

# A European collective identity via European Constitutionalism?<sup>1</sup>

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## 0. Introduction

After a long period during which methodological individualism was dominant in political science, an interesting development has taken place within a few years: the return of the community.<sup>3</sup> Normative political theories as well as empirical political science address a wide range of issues connected with community: community and democracy, community and the market economy to state just two examples. Among the newly emerging issues, the relationship between community, (individual and collective) identity and the democratic performance/persistence of a political regime is of exceptional relevance. The discussion of this connection takes place on different levels of analysis: the neighbourhood level, the community level, the national and the supranational level. It's not surprising then, that identity issues on the European level are now being widely discussed within academia as well.

In this paper, we want to focus on one issue and address the following question: Which role does the European Constitution play in the process of the development of European identity? In order to answer this question, we have to come to terms with a number of closely related questions:

- What is the relevance of (collective) identity from a *functional* perspective?
- What kind of community is desirable from a *normative* point of view?
- What is collective identity anyway? Even though community and collective identity are widely discussed terms by now, the concept itself is under-theorized in political theory, as Adrian Little has correctly stated in 2002.

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<sup>3</sup> **Little, Adrian.** *The politics of community: theory and practice.* Edinburgh: Edinburgh University Press, 2002.

- Which means, procedures, institutions, institutional arrangements generate collective identity or at least support the development thereof?

No single theory we know of answers all of these questions (neither do we in this paper). We therefore will discuss these questions separately, drawing on different theories and theoretical traditions and finally try to combine them in a theoretical consistent way to give a first, still tentative, answer to our research question.

## 1. The relevance of community – functionalist perspectives

The relevance of collective identity or a community in a functionalist perspective is quite clear and can easily be summarized.

1. *Community and Legitimacy*<sup>4</sup>: The legitimacy of political Institutions depends on the extend to which the citizens conceive the institutions as manifestations of their community.
2. *Community and Majority Principle*<sup>5</sup>: The commonly used decision rule in contemporary democracies is the majority rule (absolute or relative majority rule). But each decision decided by a majority creates a minority of citizens (in the worst case 50% minus one vote), who do not favour the outcome. Why should the minority none the less obey this decision? One crucial variable to answer the puzzle is the assumption that there will be no tyranny of the majority. The majority will take care of the minority's attitudes, because minority and majority *together* constitute the community, despite their differences concerning specific political issues. In addition, they form a community, because today's majority can be tomorrow's minority. If majorities abuse their position, making it impossible for minorities to accept their policies, any modern democratic regime would suddenly collapse. Community is thus a prerequisite for majority rule – otherwise, only fear and sanctions would motivate people to obey the law.

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<sup>4</sup> **Easton, David.** *A systems analysis of political life.* New York: Wiley, 1965.

<sup>5</sup> **Guggenberger, Bernd.** *An den Grenzen der Mehrheitsdemokratie : Politik und Soziologie der Mehrheitsregel.* Opladen: Westdt. Verl., 1984.; **Bobbio, Norberto and Bellamy, Richard.** *The future of democracy : a defence of the rules of the game.* Oxford: Blackwell, 1987.

3. *Community and Trust*<sup>6</sup>: The Social Capital School argues that community is a prerequisite for trust which in turn is a prerequisite for horizontal cooperation between citizens. Horizontal cooperation leads to better democratic performance and increasing political stability, since citizens are more content with the outputs and outcomes of the political system.
4. *Community and the Systems of Social Security*: The last years have made it obvious: The welfare state in its present form is no longer affordable. Functional substitutes are therefore needed. Many theoretists argue that community and the binding emotional ties between the citizens may work as a functional substitute.

Seen from a functionalist point of view, contemporary democracy heavily depends on community.

## 2. How to generate (European) identity?

There seem to be at least two different approaches to conceptualizing collective identity. Firstly, the psycho-sociological approach centers on the issue of “imagined community” (Anderson) and focuses on both ingroup – outgroup differences as well as ingroup homogeneity.

