Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment

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Abstract

Despite prominently featuring the concept of constitutional identity throughout its reasoning, the relevance of *Solange I* to the German Federal Constitutional Court's doctrine of constitutional identity has been all but eclipsed by the Court's judgment on the Lisbon Treaty 35 years later. This article makes the case for recovering *Solange I*'s relevance as a constitutional identity judgment. The conception of constitutional identity in *Solange I* is fundamentally distinguished from that in *Lisbon* by a near lack of references to the eternity clause of Article 79(3) Basic Law. *Solange I* bases itself on a notion of constitutional identity that seems explicitly susceptible to constitutional amendment. This article will use the window that *Solange I* offers to a conception of constitutional identity untethered from unamendability in order to challenge both the plausibility and normative desirability of linking the two. Constitutional identity, especially where it is used to set limits to the primacy of EU law, does not need to be linked to unamendability. Understanding the former as intrinsically linked to the latter gives rise to three problems: First, the problem of the hollow legitimacy of constitutional

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identity claims ostensibly grounded in the 'higher legitimacy' of acts of constituent power; second the problem of the democratic costs imposed by an increased mobilisation of amendment limits against the power of other constitutional orders, and finally, the problem of the normative mismatch between the normative considerations informing constitutional amendment limits and those informing limits to the reach of EU law. Taking *Solange I* seriously as a constitutional identity judgment opens a door to an understanding of constitutional identity that is freed of its problematic association with unamendability.

Keywords

Solange – constitutional identity – unamendability – eternity clause – identity review – constitutional amendment

I. Introduction

Even though *Solange I* contains one of the earliest references of the German Federal Constitutional Court (GFCC) to the concept of constitutional identity, it is often seen at a distance to that concept. Its relevance to constitutional identity has since been eclipsed by the GFCC's later pronouncements on the concept in *Lisbon* and beyond. Rather than asserting a particularistic sense of constitutional identity, *Solange* may be better understood as a defence of universal principles of constitutionalism against a legal order that had not yet sufficiently internalised these principles.[1] The commonly conjured triptych of the GFCC's review powers vis-à-vis EU law – fundamental rights review, *ultra vires* review, and constitutional identity review – also attests to a fundamental distance between the gist of *Solange* and the idea of constitutional identity.

However, this article makes the case that we should take *Solange I* seriously as a constitutional identity judgment. Doing so allows us to fundamentally question the way in which we have later come to construe constitutional identity as a normative resource. One of the most striking aspects of

[1] For such a 'cosmopolitan' conception of national constitutional challenges to transnational legal authority, see Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in: Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009), 258-324.

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Solange I, this contribution argues, is its lack of references to the eternity clause of Article 79(3) of the Basic Law, and indeed a conscious rejection of the link between constitutional identity and amendment limits, in stark contrast to the Court's subsequent constitutional identity jurisprudence since *Lisbon*.

This contribution will use the window that *Solange I* offers to a conception of constitutional identity untethered from unamendability to challenge both the plausibility and normative desirability of linking the two. Constitutional identity, especially if it is understood as a concept primarily used to set limits to the primacy of EU law, does not need to be linked to unamendability. Understanding the former as intrinsically linked to the latter gives rise to three problems, which the contribution will discuss: First, the problem of the *hollow legitimacy* of constitutional identity claims ostensibly grounded in the 'higher legitimacy' of acts of constituent power; second the problem of the *democratic costs* imposed by an increased mobilisation of amendment limits against the power of other constitutional orders, and finally, the problem of the *normative mismatch* between the normative considerations informing constitutional amendment limits and those informing limits to the reach of EU law. Taking *Solange I* seriously as a constitutional identity judgment opens a door to an understanding of constitutional identity that is freed of its problematic association with unamendability.

II. Constitutional Identity in *Solange I*

Decided in the 1970s, one might think that it would be anachronistic to regard *Solange I* as a 'constitutional identity judgment'. The latter only truly spawned as a genre with the genesis of the 'identity clause' in the draft Constitutional Treaty and, later, the Treaty of Lisbon, which was by many interpreted as referring to the concept of constitutional identity.[2] Many of the fundamental features of the German Federal Constitutional Court's 'constitutional identity' doctrine only emerged in the *Lisbon* judgment of 2009 and seem to be fundamentally absent in *Solange*. This contribution argues that, despite all of this, *Solange* should be taken seriously as a constitutional

2 Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union', I.CON 3 (2005), 473-492 (473); Barbara Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause', YBEL 31 (2012), 263-318 (263); Bruno de Witte, 'The Lisbon Treaty and National Constitutions: More or Less Europeanisation?' in: Carlos Closa (ed.), *The Lisbon Treaty and National Constitutions: Europeanisation and Democratic Implications?* (University of Oslo 2009).

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identity judgment. Before we turn to *Solange*, let me briefly recall the GFCC's 'constitutional identity' doctrine as we know it from *Lisbon.*

In the *Lisbon* judgment, the GFCC closely tethered constitutional identity to the limits posited to constitutional amendment by the eternity clause in Article 79(3) of the Basic Law. That provision declares as inadmissible any constitutional amendment that would affect the federal structure of the German state and the 'principles laid down in' Articles 1 and 20 of the Basic Law – such as the protection of human dignity and human rights, Germany's character as a democratic and federal state, the principle of popular sovereignty, and the rule of law.[3] The reasoning of the Court stated that, since the substance of Articles 1 and 20 of the Basic Law is protected against constitutional amendment[4], that substance also needs to be equally protected against being undermined by implicit constitutional change brought about by European integration – in the Court's words, constitutional identity is 'non-transferable and "integration-proof"'.[5] The legitimacy of identity review is tied to and derived from the supposedly higher legitimacy of the act of the constituent power that brought the of the Basic Law into existence. In the Court's own words, 'the violation of the constitutional identity codified in Article 79(3) of the Basic Law is at the same time an encroachment upon the constituent power of the people […] the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution'.[6]

Solange I is notably less densely reasoned than the *Lisbon* judgment, and the reasoning justifying fundamental rights review of the European institutions is nowhere near as drenched in *Staatsrecht*[7] and foundational language as the *Lisbon* and *Maastricht* judgments were. But we can still find the idea of constitutional identity in the judgment – in fact, notions such as 'the basic structure of the constitution, upon which its *identity* rests', 'the identity of the constitution', 'the essential [*wesentlich*] structure of the *Grundgesetz*' or 'constituent structure of the state' are integral to the judgment's reasoning.[8] The key question at issue in the judgment – namely, the scope of Article 24 of the Basic Law, which permits the transfer of sovereign rights to international organisations by simple legislation, is indeed decided with reference to some

3 Paul Kirchhof, 'Die Identität der Verfassung' in: Paul Kirchhof and Josef Isensee (eds), *Handbuch des Staatsrechts*, Band II: Verfassungsstaat (3rd edn, C.F. Müller 2004), 261-316 (307-315).

