage-three equality can be fraught with dangers of regression to stage one.

The centrality of democracy in connection with modern constitutionalism and the problematic relationship between the two is perhaps best captured by reference to the metaphor of the social contract, which figures prominently in accounts of the legitimacy of constitutions. If the constitution can be convincingly portrayed as the product of the mutual consent of all those meant to be subjected to its prescriptions,

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16 See ROSEN Feld, LAW, JUSTICE, DEMOCRACY, supra note 15, ch. 2, at 68–91. The remainder of this paragraph draws on the much more extensive discussion of equality contained in these pages.

17 See David A.J. Richards, Revolution and Constitutionalism in America, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 85 (Michel Rosenfeld ed., 1994) (arguing that conformity with the essentials of constitutionalism in the United States had to await the Civil War and the abolition of slavery).

18 See ROSEN Feld, supra note 3, at 62 n.61.

19 See id. at 18–20.
then it stands as an ultimate product of democratic self-government. Moreover, under such ideal circumstances, a social contract–based constitution would be thoroughly consistent not only with all plausible conceptions of democracy, but also with full equality among all who, consistent with Rousseau’s vision, would at once constitute themselves as the self-governing and the self-governed.20 The relationship between constitutionalism and democracy is bound to become problematic, however, as actual circumstances can never sufficiently approximate the ideal ones evoked above. Thus, for instance, by its own terms, the U.S. Constitution only required acquiescence by a part of all those who would become subjected to its prescriptions upon its entering into force.21 More generally, even if a constitution were deemed to satisfy some appropriate criterion of democracy upon its inception—e.g., ratification by a large majority, though not all of those to be subjected to it—with the passage of time it would inevitably have to confront serious challenges from the standpoint of democracy. Why should my generation be bound by the consent given by the generation of my great-grandparents’ grandparents?

Constitutionalism’s problems with democracy are compounded by the fact that constitutional prescriptions are typically to a significant extent countermajoritarian. Inasmuch as democracy requires majoritarianism, countermajoritarian constitutional norms may appear downright antidemocratic, setting up seemingly insoluble conflicts between constitutionalism and democracy. Upon closer examination, the interplay between constitutionalism and democracy seems even more complex and problematic. Indeed, some countermajoritarian constitutional provisions, such as the protection of highly unpopular political speech, seem indispensable to the deployment and maintenance of genuine democracy.22 On the other hand, other countermajoritarian rights, such as protection on privacy grounds of sexual practices found abhorrent by an overwhelming majority of the citizenry, seem downright antidemocratic. In short, how much democracy and of what kind there ought to be in the constitution (through the deployment of both majoritarian institutions such as legislatures and counter-majoritarian guarantees such as protection of unpopular political speech) and to what extent the constitution should afford certain protections against democratic rule are highly contested questions. Moreover, the answers to these questions depend

21 See U.S. CONST. art. VII (providing that U.S. Constitution would become effective upon ratification in state conventions in nine of the then-existing thirteen states).
on the theory of democracy that one adopts. For present purposes, and with a view to responding to the comments and criticisms of Seyla Benhabib, suffice it to point out that the proper role and scope of majoritarianism in the context of democracy differs depending on the theory of democracy that one embraces. Accordingly, for some of those for whom majoritarianism plays a very extensive role in their conception of democracy, some countermajoritarian actions or policies may be obviously antidemocratic, whereas for others, with a much narrower view of the proper scope of majoritarianism within their different conception of democracy, the same actions and policies may well be deemed perfectly consistent with democracy.

A. Hellman and the Logic, Grammar, and Ideologies of Equality

Hellman deems my views on equality both “somewhat peripheral to the overarching themes and claims of the book”23 and “unconvincing”24 for what I understand are two principal reasons: first, she finds my three-stage dialectic logic of equality mentioned above unhelpful, if not downright misleading;25 second, she objects to my placing relevant identities and relevant differences on the same plane, preferring a presumption in favor of linking equality to sameness.26 Moreover, Hellman advocates a conception of equality based on equal respect,27 and argues that my conclusions regarding the prospects for global constitutionalism are better supported under her conception of equality than under mine.28

As may be already apparent, I strongly disagree with Hellman that equality is “peripheral” to the book’s central concern. Not only is modern constitutionalism unthinkable without equality, but it is difficult to imagine a constitutional identity (as opposed to a national identity) and a constitutional subject without reference to some conception of equality. With respect to Hellman’s objections to my treatment of equality, on the other hand, our differences as I see them boil down to questions of logic, grammar, and ideology.

On the grammar of equality, I think Hellman is plainly wrong as she seems to blur the line between formal and substantive equality and as her introduction of a presumption of sameness as a structural matter rather than as an ideological choice seems to stem from a conflation of distinct levels of analysis. The distinction between formal and substan-

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23 Hellman, supra note 6, at 1839.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
tive equality goes back to Aristotle and has been more recently exhaustively analyzed by Chaim Perelman. Formal equality requires that all those in the same essential category be treated the same and all those in different essential categories be treated differently. Regardless of who is deemed to be the subject of equality and what the domain of equality (i.e., what is to be apportioned equally) may be, all substantive conceptions of equality must comply with the immutable grammar of formal equality. Formal equality does not tell us what similarities and differences are relevant—only that all coherent substantive equality conceptions must perforce sort similarities and differences in terms of relevance and irrelevance. Thus, for example, formal equality is equally satisfied by the substantive conclusion that differences regarding reproductive function between men and women are relevant for purposes of barring women from working outside the home and by the opposite substantive conclusion that differences in reproductive function are completely irrelevant in the context of access to employment outside the home.

Schauer’s view, as presented by Hellman, to the effect that “equality demands, at least prima facie, that like cases and different cases both be treated alike,” is patently absurd if taken at the level of the grammar or structure of equality, for it would require that murder cases be treated like accidental death cases and racial discrimination cases the same as selecting the objectively best qualified candidate for a job over less qualified applicants. Schauer’s view, however, does make sense if it is understood as advancing a particular contestable substantive conception of equality stemming from a combination of a given ideological position combined with a practical concern. Given the history of use of differences that ought to have been irrelevant between the races and the sexes in the United States for purposes of invidious discrimination, it would be salutary and practically helpful to institute a presumption of irrelevance of differences to better eradicate once firmly entrenched prejudices. As a weapon to combat past injustices, Schauer’s presumption is consistent with the quest to achieve a transition from stage-one to stage-two equality in the dialectical logic of equality that I have articulated. What is contestable about Schauer’s presumption is his seeming preference for equality as identity over equality as difference. Indeed, as some feminists have argued critically in the American constitutional context, equality between the sexes usually requires that women con-

31 See Bradwell v. Illinois, 83 U.S. 130 (1872) (holding state denial of right to practice law to women constitutional and justified in terms of women’s role as wives and mothers).
32 Hellman, supra note 6, at 1840.
form to standards tailored to the needs of men in order to be treated as equals. The point here is not to dispute Schauer’s or Hellman’s substantive equality preferences, but to underscore that they embrace one among several plausible contestable conceptions of equality all of which conform to the basic grammar and structure of equality.