According to this approach, collective identity becomes stronger, the more ingroup members consider themselves as part of the collective (cognitive dimension) *and* the more intense their emotional commitment to the group (affective dimension). In a somewhat complementary way, we could add another perspective to this approach, which is “the lesser the perceived differences in between the members of the ingroup and the greater the perceived differences of the ingroup in reference to the outgroups, the stronger the collective identity”<sup>7</sup>.

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<sup>6</sup> **Putnam, Robert D.** *Bowling alone : the collapse and revival of American community*. London: Simon & Schuster, 2001;

<sup>7</sup> **Fuchs, Dieter.** *Prospects for the development of democracy in the European Union*. Unpublished Manuscript. Dijon 2005, pp. 4-5.

While data analysis shows that Europeans already show a somewhat significant level of “ingroup identity”, at least at a cognitive level, the psycho-sociological approach would still lead to scepticism regarding European identity in the foreseeable future. In a sense, this way of looking at collective identity is passive and reactive. At best, it ignores processes of what in fact increases either dimension of collective identity (cognitive or affective). As long as there is, for instance, a multitude of languages spoken by Europeans, we would expect a certain barrier, at least on the affective level, of developing an emotional commitment to the “collective” of EU citizens. The existence of national governments, carefully watching and protecting issues of national cultural significance, such as broadcasting policies, must then also be considered a major obstacle to developing European identity.

The problem seems to us that the ingroup – outgroup dichotomy is overly emphasised if not false. Identity, as Müller wrote elsewhere, only exists as a relational concept. Identity can be “felt” in relation to a local community, a political movement, a religious group, a nation and even human mankind.<sup>8</sup> As Fuchs illustrates convincingly, Europeans have no problem considering themselves as both “nationals” (Germans, British, French etc.) *and* “Europeans”.<sup>9</sup> Thus, if we wait for Europeans to overcome their self-assignment as “nationals” and to develop a sense of ingroup community as Europeans *instead*, we would probably produce a robust reason to deny any prospects of (substantial) European identity.

Secondly, the politico-sociological approach centers on the necessity of shared value orientations by citizens of a (political) community. Institutionalisation of shared values by constitutionalism can do the trick of making transparent to citizens that a political community corresponds with the values and norms prevalent in society. By generating transparency between value orientation of a political community as a

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<sup>8</sup> **Müller, Markus** 2004: *Mut zur Staatlichkeit. Volk, Demokratie und Staatlichkeit in der Verfassungsdebatte*, in: Beckmann, Klaus/Dieringer, Jürgen/Hufeld, Ulrich (Eds.): *Eine Verfassung für Europa*: Tübingen: Mohr Siebeck.

<sup>9</sup> **Fuchs, Dieter** 2000: *Demos und Nation in der Europäischen Union*, in: Hans-Dieter Klingemann und Friedhelm Neidhardt (Hrsg.), *Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung*. WZB-Jahrbuch 2000, Berlin: edition sigma 2000, S. 215-236.

whole on the one hand, and value orientation of citizens within society on the other, the generation of collective identity can be significantly promoted.

If asked, what the main difference between both approaches, one would probably have to answer: the causal relationship between pre-political values and constitutionally generated values and norms. While the psycho-sociological approach, implicitly shared by a majority among German legal scholars, assumes some sort of socio-cultural homogeneity among any social group to “cause” (a sense of collective) identity<sup>10</sup> – thus preceding any political community as an option of institutionalizing societal interrelations, the politico-sociological approach acknowledges that institutionalisation (e.g., by a constitution) can promote, if not fundamentally generate, (collective) identity.<sup>11</sup>

As Habermas pointed out, it was one of the great achievements of the American constitution to precede collective identity of the “American people”.<sup>12</sup> In fact, “political citizenship” has come into being in the United States, merely created by individuals pledging allegiance to an unprecedented political regime. The American constitution generated “American identity” and, in a sense, the American people.<sup>13</sup>

Even though there are numerable differences between the case of the U.S. constitution and the process of constitutionalisation in the EU, the general argument

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<sup>10</sup> “Cause” is set on quote, because identity is merely an equivalent to socio-cultural homogeneity.