4 FCC, judgment of 30 June 2009, BVerfGE 123, 267 (para. 218) – *Lissabon*.

5 FCC, *Lissabon* (n. 4), para. 235.

6 FCC, *Lissabon* (n. 4), para. 218.

7 See Jo Eric Khushal Murkens, 'Identity Trumps Integration', Der Staat 48 (2009), 517-534.

8 FCC, order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 – *Solange I*, para. 43.

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notion of constitutional identity. Notably, the Court argued in *Solange I* that the scope of that Article was limited by the context of the constitution as a whole.[9] This implied that Article 24 of the Basic Law cannot be understood as permitting treaty changes and acts of European institutions that would 'overturn the identity of the valid constitution of the Federal Republic of Germany, by breaking into its constituent structure'.[10] All of this seems to suggest that *Solange* is, in fact, a 'constitutional identity judgment' *par excellence.*

However, this does not mean that *Solange* must be understood as the spiritual precursor of the constitutional identity doctrine in *Lisbon.* In fact, a close reading of *Solange* suggests a different version of constitutional identity from the one that was proffered 35 years later. Two aspects fundamentally distinguish the constitutional identity of *Solange I* from that of *Lisbon.* First, the eternity clause of Art. 79(3), which later came to play the key role in construing constitutional identity in *Lisbon*, does not seem to play a role in the court's reasoning. Despite the seemingly similar logic, Article 79(3) of the Basic Law does not find a single mention within the judgment.

Second, and more perplexingly, the Court does not even seem to consider this 'basic' or 'constituent' structure of the constitution to be *per se unamendable.* Indeed, the Court seems to suggest that 'the basic structure of the constitution, on which its identity rests' constitutional identity could be changed by way of constitutional amendment. The Court writes:

> '[Article 24 of the Basic Law] does not open the path to changing the basic structure of the constitution, on which its identity rests, *without a constitutional amendment*, namely on the basis of the legislation of an international institution [zwischenstaatliche Einrichtung].'[11]

Implicit in *Solange I* seems to be a differentiation between explicit constitutional amendment, on the one hand, and the legislation of international (or supranational) institutions, on the other: While the basic structure of the constitution may be changed by way of constitutional amendment, it may not be changed by supranational legislation. Whereas, in the *Lisbon* judgment, constitutional identity is altogether placed beyond the reach of the constitutional legislator, in *Solange,* the Court takes a view of constitutional identity that renders it open to change from within while protecting it against modification from the outside.

9 FCC, *Solange I* (n. 8), para. 43: 'Art. 24 GG muß wie jede Verfassungsbestimmung ähnlich grundsätzlicher Art im Kontext der Gesamtverfassung verstanden und ausgelegt werden.'

10 FCC, *Solange I* (n. 8), para. 43.

11 FCC, *Solange I* (n. 8), para. 43.

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One key difference between *Solange I* and *Lisbon* accounts for the reference to constitutional amendments in this passage: While Article 24 of the Grundgesetz, subject of *Solange I,* allowed for the transfer of sovereign rights by simple legislation and did not require a constitutional amendment, the amended Article 23, the current constitutional basis for European integration and subject of the *Lisbon* judgment, explicitly links the ratification of treaty changes to the constitutional amendment procedure under Article 79. *Solange I* clarified that, for the purposes of Article 24, where the 'basic structure of the constitution' is concerned, simple legislation does not suffice and a constitutional amendment is necessary.[12]

What this difference does not account for, however, is the relative lack of references to constitutional unamendability: Despite the lack of an explicit reference to the eternity clause in Article 24, the 'prevailing opinion' among constitutional scholars already prior to *Solange I* considered that article to be constrained by the amendment limits in Article 79(3).[13] The court's jurisprudence on unconstitutional constitutional amendments was already developed at the time: Already in the 1950s had the court discussed the possibility of unconstitutional constitutional amendments based on Article 79(3) in ways which indeed seem to mirror the logic employed by the Court in *Solange.* In the *Südweststaat* judgment, the Court insisted that constitutional provisions must be interpreted in line with the 'inner unity' of the constitution; the 'constitutional principles and fundamental decisions to which constitutional provisions are subordinated'. This does not only mirror the logic employed in *Solange*, which similarly invokes the necessity of reading Article 24 of the Basic Law in the overall context of the constitution – rather, in *Südweststaat* the Court explicitly refers to the eternity clause of Article 79(3) of the Basic Law as the indicator of such 'constitutional principles and fundamental decisions' and approvingly cites a judgment of the Bavarian Constitutional Court that pondered the existence of amendment limits.[14] By 1974, in any case, the court's power to review constitutional amendments had been well established.[15] Elsewhere in the *Solange* judgment, the Court does indeed speak of the fundamental rights part of the Basic Law as an '*indispensable*

12 See Wolfgang Fischer, 'Die Europäische Union im Grundgesetz: der neue Artikel 23', ZParl 24 (1993), 32-49 (40).

13 See Georg Erler, 'Das Grundgesetz und die öffentliche Gewalt internationaler Staatengemeinschaften', VVDStRl 18 (De Gruyter 1960), 7-49 (40 f.); Ulrich Scheuner, 'Der Grundrechtschutz in der Europäischen Gemeinschaft und die Verfassungsrechtsprechung', AöR 100 (1975), 30-52 (45).