The dialectical logic of equality that I embrace and that Hellman rightly characterizes as having Hegelian roots is concededly more vulnerable to attack than my use of the distinction between formal and substantive equality. That is because the three-stage logic in question is construed based on abstraction from historical events and the history of ideas. And both history and the history of ideas are always open to reasonable interpretive disagreements. Hellman’s objections, however, do not seem to take place at that level as she specifies that she agrees with my logic in the cases of racial equality and sex-based equality in the United States. What she does disagree with is my generalizing beyond these specific cases, and cites, for that purpose, the example of equality for those with disabilities as framed by the Americans with Disabilities Act and its requirement of reasonable accommodation of disability. Hellman correctly concludes that the Act in question is meant to promote stage-three equality in my scheme, but goes on to argue that there appears to be no stage one or two with respect to disability. Even if we were to concede that to be historically true it would not necessarily imply that the logic at stake cannot extend to disability. The logic in question may be derived from history, but it is meant to provide an explanatory and reconstructive conceptual function. Historical treatment of race and sex may be regarded as paradigmatic in this context, and the simple fact that some other difference does not share the same historical trajectory is not conclusive one way or another. Even under the implausible assumption that disability was never noticed before the enactment of the relevant Act, it would seem perfectly coherent to analogize the case of disability to that of sex. Both sex and disability are immutable characteristics on account of which no one should be disadvantaged. On the day before adoption of the Act, the disabled were in the exact same position relative to equality as women enjoying stage-two equality, and therefore the passage from stage-two to stage-three equality would follow the exact same logic in both cases. In short, even if disability had traditionally been invisible so that it could not be susceptible to stage-one equality treatment, that alone would not militate against the logic

33 See Martha Minow, Justice Engendered, 101 HARV. L. REV. 10, 32 (1987) (arguing that U.S. Supreme Court sex-discrimination jurisprudence posits men’s experience as the “norm” against which women are measured).
34 See Hellman, supra note 6, at 1840–41.
35 Id. at 1841.
36 Id.
37 Id.
under attack. Furthermore, beyond the conflation of levels, I think that the actual history of the treatment of disability hinted by Hellman is questionable. Disability has hardly been invisible, and once upon a time it certainly figured as grounds for invidious discrimination and for denial of equal respect. Accordingly, it fits squarely within the paradigm, but even if it had not, it would still not upset the workings of the relevant logic.

Hellman seems to think that I have an unwarranted preference for equality as difference, which she highlights through suggesting that my theory would justify charging higher health insurance fees to battered persons. This seems the result of a general misunderstanding of the nature and scope of my theory. First, my theory is dialectical and the preference for equality as difference can only be understood in terms of a logical sequence where first certain differences that ought not have counted were wrongly used to deny equality to a class of people; followed by the latter’s struggle to regain equality by hiding or underemphasizing those differences, and thus sacrificing the satisfaction of genuine needs associated with the latter differences; and culminating with a guarantee of at once not being treated as unequals because of the difference in play while at the same being allowed to fulfill the needs deriving from that difference without fear of having that difference wrongly used against them. Moreover, the dialectic in question is focused primarily on equality issues that have a significant constitutional dimension. Where the dialectic in question is either inapposite or the equality involved of little constitutional consequence, on the other hand, my theory does not require any prima facie preference for equality as difference. In the latter case, my substantive conception of equality just as every other one relies on a criterion for parsing out relevant from irrelevant differences. Whether to charge higher insurance fees to battered persons because they are almost certain to incur higher medical costs than otherwise similarly situated nonbattered persons depends on one’s substantive theory of distributive justice. My own theory, for what it is worth, is that it would be unjust to charge the battered person more because being battered is more akin to being genetically predisposed to having cancer than to choosing to smoke cigarettes and because I believe that society ought to insure against potentially prohibitive medical risks or conditions over which an individual can have no control. Furthermore, given my theory in this context, my conclusion would be the same regardless of whether in the past, battered persons had been vili-fied, glorified, or simply ignored.

39 See Hellman, supra note 6, at 1841.
B. Benhabib and Iterations of Democracy

As Benhabib herself notes, there is much congruence in our respective dialectical approaches. She nonetheless disagrees with my assertion that it is conceivable, though by no means certain, that a global constitutional subject may emerge one day and that its identity would hinge on a combination of embrace of human rights patriotism with acceptance of constitutional necessity as an inescapable ubiquitous formal and structural requirement of any working complex legal regime. Benhabib in essence objects to my conception of human rights and to what she considers my failure to properly account for the crucial role of democracy and self-government in the determination of human rights and constitutional particulars that happen to vary from one actual setting to the next. Accordingly, to my theory she offers “friendly amendments,” the principal aim of which is to replace the concept of a global constitutional subject by that of “global subjectivities.”

I basically agree with Benhabib’s analysis of human rights, with her distinction between moral, political, and legal norms, and with her insistence on the indispensable role of democracy and self-government in the transition from free-floating universal notions of human rights, constitutional ideals, citizenship, and constitutional identity to concrete working instantiations of the latter within the confines of a working polity. What I disagree with, however, is that the thrust of her analysis actually belies or throws in grave doubt the possibility of a global constitutional subject. Benhabib rightly emphasizes the paradoxes and contradictions at the heart of human rights, constitutional arrangements, citizenship, and democracy, but, as I will seek to demonstrate below, her own conclusions need not necessarily follow from her analysis and my conclusions are not necessarily foreclosed by the latter, particularly if a certain plausible interpretive gloss is placed on some of her key insights.

Before addressing Benhabib’s arguments directly, I wish briefly to address two essential points respectively about constitutional identity and the constitutional subject as I conceive them with the aim of placing the arguments that follow in their proper context. Constitutional identity originates as a lack that must be filled in an ongoing dynamic process of imagination through recombination and reconstruction of certain available relevant materials. Moreover, how the lack of constitutional identi-

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40 See Benhabib, supra note 7, at 1890.
41 See id. at 1904–05.
42 Id. at 1890.
43 Id. at 1901.
44 See ROSEN Feld, supra note 3, at 36.
ty is sought to be filled not only changes over time, but also generates disputes and rifts within the relevant polity at every moment within its trajectory. Thus, American constitutional identity is distinguishable from its French, German, or Canadian counterparts, but that does not imply that it is free of contradictions or that it is settled. For example, typical of American constitutional identity is the dispute over originalism in the context of constitutional interpretation. Originalists and nonoriginalists are locked into a dispute about a hotly contested element of American constitutional identity. There is nothing similar in Germany. Yet it would be misleading to equate the American nonoriginalist to a German counterpart who accords no particular preference to historical meaning in constitutional interpretation. That is because American constitutional identity as it pertains to the subject at hand is precisely circumscribed by the specific dynamic that pits the originalists against the nonoriginalists.

Similarly, the constitutional subject is also the product of imagination, dynamic, unsettled, and most likely in important respects contradictory. The constitutional subject is not a person or a group of persons, though it must channel its manifestations and iterations through persons assembled in plausible, even if not actual, configurations. The “We the People” that gave itself the 1787 U.S. Constitution amounted to an imagined projection that bore some connection to some of the population then residing in the thirteen states that had gained their independence from Britain and joined forces in a confederation delimited by the 1781 Articles of Confederation and to the population that was to come in various successive waves of immigration throughout the nineteenth and twentieth centuries and who would buttress the American constitutional subject through proclamation of loyalty to the U.S. Constitution as a precondition to obtaining coveted American citizenship. Consistent with this, for a global constitutional subject to make sense, it suffices that it can be imagined and plausibly linked to a possible configuration of persons that could be reasonably understood to stand for humanity as a whole. Thus, for instance, in the face of an acute and potentially devastating global environmental crisis, it seems entirely plausible to imagine a relatively small group of persons, who collectively represent all the significant views held throughout the world concerning the crisis and what to do about it, standing legitimately as “We the People of the Earth” in the quest for a partial, limited-subject global constitution providing an appropriate hierarchy of norms allowing for worldwide legal coordination to deal with vital environmental issues.

Benhabib may well at this point object that my above characterization of the “constitutional subject” reduces it to the equivalent of a

45 See id. at 33.
46 Id.
“constitutional subjectivity,” thus in effect revealing my acquiescence in her critique of the global constitutional subject. Without entering into a semantic debate concerning the distinction between “constitutional subject” and “constitutional subjectivity,” let me simply specify that I conceive the global constitutional subject in the same terms as I do the traditional nation-state one. The claim that I intend to defend in what follows, therefore, is that if the constitutional subject makes sense in the context of the nation-state, then that subject could also find a place in the arena circumscribed by the globe taken as a whole.