<sup>11</sup> It should be noted that, while a majority views the emergence of a certain degree of collective identity as crucial for any political community to work sustainable, Müller stated elsewhere that it is but clear that “identity” is a prerequisite for a working democracy at all. However, for the purpose of our question here, we assume that identity is an important feature for sustainable democracy at EU level (cf. **Müller, Markus** 2004: *Mut zur Staatlichkeit. Volk, Demokratie und Staatlichkeit in der Verfassungsdebatte*, in: Beckmann, Klaus/Dieringer, Jürgen/Hufeld, Ulrich (Eds.): *Eine Verfassung für Europa*: Tübingen: Mohr Siebeck.)

<sup>12</sup> **Habermas, Jürgen**. *Reply to Grimm*. In: **Gowan, Peter**. *The question of Europe*. London: Verso, 1997., pp. 259 - 264.

<sup>13</sup> See **Kammen, Michael**. *A machine that would go of itself : the Constitution in American culture*. New York: Knopf, 1987.; **McCarthy, Kathleen D**. *American creed : philanthropy and the rise of civil society, 1700 - 1865*. Chicago, Ill.: Univ. of Chicago Press, 2003.; **Arendt, Hannah**. *On revolution*. New York: Viking Pr., 1969.

is still significant: identity must not be a given (due to ingroup-outgroup self-determination), but can substantially promoted by the political act of constitutionalism.

### 3. What kind of identity? Two normative models of identity building via constitutionalism

We have pointed out, it is a commonly held notion with contemporary political theory, that a constitution can do the trick to generate collective identity. Theorists as diverse as Rawls<sup>14</sup>, Ackerman<sup>15</sup> and Taylor<sup>16</sup> have emphasized the capacity of a constitution to put collective identity into being. Having that said, one has to differentiate between different models and related issues of identity-building via constitutionalism.

Firstly, one has to address the *normative* question, what kind of identity is hoped for. Secondly, one has to discuss the rather technical question, by which *means* a constitution can produce identity and which means are appropriate for the different normative models of identity, respectively. We will discuss these two questions, beginning with the normative issue.

Two distinct normative models of identity are being discussed at the moment: the *liberal model* and the *republican model*.<sup>17</sup> Even though both are normative models, they too draw on empirical evidence to support their normative points of view<sup>18</sup>. Let's begin by taking a closer look at the liberal model.

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<sup>14</sup> **Rawls, John.** *A theory of justice*. Oxford: Oxford Univ. Press, 1999.

<sup>15</sup> **Ackerman, Bruce A.** *We the people*. Cambridge, Mass., The Belknap Press of.

<sup>16</sup> **Taylor, Charles.** *Wieviel Gemeinschaft braucht die Demokratie? : Aufsätze zur politischen Philosophie*. Frankfurt am Main: Suhrkamp, 2002.

<sup>17</sup> Cf. **Mulhall, Stephen and Swift, Adam.** *Liberals and communitarians*. Oxford: Blackwell, 1997.

<sup>18</sup> We should emphasize that the liberal model corresponds with the socio-political approach of collective identity, while the republican model corresponds with the psycho-sociological approach.

### **3.1 The liberal model of identity-building**

The liberal model of identity-building via a constitution draws on the works of Bruce Ackerman<sup>19</sup> and John Rawls<sup>20</sup>. The empirical point of departure of this model is the diagnosis, that modern societies are pluralist, i.e., societies deeply divided by a myriad of conceptions of the good life. There are so many different concepts of the good life around that a core of commonly shared values and norms is rapidly vanishing. This development is a threat to any democracy since, as we have already pointed out, a democratic political system needs at least some kind of community-feeling among citizens. Seen from a normative point of view, each conception of the good life has a right to be realized, so long as no negative externalities exist. Suppressing conceptions of the good life in order to increase the sense of community among citizens would be deeply unjust. What can be done in this situation?

Contemporary proponents of political liberalism argue that a *thick sense of community* is no longer needed (nor possible, anyway). What is solely needed is a consensus regarding the *core political values* of a democratic political regime. These core political values are laid down in a constitution.