14 FCC, judgment of 23 October 1951, 2 BvG 1/51, BVerfGE 1, 14 – *Südweststaat* (paras 76-79).

15 See FCC, judgment of 18 December 1953, 1 BvL 106/53, BVerfGE 3, 225 – *Gleichberechtigung*.

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[*unaufgebbar*], essential part of the constitutional structure',[16] which seemingly suggests a connection to unamendability.

Why does the Court, then, distinguish so explicitly between constitutional amendment and transnational legislation in *Solange I*? Would it not have been easier to simply flatten the distinction, as the Court eventually did in *Lisbon*? After all, if the 'basic structure of the constitution, on which its identity rests' is affected, it surely should not matter whether the law in question was passed based on simple legislation or based on a constitutional amendment. Was the Court suggesting that its *Solange* competence could have been removed by way of constitutional amendment without necessarily reaching the scope of the eternity clause?

As *Polzin* highlights, the lack of references to Art. 79(3) in *Solange I* led to significant debate about whether the 'basic structure' the Court had referred to was limited to Art. 79(3) or extended beyond these confines – if the latter was the case, then some aspects of constitutional identity could indeed be considered susceptible to constitutional amendment.[17] However, irrespective of whether constitutional identity is tethered to or extends beyond Art. 79 (3), one could also understand the Court as differentiating between a complete abrogation of constitutional identity, on the one hand, and the mere modification of principles belonging to constitutional identity in the context of European integration, on the other. Certain aspects of constitutional identity outlined by Article 79(3) may indeed be 'unamendable' and indispensable, but this was not what mattered for the *Solange I* case. There may well be a point at which a constitutional amendment crosses the threshold of Article 79(3), but for the purposes of *Solange I,* this threshold could be left in abeyance. What mattered, rather, was *who had the capacity of changing* certain aspects of constitutional identity, even if such changes did not violate or destroy constitutional identity altogether. This is reminiscent of a distinction the Court had made four years prior in the *Abhörurteil* ('eavesdropping case'), where the Court argued for a highly restrained understanding of the eternity clause – it must be understood as an attempt to deprive attempts to install authoritarian or totalitarian rule of the veneer of legality that constitutional amendment could otherwise provide.[18] For the operationalisation of the limits imposed by Art. 79(3), the Court distinguished between the mere 'internal [*systemimmanent*] modification' of principles protected by the eternity clause, and their 'fundamental abandonment'. 'Internal modifications'

16 FCC, *Solange I* (n. 8), para. 44.

17 Monika Polzin, *Verfassungsidentität* (Mohr Siebeck 2018), 43-47.

18 FCC, judgment of 3 March 2004, 1 BvR 2378/98, 1084/99, BVerfGE 30, 1 (para. 99) – *Abhörurteil.*

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could be brought about by constitutional amendment – only a 'fundamental abandonment' of these principles could not.[19] The Court argued that the eternity clause must not preclude the ability of the legislator to internally modify even fundamental constitutional principles through constitutional amendments.[20]

The majority in *Solange* had no reason to think that the situation was of sufficient gravity to bring considerations of a 'fundamental abandonment' of principles protected by the eternity clause into play. The accompanying dissenting opinion signed by three judges firmly argued that the European Communities in fact had *already* been providing fundamental rights protection on a level functionally equivalent to the Grundgesetz.[21] The dissenters suggested that 'the "basic structure of the constitution, on which its identity rests" is not at stake […] The question of whether Art. 24 […] permits a transfer of sovereign rights that gives Community organs the opportunity to enact norms free from any fundamental rights constraints no longer arises today'.[22] The suggestion that leaving fundamental rights to the European institutions would have signalled a 'fundamental abandonment' of principles protected by the eternity clause would have seemed extremely heavy-handed and far-fetched.

The fact that *Solange I* does not directly tether constitutional identity to unamendability, but indeed seems to reserve the option of constitutional amendment of constitutional identity to the legislator, provides a stark contrast to the Court's hardened identity jurisprudence as it arose especially since *Lisbon*. Reasoned to its conclusion, such a conception of constitutional identity might have left room for a more dialogical relationship between Court and Parliament in determining the constitutional limits of European integration.

However, already by the time *Solange II* was decided (and notably before Article 23 replaced Article 24 as the constitutional basis of European integration), the reference to amendment present in *Solange I* had all but disappeared. Where *Solange I* argued that Art. 24 could not authorise a 'change' to the basic structure 'without a constitutional amendment', *Solange II* subtly changed this to arguing that Art. 24 did not allow a 'surrender' (*Aufgabe*) of that basic structure and no longer made reference to constitutional amend-

19 FCC, *Abhörurteil* (n. 18). For a highly critical discussion of this judgment, see Peter Häberle, 'Die Abhörentscheidung des Bundesverfassungsgerichts vom 15.12.1970', JZ 26 (1971), 145-156.

20 FCC, *Abhörurteil* (n. 18), para. 100.

21 On the dissenting Opinion see in this issue the contribution of Franz C. Mayer, 'A Parallel Legal Universe – The *Solange I* Dissent and Its Legacy', HJIL 85 (2025), 451-477.

22 FCC, *Solange I* (n. 8), para. 83.

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ment.[23] While the constitutional identity of *Solange I* was more flexible and malleable, already *Solange II* was closer to the 'make-or-break' variety that we have been familiar with since *Maastricht* and *Lisbon*.

Solange I, for its part, seemed to give room to a more dynamic and responsive picture of constitutional identity. It suggests a much stronger sense of agency of the constitutional legislator (rather than the Constitutional Court) over the limits of European integration. Especially with the benefit of hindsight, this makes *Solange I* a fascinating judgment that offers a window into an alternative vision of German constitutional identity.

III. Constitutional Identity and Unamendability

Solange I, as I interpret it, provides an alternative approach to the concept of constitutional identity – one that is not focused on constitutional identity as the definitive marker of political closure, but as an assertion of agency of the national polity over the meaning of certain constitutional fundamentals. In what follows, I would like to use the window that *Solange I* offers us in order to take a critical look at the normative connection between constitutional identity and unamendability that predominates the German Federal Constitutional Court's approach to the concept.