Benhabib focuses on two major paradoxes that lie at the intersection between constitutionalism and democracy. The first concerns constitutional precommitment, which consists in part in binding the polity (in principle for many generations to come) to upholding antimajoritarian fundamental rights. The second paradox, in turn, relates to “democratic closure,” whereby membership in the polity through citizenship is inevitably determined by a set of actors that is to a significant extent numerically inferior to the set of those who will or should be included as members. More generally, democracy as government of the people, by the people, for the people, results in unavoidable gaps and lacks, and gives rise to a series of vexing paradoxes. Who exactly are the relevant people (as distinguished from the nation or those who happen to live on the polity’s territory)? When is consent, majority rule, or some antimajoritarian norm or process necessary or sufficient for government to be of or by the people? Finally, what ought to count for purposes of satisfying the requirement that democracy be for the people given that in a constitutional democracy some, many, and even in some cases, most (e.g., a highly unpopular constitutional judicial decision) of the people are likely to be dissatisfied with governmentally generated or shepherd-ed outputs?

Benhabib proposes to negotiate the two paradoxes she mentions through the process of “democratic iterations,” which she defines as complex processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked, and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society. In the process of repeating a term or a concept, we never simply produce a replica of the first intended usage or its original meaning: rather, every repetition is a form of variation. Every iterat-

47 See Benhabib, supra note 7, at 1897.
48 Id. at 1897–98.
49 Cf. PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA 120 (Giovanna Borradori ed., 2003) (discussing Jacques Derrida’s contrasting between democracy as “it is” and democracy “to come” (“à venir”), that is, between implementing the rational will of the majority and the (impossible) fulfillment of democracy through equal treatment of the full singularity of every person within the global polity).
tion transforms meaning, adds to it, enriches it in ever so-subtle ways. The iteration and interpretation of norms and of every aspect of the universe of value, however, is never merely an act of repetition. Every act of iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is re-posted and resignified via subsequent usages and references. Meaning is enhanced and transformed . . . . Such democratic iterations take place today not only within boundaries of the nation-state but also in transnational public spheres of communication and action . . . .

I agree with Benhabib that “democratic iterations” can play a key positive role in handling not only the two paradoxes of democracy on which she focuses, but also all the others to which I have above briefly alluded. In other words, the best we can hope for in tackling the various paradoxes of democracy is to combine collective deliberation and collective imagination, and to periodically punctuate the latter in some meaningful sense with actual expressions of acquiescence or endorsement through elections, referenda, or other equivalent broadly participatory events.

Benhabib faults my treatment of human rights and my invocation of human rights patriotism for purposes of infusing the global constitutional subject with content for failure to account for, or rely upon, a suitable occurrence of democratic iteration. Benhabib underscores that because the concept of human rights is a philosophically contested one, it gives rise to a number of competing and at times even contradictory conceptions. Because of that, argues Benhabib, one cannot effectuate a smooth transition from human rights conceived as universal moral precepts to human rights as embodied in particular constitutional rights with sufficient determinacy to become susceptible of political legitimation and legal enforceability. Only through a dialectical process of democratic iteration can a political community capable of cohering into a constitutional subject elaborate over time a sufficiently particular and determinate conception of morally grounded rights to make the latter politically acceptable and legally usable to the community in question.

I fully agree with Benhabib’s analysis except for certain details concerning what I understand to be her conception of the nature and place of democratic iteration. Whereas I concur with Benhabib that democratic iteration is indispensable as a means of meaning endowing punctuation, I have a broader conception than she seems to regarding where and how democratic iteration can be successfully inserted to

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50 See Benhabib, supra note 7, at 1899 (footnotes omitted).
51 See id. at 1901.
52 See id. at 1901–02.
53 See id. at 1902–03.
54 See id. at 1904–05.
achieve the requisite meaning-endowing punctuation. Moreover, based on this broader conception, I am persuaded that there is no unbridgeable gap between the national and the global constitutional subject, and that it is better to envision these two subjects as occupying different places within the same continuum.

Human rights as they emerged in the 1948 Universal Declaration are primarily moral rights as opposed to the constitutional rights that issued from the 1789 French Declaration, which were primarily political rights.\(^55\) Furthermore, American constitutional rights were from the outset mainly conceived as legal rights.\(^56\) There would be a perfect alignment between the moral, political, and legal dimension of human rights (and all human rights would be constitutional rights\(^57\)) in a global republic in which there would be a consensus on the moral meaning and import of human rights. In such a setting, the transition to the political and legal domains would be easy and seamless, and democratic iteration by an ideologically unified and politically undivided global constitutional subject would be purely formal and seemingly perfunctory.

Such a global republic is obviously pure fantasy, but, more importantly, the perfect alignment attributed to the latter would be impossible to approach even in the most unitary monoethnic, monocultural religiously and linguistically homogeneous present day constitutional democracy. Indeed, at the very least, any actual constitutional democracy would necessarily be significantly divided along a recognizable political spectrum and most likely prey to substantive disagreements concerning important moral issues and concerning the optimal conception of human rights. Moreover, even in the unlikely event that the constitutional subject of this minimally pluralistic modern republic coincided entirely in space and time with an exclusively \textit{jus sanguinis}–based citizenry, its constitutional identity would still not be static or monolithic. In short, even in this minimally pluralistic scenario, the passage from morals to law would require more than perfunctory democratic iteration. Would periodic majority endorsement suffice to legitimate contested resolutions of constitutionally relevant disputes?

Whatever the answer to this last question, it seems obvious that periodic majority endorsement would amount to insufficient democratic iteration in the typical multiethnic, multicultural, religiously diverse, modern polity subject to large-scale immigration often from parts of the world with cultures very much at odds with those that have been traditionally rooted in the polity at stake. Most probably in the latter type of polity encased within the framework of the nation-state, the constitu-

\(^{55}\) See ROSENFELD, supra note 3, at 253.

\(^{56}\) See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

\(^{57}\) The converse, of course, would not be the case, as some plausible constitutional rights in a global republic may concern matters beyond the proper domain of human rights.
tional subject is an evolving one that does not neatly correspond to any set of persons crisply delimited in time and space. Moreover, in such a polity constitutional identity is likely to be a constantly evolving one that is significantly plural and at least in part contradictory as evinced by the American controversy over originalism. Finally, requisite democratic iteration in this context is likely to come from a combination of sources, including ones that do not fit within any traditional majoritarian mold or emulate the type of actual iteration involved in an election or referendum. Thus, for example, as paradigmatically antimajoritarian an institution as the judiciary may measurably contribute to democratic iteration to the extent that, as some commentators have claimed, there may be cases in which courts may better reflect public opinion than the elected branches of government.\textsuperscript{58}

Consistent with the preceding observations, the differences between the constitutional subject of a thoroughly pluralistic nation-state and that operating in a transnational or global setting appear to be more ones of degree than of kind. The nation-state constitutional subject is typically an all-purpose subject whereas its transnational counterpart may be a limited-purpose one. That difference, however, does not detract from the fact that in both cases the construction of a suitable (constitutional) identity requires negotiating through a series of convergences and divergences in order to build a coherent narrative that is punctuated by an adequate array of democratic iterations and that allows for a sufficient measure of unity within the constitutional subject as constructed and imagined, while giving sufficient due to the plural and often antagonistic conceptions of key moral, political, and legal norms at play within the polity. This account, moreover, is not purely utopian as it resembles the process whereby human rights as embodied in the European Convention of Human Rights are sought to be reconciled with the constitutional norms prevalent in the several states that have ratified that Convention. Pointedly, such reconciliation involves a dialogue among judges at the European Court of Human Rights in Strasbourg and their counterparts sitting on national constitutional courts.\textsuperscript{59} Also, in this connection, judicial tools such as the proportionality principle or the margin-of-appreciation standard need not be turned into instruments of judicial fiat as they are inherently well suited for use as means for reconciling the relevant axes of convergence and of divergence. Indeed, proportionality allows for systematic elucidation of poles of identity and poles of difference whereas proper use of the margin of appreciation can prove most helpful in determining how much plurality issuing from conflicting conceptions of human and constitutional rights can be ac-


commodated, hence facilitating democratic iteration without undermining the minimum unity of the relevant polity.