This leaves us with the next puzzle: why do people obey the constitution in spite of the fact that they share very different conceptions of the good life? Rawls argues that a constitution will be subject to an *overlapping consensus* only if the constitution is *neutral* with regard to different conceptions of the good life. Neutrality implies that a constitution neither supports nor suppresses *any* specific conception. This can only be achieved by limiting the scope of the constitution with regard to two dimensions: Firstly, a constitution shall only organize the political sphere and has to refrain from intervening into the societal domain. Secondly, the rules laid down in the constitution have to be justified by *moral* reasoning only. Each and every constitutional norm has to be unanimously accepted by all citizens subject to the constitution.

Collective identity of a society is thus *political identity*. Furthermore, trying to build a collective identity on the basis of - more or less - collectively shared values, beyond

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<sup>19</sup> **Ackerman, Bruce A.** *Social justice in the liberal state*. New Haven: Yale Univ. Press, 1980.

<sup>20</sup> **Rawls, John.** *Political liberalism*. New York, NY: Columbia Univ. Press, 1993.

the above, ultimately has to *fail*. From an empirical point of view, this approach is doomed to fail due to modern society's pluralism. From a normative point of view, this approach *should* fail since it is unjust – at least if we argue on the theoretical grounds of the theory of Justice.

### **3.2 The republican model of identity-building**

The republican model of identity-building draws on the works of contemporary communitarian theorists like Taylor and Sandel.<sup>21</sup> The empirical point of departure is the diagnosis that most liberal democracies face severe problems of integration. Liberalism's individualism lies at the heart of the most daunting problems of contemporary democracy. We have lost our sense of community due to Liberalism's individualism. And – even worse – liberalism dominates not only the institutions of the contemporary democratic regimes, but also dominates liberalism the vocabulary which we use to articulate our political ideals.<sup>22</sup> In the long run, liberalism will therefore destroy the societal basis of its very existence.

Charles Taylor in particular argues against Liberalism's atomism.<sup>23</sup> He emphasizes the crucial role community plays for the development of an authentic self. Solely within a community people can live a meaningful life. It is very important to transcend one's own limited existence. It's equally important for the individual and the political collective to know, where we came from and to know, where're we going. The place to make sense of one's own individual identity is the family (and maybe the psycho-therapist, at least in a liberal environment). The place to make sense of the heritage of the political collective is the constitution (leaving aside the *grand narratives*, which shape the collective identity, too). A constitution has to be more than just an ensemble of ethically neutral rules – as political liberalism proposes. A constitution has to be the exact opposite: It has to reflect the history of a political

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<sup>21</sup> **Sandel, Michael J.** *Liberalism and the limits of justice*. Cambridge: Cambridge Univ. Pr., 1998.; **Sandel, Michael J.** *Democracy's discontent : America in search of a public philosophy*. Cambridge, Mass.: Belknap Press of Harvard Univ. Press, 1998.

<sup>22</sup> **Bellah, Robert N.** *Habits of the heart : individualism and commitment in American life*. Berkeley: University of California Press, 1985.

<sup>23</sup> **Taylor, Charles.** *Sources of the self : the making of the modern identity*. Cambridge: Cambridge Univ. Pr., 2000.

community. It needs to incorporate particularistic ethical values, which constitute the political community. A constitution makes visible for all the central cultural values of a political collective and thus re-enforces and strengthens these values. This of course implies that certain values and societal groups are not being represented in a constitution. But identity is stronger than abstract justice for republicans.

### **3.3. Comparing the two normative models**

Each model has its strengths and weaknesses. Political Liberalism's empirical diagnosis is more realistic. Societies are becoming more and more fragmented and pluralistic. Republicans' diagnosis, that there are still commonly shared values out there constituting identity of a political community, seems too optimistic. However, Liberalism's central claim, that societies are integrated via abstract rules seems too idealistic.

To sum up, two opposing claims can be identified:

1. Constitutions produce a political community, a *demos*, which formerly did not exist (liberal model).
2. Constitutions give symbolic identity to a politically pre-existing nation (republican model).