The association of constitutional identity with unamendability turns the latter into a concept that foregrounds the *closure* of a constitutional order: The ways in which a polity has been somehow conclusively defined and accordingly needs to be protected from change. Just as explicit limits on amendment powers within an existing constitution are seen as constitutive of a form of constitutional identity,[24] conversely, an otherwise contingently constructed notion of constitutional identity can also itself serve as the skeleton for a theory of constitutional unamendability.[25] Whether explicit or not, any constitution is seen as resting on a 'foundational structure' that must be protected from amendment.[26] Amendments that impinge on that foundational structure and lead to a change of constitutional identity are, in fact, not amendments, but rather should be seen as bringing about a new constitution

23 FCC, order of 22 October 1986, 1BvR 197/84, BVerfGE 73, 339 – *Solange II*, para. 104.

24 Richard Albert, 'The Expressive Function of Constitutional Amendment Rules', McGill Law Journal 59 (2013), 225-281; Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021), 89-124.

25 See Supreme Court of India, *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.*, judgment of 24 April 1973, 1973 4 SCC 225.

26 Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford University Press 2017), 141.

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altogether. Constitutional identity, in this sense, marks the boundary between constituent and constituted power; between admissible forms of constitutional amendment and forms of 'constitutional revolution',[27] 'dismemberment',[28] or 'annihilation'.[29]

When constitutional identity arguments are leveraged against other legal orders, most notably the EU, the logic of unamendability is extended to limit the reach and authority of other legal orders on one's own. Just as matters of constitutional identity are protected against amendment from within, they also demarcate the outer limit of the authority of other legal orders within one's own. Respecting the primacy of EU law cannot *de facto* amount to a form of constitutional replacement unsanctioned by an act of constituent power.[30] The German Federal Constitutional Court's identity jurisprudence is the most prominent example for this type of constitutional identity-based reasoning[31], but other constitutional courts, like the Italian Constitutional Court, similarly link the limits to European integration (albeit only lately explicitly labelled by that court as 'constitutional identity') to the unamendable core of the Italian Constitution.[32]

The idea of constitutional identity as fundamentally grounded in unamendability occupies much real estate in our constitutional imagination. The outsized influence of the GFCC's identity jurisprudence within the EU certainly plays a significant role in reinforcing this association.[33] But comparative constitutional scholars have also more generally been infatuated with liminal moments of constitutional transformation[34] as the still burgeoning

27 Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press 2020).

28 Richard Albert, 'Constitutional Amendment and Dismemberment', Yale J. Int'l L. 43 (2018), 1-84.

29 Carl Schmitt, *Constitutional Theory. Translated by Jeffrey Seitzer* (Duke University Press 2008), 151.

30 Diarmuid Rossa Phelan, Revolt or Revolution: The Constitutional Boundaries of the European Community (Round Hall Sweet & Maxwell 1997).

31 See also Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law', I.CON 14 (2016), 411-438.

32 Pietro Faraguna, 'Unamendability and Constitutional Identity in the Italian Constitutional Experience', European Journal of Law Reform 3 (2019), 329-344. On the Italian engagement with *Solange* and constitutional identity more generally see also in this issue the contribution of Niels Graaf, '"*Solange*", "*Fintantoché*", "*Tant que*": On the Local Remodelling of a Canonical German Decision in French and Italian Constitutional Debates', HJIL 85 (2025), 479-501.

33 Armin von Bogdandy, 'German Legal Hegemony?', Verfassungsblog, 5 October 2020, doi: 10.17176/20201005-124814-0, at <https://verfassungsblog.de/german-legal-hegemony/>, last access 23 April 2025.

34 See Jacobsohn and Roznai (n. 27); Albert, 'Constitutional Amendment' (n. 28); Schmitt (n. 29).

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literature on eternity clauses and unconstitutional constitutional amendments demonstrates.[35] In times of increasing constitutional erosion and backsliding, many scholars project hopes onto doctrines of unconstitutional constitutional amendments as a way of safeguarding the liberal, democratic character of constitutions.[36] However, the close connection of constitutional identity to unamendability and eternity clauses does not come without problems. In many ways, it plays into and resonates with the illiberal misappropriations of constitutional identity we have witnessed in past years in ways that more flexible, dynamic, and responsive concepts of constitutional identity do not. Three problems with the association will be discussed in the following: I have respectively labelled them the problems of *hollow legitimacy*, *democratic costs,* and *normative mismatch.*

IV. The Problem of Hollow Legitimacy

The first problem facing conceptions of constitutional identity grounded in unamendability is the problem of *hollow legitimacy.* This problem harks back to the ideational underbelly of this particular conception of constitutional identity and the answer it provides to the question of constitutional legitimacy.

Assertions of constitutional identity that rely on constitutional unamendability, ultimately, ground their authority in the allegedly higher legitimacy of an act of constituent power that established the constitution. In doing so, they ultimately hark back to *Carl Schmitt* and his conception of constitutional identity and constituent power. To *Schmitt*, the identity of a constitution is grounded in the 'fundamental political decision by the bearer of the constitution-making power'.[37] Any change of that decision, *Schmitt* argues, is

35 To name but a few recent book-length treatments, Yaniv Roznai, *Unconstitutional Constitutional Amendments* (n. 25); Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018); Richard Albert, *Constitutional Amendments. Making, Breaking, and Changing Constitutions* (Oxford University Press 2019); Suteu (n. 24); Rehan Abeyratne and Ngoc Son Bui, *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021).

36 For examples, see Yaniv Roznai, 'The Straw That Broke the Constitution's Back?: Qualitative Quantity in Judicial Review of Constitutional Amendments' in: Alejandro Linares Cantillo (ed.), *Constitutionalism. Old Dilemmas, New Insights* (Oxford University Press 2021), 147-165; Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', I.CON 13 (2015), 606-638; more critically see Silvia Suteu, 'Friends or Foes: Is Unamendability the Answer to Democratic Backsliding?', Hague Journal on the Rule of Law 16 (2024), 315-338.

