Contents

1 Introduction: Identity as Kandinsky	
Objectives, Contextualisation, the Outline	23
2 A Deconstructive Account	
Genesis and Critical Assessment of Constitutional Identity in	
Germany	59
3 Clusters of Identity Claims	
Shared Constitutional Values, Institutional Diversities,	
Undermining Identities	129
4 Forgetting Fundamental Rights Identity Claims	
The New Constitutional Paradigm in Multilevel Fundamental	
Rights Standards	203
5 Dimensions of Identity	
Functions, Protagonists, Deficiencies	245
6 Constitutional Identity for the EU	
Against the Sisyphean Endeavour to Imagine an Identity for the EU	327
7 A Reconstructive Account	
A Structural Comparison of Identity Claims with Civil	
Disobedience and Conscientious Objection	369
8 Conclusion	467



Lis	t of Abb	reviations	21
		tion: Identity as Kandinsky Contextualisation, the Outline	23
1	Setting	the Scene - Identity as Kandinsky	25
1.1	Resea	rch Questions and Objectives	27
1.2	Meth	odology and Terminology	32
1.3	Existi	ng Identity Research and Scholarly Interlocuters	34
2	Contex	tualisation	38
2.1	Ident	nitation of Competences and National Constitutional ity Functional Characteristics of the EU's Competences and	38
	2.1.1	its Consequences	39
		Retained Exclusive Member States' Competences Actions Explicitly Prohibited by the EU: Reserved	41
		Member States' Competences	42
	2.1.4	Interim Conclusion	44
2.2	Europ	pean Constitutional Pluralism	45
		Competing Claims to Authority Complementing Visions of Constitutional Pluralism: A	45
		Point of Departure	47
3	Outline		50
_		structive Account d Critical Assessment of Constitutional Identity in	
Ge	rmany		59
1	Introdu	iction	61
2	Theore Form	tical Framework: Constituent Power and Constitutional	65

Pouvoir Constituant and Pouvoir Constitué as Ideal Paradox	65
Constitutional Populism and Constitutional Form – the Power of the FCC	68
Carl Schmitt and Identity of <i>the Constitution</i> – A Voluntaristic Account	71
Identity Finds its Way into Case Law – The Part and the Legal Principles Underlying Fundamental Rights	75
The Eternity Clause - Identity Terminology Omitted	75
Identity: The Part of the Basic Law Dealing with Fundamental Rights	76
Identity: The Legal Principles Underlying Fundamental Rights	80
The Birth of the Contemporary Constitutional Review of EU Law	83
	83
The Maastricht Decision: The New Constitutional Review of EU Law	85
4.2.1 The Principle of National Democracy and the Right to Vote	85
4.2.2 Maastricht's Empirical and Normative Assumption	87
4.2.3 Inner Contradiction of the Maastricht Argumentation4.2.4 Neologism of Staatenverbund	88 89
Constitutional Identity and Ultra Vires Review: National Democracy and Five Essential Areas of State	91
The Lisbon Decision	91
Constitutional Identity and Ultra Vires Review Introduced	92
Five Essential Areas of a State - A Theory of State Introduced	93
5.3.1 Five Essential Areas 'Since Always' (seit jeher)5.3.2 Exclusive Control or Substantial Freedom of Action	94 96
The Lack of Democratic Legitimacy of the EU	97
Staatenverbund Intensified and Impossibility of the EU as a Federation	99
Concluding Remarks	100
	Constitutional Populism and Constitutional Form – the Power of the FCC Carl Schmitt and Identity of the Constitution – A Voluntaristic Account Identity Finds its Way into Case Law – The Part and the Legal Principles Underlying Fundamental Rights The Eternity Clause – Identity Terminology Omitted Identity: The Part of the Basic Law Dealing with Fundamental Rights Identity: The Legal Principles Underlying Fundamental Rights Identity: The Legal Principles Underlying Fundamental Rights The Birth of the Contemporary Constitutional Review of EU Law The Maastricht Treaty and the European Article The Maastricht Decision: The New Constitutional Review of EU Law 4.2.1 The Principle of National Democracy and the Right to Vote 4.2.2 Maastricht's Empirical and Normative Assumption 4.2.3 Inner Contradiction of the Maastricht Argumentation 4.2.4 Neologism of Staatenverbund Constitutional Identity and Ultra Vires Review: National Democracy and Five Essential Areas of State The Lisbon Decision Constitutional Identity and Ultra Vires Review Introduced Five Essential Areas of a State – A Theory of State Introduced 5.3.1 Five Essential Areas 'Since Always' (seit jeher) 5.3.2 Exclusive Control or Substantial Freedom of Action The Lack of Democratic Legitimacy of the EU Staatenverbund Intensified and Impossibility of the EU as a Federation