II. CONSTITUTIONAL MODELS, CONSTITUTIONAL IDENTITY, AND THE QUEST FOR THE OPTIMAL LEVEL OF ABSTRACTION

On the one hand, the ideal of constitutionalism is too abstract to allow for fruitful comparison of different models of self-government, approaches to the rule of law, or configurations of fundamental rights. On the other hand, each constitution and each constitution-making process taken in its full concrete historical setting is too unique to allow for useful generalizations. Accordingly, constitutional models are likely to reach “their optimal heuristic potential at a level of abstraction situated at the midpoint between constitutionalism in the abstract and the actual concrete historical experiences that are inextricably weaved into the particular constitution(s) or constitutional constructs on which a corresponding model is based.”

The contributions by Sujit Choudhry, Bernhard Schlink, and Jan-Werner Müller all raise questions concerning the actual level of abstraction at which fruitful extrapolation from actual historical experiences may yield valuable insights into different constitutional models and the workings of constitutional ordering. Choudhry addresses the nexus between history and one of the models I propose directly whereas Schlink and Müller make what amount to more indirect historical challenges, in both cases regarding Germany, that raise questions both about navigation among levels of abstraction and about the models that depend in part upon such navigation.

A. Choudhry, Civil War, Ceasefire, and the Pacted Transition Constitution-Making Model

Choudhry asserts that most accounts of constitution-making either ignore or underestimate the important role that must be attributed to violence. On this, as he himself acknowledges, we both agree. Whereas there is much in Choudhry’s analysis that I agree with, there

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60 See ROSENFELD, supra note 3, at 151.
61 Id.
62 See Choudhry, supra note 8.
63 See Schlink, supra note 9.
64 See Müller, supra note 10.
65 See Choudhry, supra note 8, at 1908–10.
66 See id. at 1910.
are two important assertions that he makes that pose a serious challenge to one of the constitution-making models that I put forth, the Pacted Transition Model, and which by extension raise questions about the methodology I rely upon in constructing my models. The first assertion in question is that constitution-making is best understood as being akin to negotiations in the context of a ceasefire after a civil war or in the hope of averting one in the future. The second assertion, in turn, is that I wrongly included South Africa within my Pacted Transition Model as the constitution-making experience in that country was far from peaceful, being instead mired in violence.

Choudhry’s first assertion meshes remarkably well with my conception of a pacted transition constitution and, as I will detail below, actually allows me to further develop and enrich that conception. For that I am grateful to Choudhry and fully acknowledge my debt. I disagree with Choudhry’s second assertion, however, not because I dispute his historical account of the South African experience, but because I believe that the implications he draws from it in terms of what is determinative in the context of constitution-making are less persuasive than the ones I relied on in my determination that South Africa, like Spain, fit within the Pacted Transition Model. In other words, as I demonstrate below, when taken at the proper level of abstraction that provides an optimal window into what forces proved crucial in propelling and shaping the course of the instance of constitution-making under scrutiny, the South African experience has much more in common with that of Spain than with those subsumed under any of the other models I discuss in the book.

Pacted constitutions are typically negotiated among parties who would prefer to impose their will on those who sit across them, but realize that they lack the requisite overwhelming force and fear the prospect of protracted violence with an uncertain outcome. That was the case in Spain after the death of Franco, in Hungary and Poland at the end of the Soviet era, and in South Africa at the end of the apartheid era. Pacted transition negotiations are thus remarkably analogous to ceasefire negotiations, with violence behind, in front, and beside those who feel pressed into compromise, even if somewhat painful, to avoid the compound curse of bloodshed and uncertainty. As recounted in the book, in post-Franco Spain, the memory of the bloody civil war almost four

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67 See ROSENFELD, supra note 3, at 197–201.
68 See Choudhry, supra note 8, at 1917–18.
69 See id. at 1919–21.
70 See ROSENFELD, supra note 3, at 185–209. Arguably, South Africa may not fit under any of the models I advance. Because I believe that it fits squarely within the Pacted Transition Model, I will not address the desirability of turning to additional models.
71 Id. This discussion very briefly summarizes the account in the book.
72 Id. ch. 4, at 127–46.
decades old that left almost no Spanish family unscathed played a vivid role in bringing to the table the heirs of the civil war antagonists, those who favored the continuation of Francoism after Franco, and the political descendants of the republicans of the 1930s, many of whom had recently returned from exile. The prospect of violence was also projected into the future as would be proved by the failed military coup of October 1981, three years after the pacted Spanish Constitution went into effect. Finally, Basque terrorism irrupted intermittently during the last years of the Franco regime and well after the adoption of the 1978 Constitution. Basque terrorism provided a dose of contemporary violence, reinforcing the pain associated with the past violence during the civil war and with the possible future violence should the pacted transition fail. The fear of Basque separatism (and for that matter even possibly Catalan separatism), moreover, also cast the Spanish pacted transition much as a ceasefire negotiation inasmuch as separatist violence loomed as a potential catalyst for a future civil war as much as a reprise of the conflict between Francoism and republicanism. Significantly, though the Basques did not directly participate in the constitutional negotiations, they nonetheless acquiesced to having their interests brought to bear in the process through cooperation with the Catalans who were full participants in the constitution-making project.

With an actual past civil war very much in mind and a potential future civil war quite a plausible eventuality, the Spanish pacted constitution fits perfectly within the ceasefire-negotiation paradigm. Other pacted transitions may not have been as overdetermined in this sense as the Spanish, but they nonetheless fit within the ceasefire metaphor to the extent that they involve violence in the past or future and genuine fear of an inconclusive outcome absent a negotiated solution. The ceasefire analogy thus reinforces and deepens the Pacted Transition Model, and this all the more so given that the analogy in question does not accord with the other models involving violence that I have elaborated in the book. It is not clear from Choudhry’s account whether he intends his ceasefire analogy to extend to all cases of constitution-making that involve violence. In any case, I do not believe that the ceasefire analogy is apt in the Revolution-Based Model or the War-Based Model of constitution-making. Indeed, in both these latter cases, constitution-making involves imposition of the will of a victorious party over a vanquished one with no or little negotiations in sight. To the extent that the eighteenth-century French and American revolutions were set against the

73 Id. at 188–91.
74 Id. at 194–97. The International Grounded Model, id. at 206–09, does involve ceasefires and pacted transitions under foreign prompting or supervision, and thus is to some extent analogous to the Pacted Transition Model. Bearing this in mind, I will not further discuss the former model in the present context.
feudal order and the British colonizer respectively, the ensuing constitutions did not involve negotiation or compromise and the ceasefire analogy would clearly seem inapt.

Upon further consideration, actual constitution-making may be a complex, protracted process aimed at settling different accounts with different interlocutors. Accordingly, a particular constitution-making experience may partake in more than one constitutional model. This is well illustrated by reference to the making of the 1787 American Constitution. The dominant moving force behind that constitution going back to the 1776 Revolution was rejection of, and differentiation from, the defeated British monarchy and its feudal underpinnings.75 One important issue that transcended the past relationship with Britain and could have proven a decisive obstacle in the path of the constitution in the making was the question of slavery that divided the southern states from their northern counterparts. The latter ultimately acquiesced to the acceptance of slavery in the 1787 Constitution in a pacted compromise that had all the earmarks of a ceasefire negotiation, particularly in view of the eventual civil war that would result in the abolition of slavery.76

After the Civil War, transformative amendments, including the one abolishing slavery, were added to the 1787 American Constitution.77 Taken at face value, these amendments coming at the end of a civil war may appear to involve ceasefire or pacted constitution-making. These amendments, however, were not really genuinely negotiated, but rather imposed by the victorious Union against the defeated states that had precipitated the War of Secession.78 Consistent with this, though the direct result of a civil war, when taken at the proper level of abstraction given the relative positions and roles of the relevant actors, the post–Civil War Amendments seem better subsumed under the Revolution-Based Model or the War-Based Model than under the Pacted Transition Model.