37 Schmitt (n. 29), 77.

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not possible from within the constitutional order – overturning it from within would amount to an 'annihilation' of the constitution.[38] Any change of the identity of the constitution requires a renewed exercise of the people's constituent power.[39]

The problem with such a conception of constitutional identity, grounded in an exercise of constituent power, is that it provides no argument as to what makes that constitutional identity legitimate. *Schmitt* does not answer the question of how a people, vaguely conceived of as 'formless formative capacity'[40] could meaningfully acquire any form of constituent agency. As *David Dyzenhaus* points out, the 'pure fiat' of constituent power does not, in and of itself, provide an authoritative reason for its legitimacy.[41] Why such a 'formless formative' decision of the constituent power ought to be more legitimate than concrete exercises of institutionalised democratic agency is not clear.

Attempts to infuse this account of constitutional identity with some notion of constitutional legitimacy usually stand and fall with a theory of what *Lars Vinx* has labelled 'strong popular sovereignty'. Such a conception of popular sovereignty regards constitutions as legitimate because they give expression to the pre-legal, political identity of an already formed, homogeneous, people.[42] The German Federal Constitutional Court can be read as espousing such a conception both in its *Maastricht* and *Lisbon* judgments: In *Maastricht*, by arguing that democracy is tied to national peoples on the basis of their 'relative homogeneity';[43] in *Lisbon,* by painting a picture of Europe as composed of pre-constitutional sovereign peoples that would have to decide on their own dissolution if a European federal state was ever to legitimately emerge.[44] In both judgments, an idea of 'strong popular sovereignty' that identifies constitutional legitimacy with a pre-existing political collective possessing a homogeneous identity shines through. But rather than answer the question of constitutional legitimacy, such a conception of popular sovereignty avoids questions of legitimacy, as *Vinx* points out. By assum-

38 Schmitt (n. 29), 151.

39 Schmitt (n. 29), 144.

40 Schmitt (n. 29), 129.

41 David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power', Global Constitutionalism 1 (2012), 229-260 (259).

42 Lars Vinx, 'The Incoherence of Strong Popular Sovereignty', I.CON 11 (2013), 101-124; Lars Vinx, 'Ernst-Wolfgang Böckenförde and the Politics of Constituent Power', Jurisprudence 10 (2019), 15-38.

43 FCC, order of 12 October 1993, 2 BvR 2134, 2159/92, BVerfGE 89, 155 (para. 101) – *Maastricht*.

44 On the prevalence of strong popular sovereignty in the *Lisbon* judgment, see also Vinx, 'The Incoherence of Strong Popular Sovereignty' (n. 42).

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ing a substantively homogeneous political identity of the people, 'strong' popular sovereignty elides the inescapable 'heteronomy' of public life within constituted polities: the inevitability of deep and entrenched disagreements among the people themselves.[45] Sovereignty is turned from a political capacity whose exercise is subject to internal contestation into a set of substantive properties.[46]

Liberal constitutional orders that rely on a sense of 'political closure' often do so out of a militant-democratic concern for preventing 'democratic autophagy'[47] that constitutionalists might, intuitively, find commendable. In doing so, they are often willing to gloss over the hollow legitimacy that comes with invocations of constituent power, and overlook the problematic implications of strong popular sovereignty. However, the fact that the same sense of political closure can also be channelled into a diametrically opposed direction – one that tilts illiberal and authoritarian rather than liberal and democratic – should render us inherently suspicious of centring unamendability in formulating constitutional identity.[48]

A sense of 'strong popular sovereignty' is, at best, incidental to liberal democracies, which can dispense with it and content themselves with a 'democracy defined in procedural terms'.[49] However, it is *integral* to illiberal and authoritarian constitutional projects. Organically identifying *the people* with a set of normative commitments derived from a presumedly settled identity justifies eroding, undermining, or altogether dispensing with procedural democracy.[50] This is not to say that the German conception of constitutional identity, based on strong popular sovereignty and unamendability, is *per se* illiberal: The GFCC turned the language of strong popular sovereignty and constituent power into a muscular defence of the liberal constitutional order established by the Basic Law. However, its conception of constitutional identity rests on assumptions that also cater to illiberal constitutional projects.[51]

45 Vinx, 'The Incoherence of Strong Popular Sovereignty' (n. 42), 103.

46 Hans Lindahl, 'The Purposiveness of Law: Two Concepts of Representation in the European Union', Law and Philosophy 17 (1998), 481-507 (488-489).

47 Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge University Press 2007).

48 To that end, see Suteu (n. 24).

49 Andrew Arato, *Post Sovereign Constitution Making. Learning and Legitimacy* (Oxford University Press 2016), 281; see also Hans Kelsen, *The Essence and Value of Democracy* (Rowman & Littlefield 2013).

50 Vinx, 'Ernst-Wolfgang Böckenförde and the Politics of Constituent Power' (n. 42); Arato (n. 49), 275.

51 See also Vinx, 'Ernst-Wolfgang Böckenförde and the Politics of Constituent Power' (n. 42).

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This illiberal potential of strong popular sovereignty shows in the Hungarian politics of constitutional identity. The Hungarian Constitutional Court insists that the Hungarian Fundamental Law 'merely acknowledges' constitutional identity. Instead of being based in a written constitution, it resides outside of the Fundamental Law, to be found in Hungary's 'historical constitution' and other normative resources outside of the space of institutionalised democratic agency.[52] The Hungarian Fundamental Law identifies popular sovereignty with a set of immutable substantive commitments. As *Renáta Uitz* points out, the Hungarian Constitution comes with thick 'anthropological presuppositions about a proper Hungarian'.[53] *Viktor Orbán* defended the Hungarian government's resistance against the relocation of refugees on grounds of constitutional identity as a matter of maintaining social homogeneity[54] and posits a fundamental difference between the basic social models of Hungary and countries in Western Europe – whereas the former are 'multicultural' societies, Hungary is homogeneous and wants to stay that way.[55] This illiberal conception of strong popular sovereignty is, ultimately, what underlies the Hungarian government's resistance against the EU's refugee relocation scheme on grounds of 'constitutional identity' in 2016. All of this speaks the same language of 'strong' popular sovereignty.

The precepts of strong popular sovereignty underlying the connection of constitutional identity and unamendability suggest that constitutional identity is fixed at the moment of constitution-making, as it rests on the decision of the constituent power, which cannot be overturned. However, dynamic conceptions of constitutional identity highlight how the former can only truly evolve *within* a constituted order, where the constituted organs have a bearing on the meaning and content of that identity and can provide the basis

52 Petra Bárd, Nora Chronowski and Zoltán Fleck, 'Inventing Constitutional Identity in Hungary', MTA Working Papers 6 (2022), 1-31.