Both claims are rather unrealistic regarding different aspects. Furthermore, they are based on normative grounds, which are controversial. This raises the question, whether certain parts of the two models may be combined in order to develop a theory of identity-building via constitution by linking the idea that people need common values in order to develop a collective identity with the pessimistic diagnosis that modern societies are getting more and more pluralistic.

## 4. Identity-building by constitutionalism

What is the constitutional mechanism that produces identity? According to the liberal model, as seen above, constitutions produce some sort of collective identity, thus forming the *demos*. In a formal-legal sense, this seems unproblematic although one could question whether popular sovereignty is pre-existing or whether it is merely created by a constitutional act.<sup>24</sup> What seems more important in our context is how identity is built through the existence of a document called constitution?<sup>25</sup>

We draw on Lepsius<sup>26</sup>, Fuchs<sup>27</sup> and Schaal<sup>28</sup> to propose an *institutional cascade model*, which claims that **acting** within institutions can be seen as both the result of a *legitimised* (constitutional) framework and, at the same time, the source of legitimacy for the (constitutional) framework, thereby generating collective identity of the citizens and actors involved. Three levels of democratic constitutionalism are distinguished: *values*, *structures*, and *performance*. These three levels build a hierarchical pyramid with *values* on top and *performance* at the bottom. “Values” consist of abstract values and norms, including normative pre-conditions and political ideas about a “good

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<sup>24</sup> See **Elster, Jon (Ed.)** *Constitutionalism and democracy*. Cambridge: Cambridge Univ. Pr., 2003; **Böckenförde, Ernst-Wolfgang**. "Die verfassunggebende Gewalt des Volkes - Ein Grenzbegriff des Verfassungsrechts." In: *Zum Begriff der Verfassung, Frankfurt am Main: Suhrkamp*, pp. 58 – 80; **Lane, Jan-Erik**. *Constitutions and political theory*. Manchester: Manchester Univ. Press, [1997].

<sup>25</sup> See **Schaal, Gary S.** *Integration durch Verfassung und Verfassungsrechtsprechung? : Über den Zusammenhang von Demokratie, Verfassung und Integration*. Berlin: Duncker und Humblot, 2000.

<sup>26</sup> **Lepsius, Mario Rainer.** *Institutionalisierung und Deinstitutionalisierung von Rationalitätskriterien* Konstanz: Univ., SFB 485, 2002

<sup>27</sup> **Fuchs, Dieter.** *The democratic culture of unified Germany*. In: *Critical Citizens. Global Support for democratic governance*. Ed. By Pippa Norris. Oxford: Oxford University Press 1999, pp. 123-145; **ibid.** *Kriterien demokratischer Performanz in liberalen Demokratien*. In *Demokratie – eine Kultur des Westens?* Ed. By Michael Th. Greven. 20. Wissenschaftlicher Kongreß der Deutschen Vereinigung für Politische Wissenschaften. Opladen: Leske + Budrich 1998, pp. 151-179.

<sup>28</sup> **Schaal, Gary S.** *Vertrauen, Verfassung und Demokratie : über den Einfluss konstitutioneller Prozesse und Prozeduren auf die Genese von Vertrauensbeziehungen in modernen Demokratien*. Wiesbaden: VS Verl. für Sozialwiss., 2004.

political order". Most of these elements are mirrored in constitutional documents, sometimes codified explicitly, sometimes to be found only in between lines. They represent, in short "conceptions of desirable types of democracy".

Beyond more or less abstract values and norms, constitutions specify and thus produce *structure*, too. By "structure", the model defines political institutions, such as the executive, legislative and judiciary powers, parties and other political actors insofar as they play a significant role in the institutional context of a democratic (constitutional) regime. By their very operation within the constitutional framework, political institutions (and their actors) generate both the political process as well as political outputs. The sum of both is defined as *performance*.

In a sense, in a top-down direction *legitimacy* is produced within the hierarchical pyramid, streaming from *values* via *structures* to *performance*. Constitutional values and norms legitimise (constitutional) institutions, which themselves legitimise the behaviour of actors within them. Normatively speaking, this stream should be dominant in a working democratic order, as values and norms should control institutional settings, which themselves should shape actors' behaviour within the framework.