Similarly, turning to Choudhry’s second assertion, even if the transition to a new constitution in South Africa during the 1990s was mired in much greater violence or threat of violence than Spain’s 1978 Constitution or the then-recently concluded constitutional transitions in Hungary and Poland, that transition was nonetheless clearly a pacted one. Neither the ANC nor the much weakened but still in power apartheid government was in a position to get its way without negotiation or compromise with the other. As a consequence, though each of the two parties were weary of the other, with the white minority bent on preserving

75 See Richards, supra note 17, at 93.
76 See generally id. (providing a detailed account of the American Constitution from 1787 until the adoption of the post–Civil War amendments).
77 See U.S. CONST. amend. XIII (repealing slavery); id. amend. XIV; id. amend. XV.
78 See Richards, supra note 17, at 101.
as many entrenched rights as possible and the black majority eager for a
prompt transition to full democracy, they jointly crafted an interim con-
stitution.\textsuperscript{79} Moreover, the latter constitution was negotiated subject to
conforming to agreed-upon constitutional principles with the country’s
Constitutional Court being set as the ultimate arbiter of compliance with
the said principles.\textsuperscript{80}

B. \textit{Schlink and the People of the State Versus the Nation}

Based on his assessment of German constitutional history, Schlink
concludes that the German Constitutional Model is more complex than
my account of it suggests,\textsuperscript{81} and asserts that German constitutionalism is
less the product of constitutional or of national identity than of that of a
people within a state or a \textit{Staatsvolk}.\textsuperscript{82} In other words, consistent with
my reading of Schlink’s narrative, it is the existence of a full-fledged
functioning state and the imprint of those that make up its people that
principally shape the constitution of the state in question, with national
and constitutional identity playing a rather secondary role. And this is
the case not only in Germany, but throughout Europe, as opposed to the
United States.\textsuperscript{83}

Schlink’s account presents two principal challenges to my analysis.
The first of these concerns what I have labeled the German Constitu-
tional Model,\textsuperscript{84} and is ultimately of relatively minor concern, as it could
be overcome through renaming the model, which refers in substance to
ethnocentric constitutionalism. The second challenge is much more
troubling, however, as it calls into question the importance of constitu-
tional and national identity in relation to the state, the people, and the
constitution.

In designating the constitutional model in which the \textit{ethnos} pre-
dominates over the \textit{demos} as the German Model, I follow Ulrich
Preuss,\textsuperscript{85} whom Schlink mentions in his above contribution.\textsuperscript{86} Moreo-

\textsuperscript{79} \textit{See In re Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC) at 39 para. 12 (S. Afr.).}
\textsuperscript{80} \textit{See NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 122 (2d ed. 2010).} The South African Constitutional Court found the Interim Constitution to have fallen short of some of the agreed-upon constitutional principles. After that was remedied, the Constitution was finally approved and went into effect in 1997. \textit{Id.} at 129.
\textsuperscript{81} \textit{See Schlink, supra note 9, at 1872.}
\textsuperscript{82} \textit{See id.} at 1872–73.
\textsuperscript{83} \textit{See id.} at 1872.
\textsuperscript{84} \textit{See ROSENFELD, supra note 3, at 152–56.}
\textsuperscript{85} \textit{See Ulrich K. Preuss, Constitutional Powermaking in the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY, supra note 17, at 143, 148–50.}
\textsuperscript{86} \textit{See Schlink, supra note 9, at 1869.}
ver, I certainly do not disagree with Schlink that the current German Constitution departs in many significant respects from the ethnocentric model. However, in many other respects contemporary German constitutionalism retains an ethnocentric orientation and this seems especially the case in the context of citizenship. This is reflected in the account provided in Benhabib’s contribution above and in the works of others. Be that as it may, the ethnocentric model is an important one and it is currently alive and well in countries such as Hungary and Croatia. Accordingly, the model in question could be preserved and renamed if, after careful review, Schlink’s thoughtful and insightful appraisal of the German constitutional experience proved most persuasive at the appropriate level of abstraction for the construction of constitutional models.

It is much more daunting to confront Schlink’s powerful case for the predominance of the Staatvolk and to fit the unique case of German reunification, which he vividly recounts as a constitutional actor and keen observer within the framework of analysis I provide in the book. Whereas Schlink’s analysis touches upon deeper issues that deserve full airing, I will confine my remarks here to a determination of whether the Staatvolk and the unique constitutional profile projected by German unification as presented by Schlink could be plausibly reconciled within my theoretical framework.

In comparing the French, German, and American constitutional models, I claim that in the French, the state precedes the nation; in the German, the nation precedes the state; and in the American, the constitution precedes both the nation and the state. These assertions are meant to be understood in the context of explaining the production of constitutional identity and of differences in the configuration and place of constitutional identity in various types of settings. From a purely functional standpoint, in contrast, all constitutions on the scale of the nation-state require a people, a nation, a state, and a constitution with the requisite features to bind the whole together into a polity that comports with the essential attributes of modern constitutionalism. All nation-state constitutions thus require a state framework, a collectivity plausibly cast as a people, and an imagined community of interests and

87 See ROSENFELD, supra note 3, at 154.
88 See Benhabib, supra note 7, at 1895–96.
89 See, e.g., ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY (1992).
92 See ROSENFELD, supra note 3, at 149–63. The following discussion draws upon the analysis provided in the cited pages.
purpose that can cohere into a nation. With this in mind, in the French case, the state preceded the nation inasmuch as the absolute monarchy had entrenched a powerful functioning centralized state within a well delimited territory that, though it required transformation to serve the purposes of a parliamentary democracy, proved very useful in anchoring a nation in the making and in paving the transition from the subjects of the King of France to the French people. Similarly, in the United States, the 1781 Articles of Confederation erected an albeit insufficient and inadequate national confederal state and those behind the “We the People” of the 1787 Constitution’s Preamble set in motion the rudiments of peoplehood and planted the seeds of a nationhood that would transcend the several distinct visions generated within each of the thirteen confederated states. Under these circumstances the constitution preceded the nation and the state as it furnished the blueprint for their transformation, implantation, and evolution.

Does Schlink’s account of the German state and the German people coming before the German nation and the German Constitution necessarily contradict my assertion regarding the German Constitutional Model and the type of constitutional identity associated with it? I think not, based on at least one plausible interpretation of the key relationship between the Staatsvolk and the German nation. Before proceeding any further, however, it is necessary to briefly focus on the difference between the people and the nation that Schlink’s narrative brings to the fore. The people is the self-governing collectivity that unfolds its political will within the confines of a particular state; the nation, in turn, is the imagined community or, in Max Weber’s expression, the “community of sentiment”\(^{93}\) that bonds together to forge a common political destiny. In many cases, the people and the nation completely overlap, and the nation provides the people with a common identity that furnishes substantive content to self-government. Thus, the French people and the French nation as well as the American people and the American nation seem for all practical purposes coextensive. There are also multi-national states, such as Spain, in which the state does not coincide with a single nation—it includes Basque and Catalan nationals among others—and in which the people is made up of persons belonging to different nations.\(^{94}\) In the case of Germany as depicted by Schlink, in contrast, the people and the nation do not coincide because significant numbers of German nationals are cut off from their German counter-


\(^{94}\) I leave aside for now the possibility of belonging to two different nations or two overlapping imagined communities at once, such as being a Spanish national while at the same time identifying as a Catalan national.
parts within the German state who alone can function as the German people through self-government within their own state.