53 Renáta Uitz, 'Reinventing Hungary with Revolutionary Fervor: The Declaration of National Cooperation as a Readers' Guide to the Fundamental Law of 2011' in: János Mátyás Kovács and Balázs Trencsényi (eds), *Brave New Hungary: Mapping the 'System of National Cooperation'* (Lexington Books 2019), 9-28 (16).

54 In 2015, Orbán argued that 'we regard it to be a value that Hungary is a homogenous country and that it shows a very homogenous face in its culture, way of thinking and customs of civilization'. See Eurologus Peszto, 'Orbán: sosem voltunk multikulturális társadalom', Index of 19 May 2015, at <https://index.hu>, last access 23 April 2025.

55 Asked whether he still wanted to have a 'Western society' in Hungary, Orbán responded: 'Because of the migration, now it is more complicated. Migration changed our understanding of the West, because we would not like to have multicultural, parallel societies based on migration'. <https://twitter.com/EuroSandor/status/1284794093181304834>, last access 23 April 2025.

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for their legitimacy.[56] Constitutional identity is not 'eternal' and unchanging, but contingently constructed within the constituted order, and only as such can it be considered legitimate.

V. The Problem of Democratic Costs

Basing assertions of constitutional identity upon unamendability turns constitutional rigidity into a normative resource. The more rigid, eternal, unamendable an element of a national constitution is, the more it seemingly requires other authorities to yield to that element. After all, why should the idea that something forms part of a state's constitutional identity induce respect or recognition on the part of overlapping legal orders if that constitutional identity is inherently flexible and changeable? The elasticity of constitutional identity, if anything, speaks to its capacity to change, also through a state's interaction with the influence of transnational and supranational legal orders.

There is some sense to this logic. Pre-commitment, after all, is seen as a, if not *the,* core virtue of liberal constitutionalism, constraining political actors from acting on irrational passions in heated moments and ensuring the stability of a liberal constitutional framework.[57] Unamendability is the strongest form of pre-commitment – it strives to make attempts to override fundamental constitutional commitments legally impossible. If we value liberal constitutionalism in a world of overlapping constitutional orders, we would do well to structure the boundaries between constitutions in a way that allows us to heed each other's pre-commitments.

However, we must be aware of the democratic costs that come with this normative logic. The pre-commitments covered by eternity clauses and other forms of unamendability, after all, most frequently take the shape of vague and ill-defined principles. It would be naïve to think that unamendability prevents change of unamendable principles altogether – rather, as *Melissa Schwartzberg* points out, it 'shifts the locus of this change away from legislatures and toward the judiciary'.[58] It is in the hands of constitutional judges to flesh out what unamendable principles entail, and to define the

56 Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in: Neil Walker and Martin Loughlin (eds), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford University Press 2008), 9-24.

57 See Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy (University of Chicago Press 1997); Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge University Press 2000).

58 See Schwartzberg (n. 47), 4.

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boundaries of unamendability. Tying constitutional identity to unamendability, then, runs the risk of driving litigants and constitutional judges towards petrifying ever larger parts of their constitutional order as a means of gaining leverage over the demands of overlapping legal orders. Making the eternity clause the focal point for litigious mobilisation against European institutions means that, every time a provision of EU law is challenged on grounds of constitutional identity, the Court is also invited to expand the scope of things that are outside the scope for democratic agency of the constitutional legislator. This also threatens to foreclose the ability of democratic processes of resolving constitutional conflict by asserting a different interpretation of constitutional identity.[59]

The extensive fashion in which the German Federal Constitutional Court interprets the German Constitution's eternity clause in the context of constitutional identity is illustrative of this. The Court not merely protects these principles themselves, but many facets springing from them. Two much-discussed examples are particularly salient: First, the court's interpretation of the principle of democracy in *Lisbon* specifies a number of 'state tasks' which the court considers at the core of national democracy and, accordingly, may never be transferred to the EU – criminal law, police and military powers, public expenditure and tax policy, welfare, and culture and religion.[60] There is little rhyme or reason to the list; *Halberstam* and *Möllers* call it 'the leftovers of European integration recycled as necessary elements of state sovereignty',[61] while *Schönberger,* noting the conspicuous absence of the power to coin currency from the list, concludes that it is, at best, a result of 'political expediency'.[62]

In the *OMT* case, the strategic mobilisation of the eternity clause goes arguably even further. While most of the Court's reasoning underlying the Court's preliminary reference to the ECJ pertains to *ultra vires* questions, the Court also pondered the possibility of a violation of constitutional identity resulting from the European Central Bank's Outright Monetary Transactions programme. In particular, it considered the possibility that an excessive financial burden resulting from central bank losses as part of the OMT programme might be considered a violation of the German Parliament's

59 Jan Komarek, 'The Place of Constitutional Courts in the EU', Eu Const. L. Rev. 9 (2013), 420-450 (447).

60 FCC, *Lissabon* (n. 4), para. 252. See also Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court Says "Ja Zu Deutschland!"', GLJ 10 (2009), 1241-1258 (1250).

61 Halberstam and Möllers (n. 60), 1251.

62 Christoph Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones at Sea', GLJ 10 (2009), 1201-1218 (1209).

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budgetary autonomy, resulting in a financial burden that unacceptably limits the *Bundestag*'s scope for democratic action.[63]

This normative expansion of the scope of the eternity clause[64] gives the GFCC increased leverage in its ongoing dialogue with the Court of Justice of the European Union about the boundaries of the powers of the EU: the more expansive, rigid, and concrete one's constitutional identity, the more it can seemingly be cashed in in terms of normative value. This, however, also slims the discretion of the legislator to concretely make sense of the principles underpinning German constitutional identity. The assertion and defence of constitutional identity thus comes at the cost of collective democratic agency. This manner of asserting constitutional identity comes with the profound irony that the only way the Court seems able to defend the collective autonomy of the German people is to petrify that autonomy within a sole iteration of it.