However, there is also a bottom-up stream. In a working democratic order, actors "reproduce" institutional settings as well as norms and values. Citizens take up norms and values of the constitutional framework as they experience this very constitutional framework via its institutional settings. In a sense, by acting within (constitutional) institutions citizens re-affirm the values and norms (and ultimately the "idée directrice") of the constitution.

There is an interesting extension of this model by Offe<sup>29</sup>. Constitutional orders stimulate generation of *trust* via their institutional arrangements. They help citizens to develop trust in their fellow citizens' behaviour insofar as expectations converge. As Claus Offe puts it:

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<sup>29</sup> **Offe, Claus.** *How can we trust our fellow citizens? In: Democracy and Trust. Ed. By Mark E. Warren.* Cambridge: Cambridge University Press 1999, pp. 42-87.

“My thesis is that it is this implied normative meaning of institutions (the “basic idea” or “*idée directrice*”, the authors) and the moral plausibility I assume it will have for others which allows me to trust those that are involved in the same institutions – although they strangers and not personally known to me. From “my” point of view it is the built-in meaning of institutions, its evidence and moral compellingness, that leads “them” to share with “me” a commitment to the norms and values represented by the institutions.”<sup>30</sup>

Institutions make citizens’ expectations vis-à-vis individual behaviour of others compatible, thus creating *inter-subjective trust*. This line of thought offers an explanation for the puzzle how large modern anonymous society, and its members, can possibly develop a sense of community, thus a sense of collective identity as a political community. It answers the puzzle by emphasizing the role of constitutionally created institutional settings. These institutions allow citizens to merely “experience” a distinct set of values and norms (vertical dimension), while simultaneously stimulating convergent expectations vis-à-vis each others’ behaviour (horizontal dimension). This mechanism gives rise to societal development of collective identity. And the top-down stream of “legitimacy” as well as the bottom-up stream of “re-affirmation” ensures that collective identity remains a flexible entity, not fixed to a given historical minute where a constitution came into force.

In fact, the dynamic element of the counter-stream model (top-down legitimacy, bottom-up re-affirmation) allows for integrating *constitutional change* (*Verfassungswandel*) into the cascade model of identity-building. A considerable part of constitutional change is not produced by formal re-writing of constitutional passages, but by re-interpretation of the incumbent legal norms, ultimately (and authoritatively) performed by constitutional courts. By providing authoritative (re-)interpretation, constitutional courts serve as intermediary catalysts in this system, allowing both society and constitution to move on as contexts (societal demands, international environment, economic performances etc.) change.

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<sup>30</sup> **Offe, Claus.** *How can we trust our fellow citizens? In: Democracy and Trust. Ed. By Mark E. Warren.* Cambridge: Cambridge University Press 1999, p. 70.

In the republican model, the above neo-institutionalist mechanism is unthinkable. Institutions (as created by a constitution) lend only symbolic identity to citizens, assuming (pre-)existence of a political community (e.g., as a nation). They virtually substitute for citizens' experience of acting under a constitutionally given institutional setting. Thus, constitutions can not generate collective identity whatsoever, they only represent it. Those, who adhere to this school of thought, will therefore be unable to provide advise as to how a constitution (and its respective institutional setting) should be drafted in order to promote societal identity and stability for a pluralistic society.

## 5. Lessons for a European constitution

From the above, it follows firstly, that only within the normative realm of the liberal model a constitution can play a pro-active role in building identity. Secondly, according to this model and its concretisation in the institutional cascade model, **experienceability** of a constitutional order, as made possible through its institutions, is a crucial key to generate collective identity. By being experienceable for citizens, institutions virtually empower the values and norms of a constitution to generate identity-building power. Furthermore, only via a living *praxis* of acting under an institutional setting created by the constitution, intersubjective mutual trust among citizens, including convergence of expectations, is produced, contributing to the generation of identity. And thirdly, intermediary catalysts, such as **constitutional courts**, providing for authoritative re-interpretation of constitutions, play a significant role in ensuring dynamism of collective identity.