6	Finding Appropriate Self-Restraint – The Criterion of Manifest	
	and Structurally Significant Violations	101
6.1	Introduction - Continuity and Revisions	101
6.2	Mangold and the Right to Err	103
6.3	,	
	Violations	104
6.4	Concluding Remarks	108
7	The OMT Saga and Fiscal Independence - About Money	109
7.1	The Context of the Outright Monetary Mechanism	110
7.2	OMT I - FCC's First Reference 'Dictate' to the CJEU	111
7.3	Relationship Between Constitutional Identity and Ultra Vires Review	114
7.4	Article 4(2) and National Constitutional Identity by the FCC	115
7.5	The Right to Vote and Constitutional Review – <i>OMT I, ESM</i> and <i>OMT II</i>	117
7.6	Concluding Remarks	120
8	Since Solange II	122
8.1	EAW - Human Dignity and the Principle of Individual Guilt	122
8.2	Reviewing EU Law Against German Fundamental Rights Standards	123
9	Conclusion	125
Sho	Clusters of Identity Claims ared Constitutional Values, Institutional Diversities, dermining Identities	129
1	Introduction	131
2	In the Name of (National Constitutional) Identity	133
2.1	National Constitutional Identity - Muddying the Waters	133
2.2	Legal Intuition and Beyond	135
2.3	The Unbearable Lightness of Identity	141

3 (Cluste	rs of Identity Claims	144
3.1	Ident	ity and Fundamental Rights	144
3.2	Share	ed Liberal Constitutional Commitments - Sameness	145
3.3	Sove	reignty - Control and Independence Over Essential Areas	147
3.4	Politi	ical and Constitutional Fundamental Structures –	
	Instit	utional Diversity	149
3.5	Share	ed Principles and their Idiosyncratic Applications	151
		Human Dignity and Identity	153
		Equality and Nobility Titles	154
		Principles of Criminal Law Interim Concluding Remarks	156 157
3.6		tive Areas and Unifying Effects	157
3.0		Unifying Effect of Fundamental Rights and Freedoms	157
		Self-Determination of Churches and Non-	130
		Discrimination	159
	3.6.3	Recognition of Same-Sex Marriages and Fundamental	
		Freedoms	161
3.7	Prote	ction and Advancement of Language	162
	3.7.1	Protection of Languages and Equality of the Member	1.60
	372	States Language as Identity in the CJEU's Case Law	163 164
2.0			
3.8		ory and its Influence on National Constitutional Identity	166
		Uneasy Historical Narratives Common State and Questions of Dissolution	166 167
		Colonial Past	170
3.9	Cultu	iral Diversities	171
3.10	Citize	enship and Nationality	173
3.11	Interi	im Conclusions	175
4 L	Jnderi	nining Illiberal Identity Claims	177
4.1		garian Illiberal Democracy - I Threw My Hat in the Air	178
		Constitutional Transformation and Illiberal Democracy	179
		Relocation of Refugees and Identitarian Constitutional	_,,
		Defence	181