The democratic costs that come with the politics of constitutional identity are very much a form of collateral damage, and something that the Court seems mindful of, since the GFCC has, to this day, not found the constitutional identity of Germany violated by the EU. But where constitutional identity becomes a weapon for the vindication of authoritarian politics, like it has in Hungary, this 'collateral damage' is very much the point: an expansive mobilisation of constitutional identity also serves the *internal* closure of the polity. As discussed previously, the Hungarian Constitutional Court understands Hungary's constitutional identity as residing *beyond* constitutional text – in its own words it is 'a fundamental value not created by Fundamental Law [but] merely acknowledged by [the latter]'.[65] Constitutional identity is unchangeable, immutable, and beyond political agency.

At the same time, however, the Hungarian government has actively (and paradoxically) employed constitutional amendments to clarify and expand the content and scope of this immutable constitutional identity. Having secured a two-thirds majority in Parliament for almost the entirety of its time in power,[66] it can modify the constitution at will. The Seventh Amendment, passed in 2018, introduced a ban on the settlement of foreign population on the territory of Hungary alongside a general duty of 'every organ of state' to

63 FCC, order of 14 January 2014, BVerfGE 134, 366 (para. 102) – *OMT-Program*.

64 See also Albert Ingold, 'Die verfassungsrechtliche Identität der Bundesrepublik Deutschland. Karriere – Konzept – Kritik', AöR 140 (2015), 1-30 (14).

65 Hungarian Constitutional Court, *AB on the Interpretation of Article E) (2) of the Fundamental Law*, judgment of 30 November 2016, decision no. 22/2016 (XII.5), para. 67.

66 Between 2015 and 2018, following the loss of two by-elections, Fidesz had fallen two votes short of a supermajority.

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protect Hungary's constitutional identity.[67] The Ninth Amendment of 2021 constitutionally enshrined transphobic views on gender and the concept of the traditional family, establishing the right of every child to be raised in accordance with Hungary's constitutional identity.[68]

Paradoxically, the Hungarian government is instrumentalising its supermajority to expand and concretise the scope of a constitutional identity that is said to be located in a space outside of the constitution. Doing so allows the Hungarian government to effectively craft a particular set of commitments that seem unchangeable from within the polity. This is not only a way of closing Hungary off from the EU's influence but also a way of rendering very particular views about society and the family beyond contestation from within. The internal entrenchment of an authoritarian constitutional vision goes hand in hand with its assertion vis-à-vis the EU.

Just as Eurosceptic litigants encourage the German Federal Constitutional Court to read ever more detailed substantive limitations into the constitutional provisions making up Germany's 'eternal' constitutional identity, the Hungarian government concretises and fleshes out what it sees as Hungary's immutable constitutional identity through ever more detailed constitutional amendments. This is not to say that the GFCC and the Hungarian government are doing the same thing in relying on constitutional identity. But the dynamics unleashed are similar: whatever becomes a matter of constitutional identity becomes petrified and placed beyond democratic agency. This can, as in the German case, be the collateral damage of a strategic mobilisation of the eternity clause in order to challenge the authority of the EU. But it can also, as in the Hungarian case, be part and parcel of an authoritarian logic.

VI. The Problem of Normative Mismatch

A final problem leads us directly to an alternative way of thinking about constitutional identity, and brings us back to *Solange I*. This problem is one of normative mismatch: Presenting assertions of constitutional identity as a matter of unamendable constitutional principles suggests that the normative considerations arising from constitutional unamendability are

67 The Government of Hungary, *Seventh Amendment to the Fundamental Law of Hungary*, bill no. T/322, see <https://helsinki.hu/en/>, last access 23 April 2025.

68 Venice Commission, *Ninth Amendment to the Fundamental Law and Explanatory Memorandum*, opinion of 3 June 2021, opinion no. 1035/2021, CDL-REF(2021)045, at <https://www.venice.coe.int/>, last access 23 April 2025.

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identical with the considerations arising from advancing constitutional identity in a transnational setting. Ultimately, however, assertions of unamendability and assertions of constitutional identity vis-à-vis other constitutional orders ask different normative questions: One is about the absolute and unshakeable limits of constitutional agency, the other is about the boundaries of political and constitutional agency in a world of overlapping constitutional authority.[69]

Eternity clauses, basic structure doctrines and other forms of unamendability seem, primarily, targeted at posing substantive constraints within one's own constitutional order. Their goal is to constrain the *constituted power* in its ability to fundamentally change the constitution from within. But such internal constitutional constraints call to task different normative questions than external impacts on one's own constitution. Assertions of constitutional identity vis-à-vis other constitutional sites do not necessarily speak to the absolute boundaries of democratic action within the constituted order. Rather, they may address *who* has the authority of affecting or modifying aspects that are considered to be at the core of a polity's given constitution.

In this sense, assertions of constitutional identity vis-à-vis overlapping legal orders should be seen as a particular iteration of what democratic theory calls the 'boundary problem'[70]: In a world of overlapping constitutional orders, does one unit have the legitimate authority to decide on questions that affect another unit's constitutional core? Rather than necessarily being a peremptory assertion of an immutable constitutional substance, assertions of constitutional identity vis-à-vis other constitutional sites may also simply mark a claim to constitutional and democratic agency.

Such a description of the politics of constitutional identity also better tracks the realities on the ground. After all, the bulk of contestation that takes place in the name of constitutional identity in the EU is about the interpretation of principles that are often common to both the national and the transnational constitutional order, rather than actual threats of constitutional 'revolution' or 'annihilation'. Nobody would seriously suggest, for instance, that in the *Taricco* case, the republican form of government, which is at the core of the Italian concept of constitutional identity,[71] was existentially

69 Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', I.CON 6 (2008), 373-396.

70 Frederick G. Whelan, 'Prologue: Democratic Theory and the Boundary Problem', Nomos (New York) 25 (1983), 13-47.

71 As Martinico notes, the Italian Constitutional Court's interpretation of the 'republican form of government' protected from amendment by the Italian constitution is broad, encompassing 'the entirety of supreme principles that represent the essence of the post-WWII constitutional experience'. See Giuseppe Martinico, *Filtering Populist Claims to Fight Populism: The Italian Case in Comparative Perspective* (Cambridge University Press 2021), 47.