We draw the following consequences for a European constitution (if it is to contribute to development of collective identity among Europeans): it must provide for (political) institutions which are experienceable by European citizens *and* it should allow the European Court of Justice to become the Constitutional Court of the EU constitution. In practice, “experienceable institutions” are somewhat at odds with the traditional institutional system of the EU. Its incumbent institutions are hardly understood by the citizens, often criticised as overly bureaucratic, intransparent and at distance from the people. In fact, many people do not understand the incumbent system at all, which is only to indicate that the EU, at present, does a bad job in being “experienceable”. At best, those being the beneficiaries of the EU redistribution system (e.g., its cohesion policy, structural funds etc.), experience EU policy effects. However, it would be a misunderstanding to reduce “experienceability” to the enjoying of benefits. That only leads to “sunny day” acceptance of EU policies, but most certainly not to any kind of collective (European) identity.

Contemporary constitutional theory differentiates between two dimensions of a constitution, i.e. a symbolic and an instrumental one.<sup>31</sup> On the instrumental dimension, the only way to create “experienceable” institution at EU level, in the sense developed above, is to re-arrange the incumbent system in various significant aspects. In substance, it makes sense to dissolve (today’s) multilevel governance system of EU institutions, national governments and regional administration wherever possible. Political tasks should be clearly assigned to particular institutions, which in turn must be clearly accountable to the people. This implies, of course, more elements of (representative) democracy at EU level than today (and, for that matter, than the EU constitutional draft provides for at the moment). In consequence, the EU should also receive a right to tax (but also to be accountable for its tax policies to the people, of course).

Regarding the European Court of Justice, it must fulfil all functions of a constitutional court. If European identity is to be promoted by a constitution, such a European Constitutional Court must enjoy supremacy over national constitutional courts. As history teaches us, all successful constitutional courts, from the U.S. Supreme Court to the *Bundesverfassungsgericht* in Germany, have within a few years after creation adopted a position of double supremacy, i.e., supremacy over other constitutional courts (in the states, or the *Länder* respectively) and, in fact, regarding authoritative interpretation of “what the constitution is”.<sup>32</sup> According to the institutional cascade model, barriers to empowering the European Court of Justice to fulfil such functions will ultimately endanger the identity-building power of a European Constitution in the long run.

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<sup>31</sup> **Vorländer, Hans.** *Die Verfassung : Idee und Geschichte.* München: Beck, 2004; **Brodocz, André.** *Die symbolische Dimension der Verfassung : ein Beitrag zur Institutionentheorie.* Wiesbaden: Westdt. Verlag, 2003.

<sup>32</sup> Cf. . **Gibson, James L, Gregory A. Caldeira, and Vanessa A. Baird.** *On the Legitimacy of National High Courts,* in: *American Political Science Review* 92/2 (1998): S.343-358; **Caldeira, Gregory, & Gibson, James:** *The Legitimacy of the Court of Justice in the European Union Models of Institutional Support,* in: *American Political Science Review* 89/2 (1995): S.356-76.; **Caldeira, Gregory, & Gibson, James:** *Democracy and Legitimacy in the European Union: The Court of Justice and Its Constituents,* in: *International Social Science Journal,* 152/2 (1997) : S.209-24.

On the symbolic dimension, a European foreign minister, visible to all Europeans would also be an “experienceable” institution, even if she had only symbolic (or representative) functions to fulfil. Similarly, a European President could be installed.

Interestingly, the importance of symbolism in terms of constitutional institutionalisation is already addressed by the draft EU Constitution in Art. I-8 (“The symbols of the Union”), mentioning the “EURO”, the flag, the anthem, and a European holiday on 9<sup>th</sup> of May. Moreover, the EU constitution explicitly formulates the *idée directrice* of the European Union: Unity by Diversity.

In general, we claim that European identity *can* be promoted by a European constitution via its institutional settings. However, these institutions must be “experienceable” to European citizens. Thus, it will take a while to develop both a European “demos” and ultimately, a European “nation”.