Specifically, Schlink states:

We Germans were members of the German Reich long before we had a modern German constitution... What constitutes the collective identity of those living in the Federal Republic of Germany is first of all the Federal Republic of Germany as the state in which they live, which has its identity as a state since 1871, which has a national tradition and a modern constitution, but which has been smaller than the nation and has had constitutions that had little in common with modern constitutionalism.\(^95\)

The key to reconciling my assertion that in the German Model the nation precedes the state with Schlink’s emphasis on the priority of the state turns on the import from the standpoint of constitutional identity of Schlink’s observation that the original German state created in 1871 was “smaller than the nation.” Was it smaller by design or by necessity? If it is the latter, then Schlink’s narrative does not contradict my position. Indeed, in that case it seems entirely plausible that the German nation preceded the German state and that German statehood would have ideally encompassed the entire German nation. However, given the impossibility of achieving that, having a German state that could house most but not all German nationals became the best possible alternative. Moreover, in the context of that alternative, German peoplehood had to be inevitably restricted to the German nationals found within the confines of the new state. Finally, consistent with this interpretation, what endows the \textit{Staatsvolk} with a sufficiently thick and concrete identity to allow German self-government to acquire a full substantive dimension is its inextricable link to the key attributes, concerns, and aspirations embedded in the German conception of nationhood.

Consistent with the above interpretation, it is also possible to give a plausible account of the seemingly puzzling unification of East and West Germany after the fall of the Berlin Wall in 1989 without the East Germans first adopting a new constitution or requiring that the (then) West German Basic Law be jettisoned in favor of a new joint constitution. As Schlink recounts the events, it is clear that before reunification, East and West Germany were two states with two people.\(^96\) But as Schlink emphasizes, “[d]uring the revolution the slogan ‘We are the people’ had increasingly been accompanied by another slogan, ‘We are

\(^{95}\) See Schlink, \textit{supra} note 9, at 1872.

\(^{96}\) \textit{Id.} at 1871. The Communist regime and Soviet hegemony bearing upon East Germany raise serious questions as to “the People” in that “German Democratic Republic.” That people certainly did not enjoy any genuine rights of self-government or a constitutional regime that complied with the basic requirements of modern constitutionalism.
one people,’ and many citizens of the GDR expected . . . that one
day eastern and western Germany would reunite.”

One plausible interpretation for this rapid evoluti

tion from the asser-
tion of East German peoplehood to that of united East and West Ger-
man peoplehood is that the glue that allowed the process of integration
to go so swiftly was a common German nationhood, that while re-
pressed somewhat and for different reasons in both Cold War Ger-
manys, remained a powerful source of inspiration for the reinstatement of a
commonly shared community of sentiments and of interests. Indeed,
without common national origins, whereas the attraction of the West
German Basic Law may have been strong and influential, it may have
inspired a separate East German Constitution, but not submission by the
GDR people to it. After all, the Basic Law was certainly an inspiration
to many other former Soviet east/central European countries, but one
would not expect the Hungarians or the Czechs to simply join in with
the West Germans.

C. Müll er and the Contrast Between Constitutional and
Human Rights Patriotism

Müller is critical of my reliance on human rights patriotism as a
potential pillar of supranational, let alone, global constitutionalism, and
he suggests that constitutional patriotism properly understood can per-
fom the function that I reserve for its human rights counterpart. Müll-
er’s analysis, moreover, focuses primarily on the European Union
(EU), a supranational entity that, according to him, “does have a de
facto constitution.” Relying on a conception of constitutional patriot-
ism that departs significantly from the influential views on the subject
advanced by Habermas, Müller argues that such patriotism can play an
important role today in the context of both national and supranational
constitutions. In addition, turning an argument often made against
Habermas’s invocation of constitutional patriotism toward my suggest-
tion that human rights can elicit passionate commitment, Müller ex-
preses strong skepticism concerning the prospects of human rights
being a major moving factor in the deployment of transnational consti-
tutions.

97 Id. at 1870.
98 See Stanley N. Katz, Constitutionalism in East Central Europe: Some Negative Lessons
from the American Experience, GERMAN HISTORICAL INST. 8, 23 (Annual Lecture Ser. No. 7,
99 See Müller, supra note 10, at 1923–24.
100 Id. at 1930.
101 Id.
102 Id. at 1932.
I will limit my comments on Müller’s critique to two points and then briefly compare his theory to mine concerning two recent constitutional developments that have had an impact on the constitutional status of the EU that Müller alludes to and that took place after I completed my book. The two points relate respectively to his conception of constitutional patriotism and to his claim that my notion of human rights patriotism “falls victim to the misguided search for political objects fit for passionate attachment and fervor.”

The two recent developments mentioned by Müller, in turn, are the new illiberal Hungarian Constitution that went into effect in January 2012 and the crisis of the euro afflicting the EU at this writing.

Müller insists that his conception of constitutional patriotism does not rely on emotional attachment. Instead, in his own words:

It ideally involves a much more reflective attachment and, crucially, a critical—and, above all, a self-critical—stance, which never takes it for granted that universal liberal-democratic norms and values have been successfully instantiated in any given constitution. It is not all about affirming a given constitutional settlement . . . but also about contesting such a settlement in the name of norms and values that are as yet imperfectly realized . . . [O]ne might say: constitutional patriotism resembles a journey more than a home.

Müller illustrates the positive work that his version of constitutional patriotism can achieve by focusing on the political and constitutional challenges posed by multiculturalism both within and beyond nation-states. As he sees it, in the context of multiculturalism, constitutional patriotism prescribes adherence to “liberal-democratic norms and values” without requiring the citizenry as a whole to embrace the same—presumably majority—culture. In other words, liberal constitutionalism should be pressed as an antidote to identity-based fragmentation predicated on a clash of cultures—a clash that appears present both at the national and supranational level.

Leaving aside any clash over labels, at least in the case of multicultural polities, what Müller prescribes has all the earmarks of a particular iteration of constitutional identity. Constitutional identity is in part the product of negation, and at times must be set against other relevant identities including dominant or minority cultural identities to preserve the unity and integrity of the constitutional subject. Minimizing the

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103 Id. at 1931.
105 Id.
106 Id. at 1926.
107 Id. at 1934–35.
108 Id. at 1927.
109 See ROSENFELD, supra note 3, at 28–33, 46–51.
constitutional importance and impact of cultural strife is certainly a worthy and legitimate objective in certain multicultural settings. This, however, cannot be simply achieved through reflective adhesion to liberal norms. To be meaningfully integrated into a working constitutional order, the liberal norms in question must be particularized and fitted to the actual fragmentation threats of the individual polity involved. Large scale Muslim immigration in a western European democracy does not necessarily pose the same challenges to liberal values that the rise of Christian religious fundamentalism as a political force in the United States or the identitarian claims of indigenous populations in countries such as Australia or Canada do. In short, what Müller refers to as constitutional patriotism could only do what he prescribes for it if it could be successfully particularized through becoming embedded in an existing and evolving constitutional identity.

Concerning human rights patriotism, Müller’s claims boil down to the following two propositions: we see no evidence of it in the context of the EU; and, emotional attachment to human rights as a moving force in the context of instituting viable constitutional regimes is highly unlikely if not downright absurd. As to the first of these propositions, Müller may well be framing the inquiry far too narrowly. As he himself writes, “[h]uman rights patriots might find many good things to say about the European Court of Justice and the European Charter, but is the EU really plausible as a particularly great champion of human rights, or even of a particularly European understanding of human rights . . . ?”

I would simply reply that although not all countries that are signatory of the European Convention of Human Rights (and hence subject to the decisions of the Strasbourg Court) are members of the EU, all EU members are subject to the Convention and the Court. Accordingly, it seems logical to infer that whatever human rights patriotism emanates from the Convention and from Strasbourg should be considered incorporated in substance in the EU’s de facto constitution.