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threatened by waiving the limitation period in the particular case at hand. Nor would Germany have stopped being a democracy had it suffered financial consequences from the ECB's OMT programme. More often than not, the politics of constitutional identity concern the meaning of principles that are broadly shared across the boundaries of overlapping constitutional orders, but which have contingently come to mean different things or take different shapes across different constitutional orders – be it human dignity[72] or the protection of fundamental rights.[73] Constitutional identity claims remind us that these contingent differences are not always simply 'foibles',[74] merely waiting to be harmonised, but concretely speak to the way in which a polity imagines its own legitimacy.[75] What is at stake in these cases is *who has a say* in concretely shaping and protecting these principles – not whether they are irredeemably violated.

Tethering constitutional identity to unamendability presumes that the only changes a constitutional identity is capable of undergoing are 'make-or-break' changes, rather than slow evolutions or transmutations generally capable of being accommodated but occasionally in need of contestation and negotiation through dialogue. It implies that the only plausible way in which a polity can protect a constitutional core against external override is by also denying itself agency over the meaning of that core. It makes unnecessary concessions to a static view of constitutional identity that caters to authoritarian misappropriations.

Solange I, in distinguishing between constitutional amendment and transnational legislation, appears mindful of this normative mismatch. Yielding power over fundamental rights enforcement to the European Communities was *not* a question of whether fundamental rights would have been *fundamentally abandoned* – it was a matter of continued agency over the meaning of such rights. The latter is not a less compelling reason for asserting authority than the former.

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72 ECJ, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, judgment of 14 October 2004, case no. C-36/02, ECLI:EU:C:2004:614; FCC, order of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317 – *Identitätskontrolle*.

73 Italian Constitutional Court, *Taricco I*, order of 23 November 2016, no. 24/2017.

74 Joseph H. H. Weiler, 'In Defence of the status quo: Europe's Constitutional Sonderweg' in: Marlene Wind and Joseph H. H. Weiler (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003), 7-26 (14).

75 See also Joseph H. H. Weiler, 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space' in: Joseph H. H. Weiler (ed.), *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999), 102-129.

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VII. Conclusion

Solange I offers a glimpse into a conception of constitutional identity that is quite different from the one we have gotten used to. Unlike *Lisbon*, *Solange I* espouses a conception of constitutional identity that is not directly bound to the eternity clause. *Solange I* does not address the question of which principles in the German constitution may *never* change so much as it addresses *who may effect change* in the meaning and shape of these fundamental principles. By distinguishing between change through constitutional amendment and change through transnational legislation, it presents matters of constitutional identity as questions of democratic agency rather than constitutional closure. This article has used this reading of *Solange I* as an opportunity to challenge the connection between constitutional identity and unamendability that the German Federal Constitutional Court has made since *Lisbon*, and which is predominant in academic discourse. Three problems plaguing that connection were discussed:

First, the *problem of hollow legitimacy* highlights that tethering identity to amendment limits ties the latter to an allegedly higher legitimacy of acts of constituent power that can only be accepted if one accepts the idea of 'strong popular sovereignty', which posits the existence of pre-legal political collectives with an already settled sense of identity. This idea strongly plays into the hands of authoritarians, as it can serve to fundamentally devalue an institutionalised democratic process to the benefit of an already formed substantive vision of 'the people'. Unless one accepts such a conception of popular sovereignty, the legitimacy of constitutional identity claims grounded in unamendability is hollow.

Second, the *problem of democratic costs* highlights that, where constitutional identity is tethered to unamendability, every substantive invocation and concretisation of that identity comes at the expense of democratic agency, imposing democratic costs on the legislator. While such democratic costs may be seen as 'collateral damage' of the politics of constitutional identity in liberal democracies, illiberal authoritarians openly embrace and utilise these democratic costs in order to impose a substantive vision of the polity.

Finally, the *problem of normative mismatch* highlights that constitutional amendment limits and assertions of constitutional identity vis-à-vis other constitutional sites answer fundamentally different questions that should not be confused with one another. While one is about the limits of constitutional agency altogether, the other is about the boundaries of constitutional agency in a world of overlapping constitutional orders. Eliding the difference between the two casts more shadow on the politics of constitutional identity than it sheds light.

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Understanding *Solange I* as a constitutional identity judgment allows us to think more critically about the connection between constitutional identity and unamendability. Notably, *Solange I* is not alone in not eschewing the connection. The Irish Supreme Court has recently advanced a concept of constitutional identity that in fact encompasses the *unfettered ability of the people to amend the constitution*,[76] while the (pre-2015) Polish Constitutional Tribunal also advanced a conception of constitutional identity that was explicitly susceptible to amendment.[77]

At least in the context of its normative deployment in the EU context, the connection of constitutional identity to unamendability is not intrinsic to the concept and can be dispensed with. Indeed, questioning that connection may provide us with a more accurate picture of the normative concerns conveyed by the language of constitutional identity in the conflict between national constitutional orders and the EU.

Understanding constitutional identity claims as the assertion of contingently evolved constitutional understandings, rather than immutable constitutional substance, rightly relativizes the authority of constitutional identity claims and the confidence with which they can be advanced.[78] It clarifies the degree to which such claims can and need to be, and indeed are, negotiated and compromised over. It sheds some of the conceptual baggage that has made the idea of constitutional identity so attractive to illiberal misappropriation. While none of this prevents the abuse of constitutional identity,[79] untethering constitutional identity from unamendability nonetheless provides a healthy adjustment of our perspective on the concept.

76 Supreme Court of Ireland, *Heneghan v. Minister for Housing*, Judgment of Justice Gerard Hogan, judgment of 31 March 2023, [2023] IESC 7, para. 38.

77 Polish Constitutional Tribunal, *Poland's Membership in the European Union (The Accession Treaty)*, judgment of 11 May 2005, case no. K 18/04, para. 13.

78 Bosko Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017), 191-222.

79 Even the advocates of 'abuse-proofing' constitutional concepts seem sceptical about the ability of conceptual shifts preventing the abuse of concepts: Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing. Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021), 200.

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