	4.1.3 Identity Decision – Historical Constitution	184
	4.1.4 National Constitutional Identity and Migration	185
	4.1.5 Interim Conclusions	186
4.2	Structures of Judiciary	187
	4.2.1 Contextualizing the Struggles of Former One-Party	
	Systems	188
	4.2.2 The Trajectory of Changes – Undermining the Judiciary4.2.3 The CJEU's Milestone Protecting Judicial Independence	
	– ASJP	192
	4.2.4 Introduction of Identity to Safeguard Judicial Reform4.2.5 The CJEU Further Strengthens National Judicial	194
	Independence	195
	4.2.6 Legal Polexit as Climax of the Constitutional Conflict	197
	4.2.7 Interim Conclusions	198
5	Conclusion	200
Rigi	New Constitutional Paradigm in Multilevel Fundamental ts Standards	203
1	ntroduction	205
2	National and Supranational Fundamental Rights Standards	207
2.1	Multilevel Constitutional Design of Fundamental Rights	
	Protection	207
2.2	The Scope of Fundamental Rights Application – A Disputed Matter	209
2.3	Three Levels of Fundamental Rights Protection – Turning Minimum Protection into a Final Norm	211
3	dentity as Protection of National Fundamental Rights Standard	s 214
3.1	European Identity Clause and Fundamental Rights – Going Beyond	214
3.2	Identity as Commitments, Interpretations and Unique Fundamental Rights	216
3.3	Treating Fundamental Rights Identity Claims Differently	218

4	Right to be Forgotten I - National Standards of Review	221
4.1	To be Forgotten I - Reviewing the Basic Law's Standards	221
4.2	The Basic Law as the Standard of Review in EU Matters	222
4.3	Embracing or Facilitating Diversity of Fundamental Rights in the EU	224
4.4	Marginalizing the EU Charter but Forgetting Constitutional Identity	226
5	To be Forgotten II – The Change of Paradigm	228
5.1	Direct Application of the EU Charter in Constitutional Complaints	228
5.2	Constructive Pluralism in the Field of European Fundamental Rights	231
5.3	The Tensions of the <i>Right to be Forgotten II</i> – Applying and Interpreting	232
5.4	Co-Shaping the Process of Constitutionalization of the EU	235
6	Forgetting Fundamental Rights Identity Claims	238
7	Conclusion	242
	imensions of Identity	
Fur	nctions, Protagonists, Deficiencies	245
1	Introduction	247
2	National (Constitutional) Identities from the EU's Perspective	251
2.1	Evolution of European Identity Clause under the EU Treaties	251
2.2	Identity as a Core National Responsibility	253
3	National Constitutional Identity: National or Constitutional	258
4	Mutual Constraint between Identity and other Values and Principles	268
4.1	Protecting National Identity to Sacrifice Common European Values	268
4.2	National Constitutional Identity and the Other EU Principles in Accord	276

5	Multilevel Constitutional Relations – From Engagement to	200
	Resistance	280
5.1	Deterrence and Engagement	280
5.2	Identity as Dissent and Resistance	284
6	Multifarious Identity Functions	290
6.1	Identity as a Pre-Constitutional Conception to Define the Community	290
6.2	Identity as a Constitutional Argument – <i>Identitarian</i> Adjudication	294
6.3	Identitarian Adjudication Beyond the EU	296
6.4	Protecting the Core of the Constitution	300
7	Identity Protagonists	303
7.1	The Courts	303
7.2	The Legislator	306
7.3	The Executives	308
7.4	Legal Scholarship	311
8	Deficiencies of National Constitutional Identity	313
8.1	From Public Policy to National Identity – Connections and Shortcomings	313
8.2	Possibilities for Misuse and Considerations of Abandoning the Concept	317
8.3	Identity in the Light of Tradition, History and Culture	319
9	Conclusion	322
	Constitutional Identity for the EU ainst the Sisyphean Endeavour to Imagine an Identity for the EU	327
1	Introduction	329
2	The Oracle of Delphi	332
2.1	Know Thyself	332