Turning to Müller’s second proposition, I share his view that attitudes to human rights or constitutions for that matter have nothing in common with purely emotional patriotism such as becomes manifest during soccer matches among national teams or the singing of national hymns one has cherished since childhood. Nevertheless, I believe that human rights can give rise to the kind of emotions that prompt to action. Those emotions need not be contrary to reason, but it is difficult to imagine taking action to combat systematic violations of human rights in the absence of some empathy for the victims combined with outrage at the gross injustices and deprivations of basic dignity to which they are being subjected.

110 See Müller, supra note 10, at 1932.
It is certainly true that emotions such as those just alluded to can and do also arise in relation to egregious violations of domestic constitutionally protected fundamental rights. In the latter case, however, the focus remains within the nation-state whereas in the international-human rights context both the concern and the call for action are often transnational. Also, even if the reaction to violations of fundamental rights within the nation-state and the commitment to the values that such rights embody were properly deemed to be akin to patriotism, this would result in fundamental-rights patriotism but not by the same token in constitutional patriotism. Indeed, it seems unlikely that the same kind of emotion would attach to structure of government issues as would to those regarding fundamental rights. In sum, human rights patriotism makes sense in a way that constitutional patriotism cannot and, at the same time, human rights patriotism seems particularly well suited to transport constitutional norms and values across national boundaries.

The two recent developments, namely the new illiberal Hungarian Constitution and the euro crisis to which Müller refers to bolster his theory,\textsuperscript{111} can also be interpreted so as to conform to, and bolster, my own theory. The new Hungarian Constitution poses a challenge to the EU constitutional order and highlights a seeming paradox or contradiction within it. To gain admission to the EU, an applicant must comply with the essential dictates of liberal constitutionalism.\textsuperscript{112} If a country abandons, or retreats very significantly from, liberal constitutionalism after admission into the EU, however, the EU possesses no constitutional- or constitutional-like\textsuperscript{113} tools to force a return to liberal constitutionalism. At one level, this looms as a constitutional design flaw that could be remedied by adopting a treaty or constitutional provisIon much like the U.S. Constitution’s Guarantee Clause whereby the federal government must guarantee republican government within each federated state.\textsuperscript{114} On another level, in contrast, human rights patriotism—via Strasbourg or otherwise—could be garnered to put pressure on Hungary to reverse its illiberal retreat from human rights protection.

The euro crisis, on the other hand, has revealed that the EU lacks the requisite constitutional institutional mechanisms to allow for orderly handling without being relegated to ad hoc politics at times more reminiscent of traditional foreign relations among independent countries than to regularly channeled dealings within a common supranational

\textsuperscript{111} Id. at 1935.
\textsuperscript{114} U.S. CONST. art. IV, § 4, cl. 1.
In this respect, the EU lacks the kind of constitutional provisions designed to coordinate currency management with economic regulation typically found in nation-state constitutions. Moreover, this lack illustrates the need for what I have termed “constitutional necessity.” Presumably, all governing entities that exercise control over a currency, whether the countries within the eurozone within the EU acting jointly or individual nation-states, require a constitutional framework and corresponding constitutional norms that would allow for proceeding in a cogent and orderly manner. And this is a matter of logic, not of emotion.

III. A LOOK INTO THE FUTURE: CONSTITUTIONAL VERSUS ADMINISTRATIVE TRANSNATIONAL GOVERNANCE

Focusing on the EU, Lindseth disagrees with my views on constitutionalism beyond nation-states and argues for his theory that the EU should be regarded as an administrative transnational order that draws its constitutional legitimacy exclusively from the several nation-state constitutions of the EU member states. I disagree with Lindseth, and, apparently, so do at least two of the contributors above: Müller, who, as we have seen, asserts that the EU has a de facto constitution; and Stone Sweet, who claims that the “European Convention on Human Rights (ECHR) is . . . quickly evolving into a transnational, constitutional regime.” Moreover, as emphasized above, the ECHR is a transnational regime that extends throughout the EU, even if the EU itself is not a signatory. I have already expanded on the basis for my disagreement with the claim that transnational regimes can dispense with a constitutional source of legitimation that operates at a transnational as opposed to a purely national level, and I do not intend to repeat my arguments here. What I do wish to concentrate on, however, are certain methodological issues that Lindseth raises and that lead him to claim that his conclusions are warranted and mine not.

116 Id.
117 See ROSENFELD, supra note 3, at 267.
118 See Lindseth, supra note 11, at 1876–78.
119 See supra note 100 and accompanying text.
120 See Stone Sweet, supra note 14, at 1859.
121 See supra note 59 and accompanying text.
Lindseth contends that my focus on the conceptual plausibility of the implantation of a supranational constitutional order is flawed because I do not take a proper account of the historical, functional, political, and cultural factors that relate to institutional change and the complexities associated with reconciling all of the latter. Specifically, Lindseth charges that “[t]he failure to move beyond conceptual plausibility to sociohistorical analysis . . . strikes me as the greatest weakness . . . of Rosenfeld’s new book.” Furthermore, Lindseth identifies himself as a historian in connection both with his criticism of my methodology and of his conclusion that the EU is an administrative regime with constitutional backing in the EU member states national constitutions.

As Lindseth himself indicates, it is not for historians to speculate. I, on the other hand, admit that I speculate, and that we do not now possess a historical record regarding transnational constitutional ordering comparable to that regarding constitutional functioning at the nation-state level. Contrary to Lindseth’s intimation, however, I do not engage in detached philosophical speculation to determine whether a transnational constitution is plausible in any possible world. Methodologically, throughout the book I do relate the concepts I examine to relevant social, historical, ideological, cultural, and functional factors, not as a historian, to be sure, but from the standpoint of political and legal theory. Some of my analyses focus on past trends or historical occurrences, others on current trends and events such as those in play in the context of the EU. Throughout all these analyses, I have endeavored to search for concepts and conceptualizations that might be helpful to understand meanings, trends, changes, conflicts, contradictions, etc., in the context of legal and political theory. In the case of the EU, as Lindseth himself admits, we have constitutional or constitutional-like norms, but the order of which they are a part does not fit within any of the proven models of the past. From a constitutional standpoint the EU is sui generis and whatever its constitution is, or may become, it does not fit within the model of the hierarchical unitary constitution typical of Westphalian nation-states. Moreover, there are now other at least partial constitutional orderings that are transnational in scope, the ECHR being one of them, and all these developments taken together justify inquiring into whether traditional concepts and conceptions of constitutional ordering are still adequate for purposes of best understanding important

123 See Lindseth, supra note 11, at 1883–85.
124 Id. at 1884 n.34.
125 Id. at 1884.
126 Id.
127 See ROSENFELD, supra note 3, at 73.
128 See id. at 127.
129 See Lindseth, supra note 11, at 1884.
evolving historical changes. It is in this context that I have speculated in the sense of venturing educated guesses based on all the relevant existing conditions and positing plausible future scenarios or trends that could vindicate fruitful new conceptions of constitutional ordering.

The difference between a historian and a political theorist is that whereas they both engage in interpretation of the past, the historian must refrain from making predictions about the future, but the political theorist need not be so restrained. For example, if both the historian and the political theorist agree from studying past instances that in periods of economic growth the political party in power will win reelection, the political theorist, but not the historian, may generalize her finding and predict that the correlation will hold in the future. With this in mind, it is not clear to me whether at bottom Lindseth believes that my history is wrong or my political theory is unpersuasive. From my perspective, however, either Lindseth’s historical conclusions are wanting, or, in the end, he engages in the same kind of speculation as I do, in which case we both advance essentially contestable positions.

On the historical front, there is much evidence that runs counter to Lindseth’s conclusion that the EU’s constitutional ordering is exclusively grounded in, and legitimated by, the national constitutions of the member states. First, the proposed EU Constitution, crafted through a broadly encompassing consultative process involving both national governments and legislators and many civil society actors, was approved by all twenty-five EU member states in 2004, and though eventually rejected by referenda in 2005, its substance was, for the most part, included in the Treaty of Lisbon approved by all twenty-seven members of the EU in 2007.\(^\text{130}\) Second, the EU Court of Justice (ECJ) has acted for decades, in part, as a constitutional court.\(^\text{131}\) Already in 1962, the ECJ upheld an action by Dutch citizens against their own state for imposing—in conformity with the Dutch Constitution—a legal duty in conflict with the EC (the predecessor of the EU) Treaty. In its holding in favor of the citizens, the ECJ stated:

> The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights . . . and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage . . . . According to the spirit, the general scheme and the wording of the . . . Treaty, [it] must be inter-

\(^{130}\) See Rosenfeld, supra note 3, at 172.

\(^{131}\) See Michel Rosenfeld, Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court, 4 Int’l J. Const. L. 618 (2006).
interpreted as producing direct effects and creating individual rights which national courts must protect.\textsuperscript{132}

Third, currently the EU confers citizenship that bestows political rights both at the level of the EU, as EU citizens have the right to vote in elections for the EU Parliament, and at the level of member states, as EU citizens who are also citizens of one of the member states but reside in another have a right to vote in the latter’s local elections.\textsuperscript{133}

The above list is only partial, but it suffices to compel a nonspeculating historian to recognize that the EU has a constitutional dimension of its own, even if it is not as full as that of its nation-state counterpart or securely enough implanted to warrant confidence in its future consolidation or survival. Consistent with this, moreover, I think it fair to infer that Lindseth’s conclusion concerning the administrative nature of the EU is better understood as the work product of a legal or political theorist rather than that of a historian. Because of this, Lindseth’s theory is in the end on the same plane as mine, and, as such, they are both contestable. Each of us, of course, is convinced that his own theory is the better one and it is ultimately up to every person who undertakes to compare the two theories involved to decide for him- or herself which of the two theories is more persuasive.

IV. THE UNIVERSAL, THE SINGULAR, AND THE PLURAL

The notion of identity may connote community, unity, and harmony. By characterizing constitutional identity as a lack, I have sought to dispel any implication that the dialectical tension between the universal, the singular, and the plural may be eventually overcome in any definitive manner through a Hegelian process of \textit{Aufhebung}. Pierre Legrand, however, suggests that my book “aims for a contemporary \textit{Aufhebung}, a muffling of difference making for some form of constitutional tranquility and unanimity, of composition and unity.”\textsuperscript{134} Legrand reaches this conclusion after highlighting my lack of reference to Derrida in the book—an omission he finds remarkable given my extensive past engagement with the latter’s works.\textsuperscript{135} Legrand further surmises that the reason Derrida is absent in my book is because, as a U.S. constitutionalist, I am chiefly preoccupied with reconciliation, given the profound split among American constitutionalists between those who advocate

\textsuperscript{133} See ROSENFELD, supra note 3, at 236.
\textsuperscript{134} See Legrand, supra note 2, at 290.
\textsuperscript{135} See id. at 282–83.
for an exceptionalist vision shut off from foreign influences and those who embrace a cosmopolitan attitude.136

Leaving aside autobiographical speculation and glossing over differences I might have with Legrand regarding his reading of Derrida, I wish to emphasize my disagreement with Legrand’s interpretation of my project. I view this as particularly important to the extent that Legrand suggests that I am after a synthesis between the universal, the singular, and the plural, when, in fact, I see all three as being engaged in an ongoing dialectical struggle with no end in sight. What Legrand describes as “reconciliation,” “tranquility,” “unanimity,” and “unity” amounts to sequences of imaginary projections forged through interpretive juxtapositions relying on negation, metaphor, and metonymy. The constitutional subject is never fixed or stable and its identity appears tied to a seemingly perpetual sense of lack.

Legrand relies on writings by Derrida focusing on an unbridgeable gap between self and other, the impossibility of capturing the other’s singularity, and the infinite irreducibility and heterogeneity that prevents forming a single community that encompasses self and other.137 Even if one shared this view on an ontological plane—as complete beings, self and other can never escape alienation from one another as bearers of mutually irreducible singularity—what consequences would necessarily follow from that? I have long rejected the position that ontological isolation need result in ethical, legal, or political impossibility to develop genuine concern for the other, and to form albeit imperfect and precarious legal and political alliances and commonly shared projects.138 If we postulate that ethical concern is what prompts the quest to live in community rather than isolation, then imagining the constitutional subject and endeavoring to draw a constitutional identity—inevitably subject to repeated erasures and constantly calling for redrafting—figures as the political and legal expression of the need to persist and to engage with those who will to a significant degree remain irreducibly other.

Unless a dichotomy is maintained between ontology on the one hand, and ethics, politics, and law on the other, one seems condemned to nihilism or radical relativism. As I read him, Derrida himself differentiates between ontology and ethics to which his writings on justice, friendship, and hospitality attest.139 Derrida’s own acceptance of the dichotomy under consideration is perhaps best illustrated by his reaction to global terrorism and the attacks of September 11, 2001. Whereas Derridian deconstruction posits all communications as open-ended and

136 Id. at 284.
137 Id. at 285.
139 See ROSENFELD, LAW, JUSTICE, DEMOCRACY, supra note 15, at 253–54.
susceptible to a multiplicity of meanings, he refers to the 9/11 attacks as “unspeakable” and devoid of all meaning. In other words, for Derrida, unlike global terrorism, which signifies a complete rupture between self and other, all other forms of interaction imply the possibility of finding some meaningful common ground in spite of the ultimate irreducibility of each person’s singularity. Accordingly, it is within the space opened up by the latter possibility—as small and narrow as it may be—that the constitutional subject aims to leave its mark through elaboration of a constitutional identity.

Going beyond Legrand’s concerns, my project situates itself somewhere between Derrida’s ethics of difference and Habermas’s ethics of identity. Radical hermetically sealed singularity makes any cogent constitutional project impossible; thorough and permanent identity between self and other, on the other hand, would make constitutional projects superfluous as universal constitutional essentials would be self-imposing and beyond dispute. The constitutional subject and constitutional identity become intriguing, problematic, and challenging when some links of identity clash with claims to give singularity its due. It is precisely at that point that the dialectic between the universal and the singular is unleashed and that it becomes oriented to the plural. Moreover, because conceptions of the universal are plural, and those of the needs for purposes of preserving singularity are multiple, what qualifies as the plural is likely to remain perpetually in question. In view of this, my project is to account as best as possible for the place and role of constitutions, constitutional subjects, and constitutional identities under such prevailing circumstances.

CONCLUSION

Having had the privilege of grappling with the thoughtful and incisive insights of the generous group of authors who commented on my book, to whom I have attempted to respond as best I could, I ended up both reassured and humbled. I feel that for all its frailties underscored by my critics, my main thesis regarding the constitutional subject and constitutional identity remains viable and coherent. At the same time, much work remains to deepen and expand the analysis and properly factor in constantly evolving circumstances. The constitutional subject is inextricably linked to equality and democracy, but as all three concepts are essentially contested, many issues remain open and call for further investigation. Furthermore, the question of the proper level of

140 Id. at 256–57.
141 For an account of the salient features of these two ethics and of the principal differences between them, see id. at 251–96.
abstraction for optimal processing of the complex, multifaceted, and evolving events and factors that contribute to the making and unmaking of plausible iterations of constitutional identity is one that requires uninterrupted attention. The constitutional subject proves capable of coming in many shapes and sizes, but separating the plausible from the implausible remains a constant challenge. Finally, the dialectic between the universal, the singular, and the plural seems to remain a constant, but keeping up with its vicissitudes and unexpected turns requires vigilance and unremitting attention to the ever-changing details of history and the varied potentials and pitfalls of theory.