2.2		225
• •	Methodological Narratives	335
2.3		338
2.4	An Endeavour of Numerous Projections - Following Intuition and Creating Meaning	341
2.5	Shared Constitutional Traditions - Comparison and Differentiation	343
3	Identity as Conceptual Substitute for Sovereignty – Nihil Novum Sub Sole	347
3.1	Conceptual History	347
3.2	Sovereignty and Identity Together	350
3.3	European Sovereignty and Neo-Colonial Delusions	352
4	Identity as a Relation	355
4.1	Identity as Relational, not Descriptive	356
4.2	Identified Subject Matter as Idea or Narrative	357
4.3	Singleness and Multitude of Identities	358
5	Tensions Between Identity and Democracy	360
5.1	Identity as Perpetuum Mobile	360
5.2	(Dis)Ability to Change and the Hierarchy of Norms	361
5.3	Law and Democratic Reversibility	362
6	Call the Essential Constitutional Commitments by their Name	365
7	Concluding Remarks	368
	Reconstructive Account Structural Comparison of Identity Claims with Civil	
Dis	sobedience and Conscientious Objection	369
1	Introduction	371
2	Points of Departure – Structural Similarities, Previous Research, Methods and Caveats	373
2.1		373

2.2	Conscientious Objection with the Acts of State and its Institutions – State Civil Disobedience	376
2.3	Institutions as Agents of Civil Disobedience - Parliaments and Courts	380
2.4	Structural Similarities Explained	383
	 2.4.1 Civil Disobedience and Solange I – Resistance to Change 2.4.2 Conscientious Objection and Sayn-Wittgenstein – 	384 387
2.5	Asking for Exemption Methods of Research - Interdisciplinary Aspect	391
	• • • •	
2.6	Caveats	392
	2.6.1 The Scope of the Survey – Explored and Overlooked Theories	392
	2.6.2 Apples, Oranges, and Anthropomorphism - Comparing Individuals and Constitutions, Civil Society and Judicial	372
	Institutions	394
	2.6.3 (Un)Productive Journey – What Can We Learn?	398
3	Conscience and Conscientious Objection	400
4	Conscientious Objection in Legal Theory	406
4.1	Conscientious Refusal and Political Principles in the Theory of Justice	406
4.2	Conscientious Objection in the Theoretical Approach of Joseph Raz	410
4.3	When the Law is Doubtful – Dworkin's Judicial Theory of Civil	
	Disobedience	413
5 '	Transplants of Conscientious Objection	416
5.1	Nature and Purpose of the Law	416
	5.1.1 Legal Paternalism and Self-Regarding Actions	416
	5.1.2 Consent	419
5.2	The Spheres of Law	421
	5.2.1 Objections Against the State and Beyond	421
	5.2.2 Objection on Behalf of the State	423
	5.2.3 Conscientious Objection Among Private Individuals	425

5.3	Compensation or Substitute Services	426
5.4	Away with a Comprehensive Legal Doctrine of Conscientious Objection	428
6	Civil Disobedience	430
6.1	Defining Civil Disobedience - The Last Resort, Non-violence, and Openness to Consequences	430
6.2	Moral Justificatory Reasons from Raz	432
6.3	Determining What is Morally Right and Wrong – Conflicting Examples	434
7	Transplants of Civil Disobedience - Modest Guidelines for Justification	438
8	Identity Jurisprudence in the Light of Institutional Civil Disobedience and Constitutional Conscientious Objection	44 1
8.1	Disobedience as Incentive to Change - Ultra Vires Review	441
8.2	Identity Claims as Constitutional Conscientious Objection – Asking for Exemption	452
9	A Reconstructive Account of National Constitutional Identity	457
9.1	The Motivation for Action - Individual v Collective Interests	457
9.2	Constructive and Undermining Consequences of Resistance – Time will Judge	458
9.3	Discursive or Absolute Resistance	460
9.4	Normative Justificatory Reasons for Action - The Rationale	462
10	Conclusion	464
8 C	Conclusion	467
1	Closing Insights	469
2	Key Takeaways	470
3	Looking Ahead	476
Bib	oliography	477
Tal	ole of Cases	511