Michel Rosenfeld should not be penalized by being one of the Editors-in-Chief of I·CON. His book is important, engaging and—like the Dunoff and Trachtman volume—at the core of I·CON’s interests. In the present I·CON Book Forum the articles by Gianluigi Palombella, Ayelet Shachar, Mark Tushnet, and Neil Walker relate directly to the book and constitute the beginning of a discussion of the theme that will no doubt be carried on in different forms in future issues.

JHHW

Structures and process in the constitutional self: Coping with the future?

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1. Among the many virtues of pictorial endeavors such as Renaissance frescoes, we find the clarity and majesty of the image as a whole, one that requires a detachment and distance, both optically and intellectually, to be fully ‘comprehended.’ However, unlike the contemporary pixel-based performances of electronic imaging, by getting closer and closer, subsequent levels of coherence and narrative become perceptible, and one is caught by the appearance of high-definition scenes and detailed descriptions; we end up captured by the unexpected surfacing of the fresco’s many concurring worlds.

The “identity of the constitutional subject”1 reminds us of this dual dimension; the very hypothesis of its existence remains an intuitional projection prompted by the institutional continuity of the constitutional idea, whose rationale cuts across diverse scenarios, since modernity, and thrives on the conjecture of an author, a subject, a universalizable self spanning as far as constitution making. And yet the quasi-metaphysical connotations of such an overarching unity involve both an “idea of reason” and an ungrounded defeasible appearance. What Michel Rosenfeld does is to

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bring us closer to the picture, by zooming out and in, exploring its further dimensions, structures, actors, environment, and circumstances, all without discarding the very notion of a constitutional self as an illusory artifact stemming from the sheer need for ideological reassurance. Thus, the vantage point of a closer look does not bring about the debasing of the “general” notion but, instead, takes a further step toward the latter’s “dialectical” reframing, the overcoming of abstraction, the recognition of its conflicting or concurring components, and the pursuit of concrete determinants. This paves the way for its translation into a vital and identifiable identity, whose “sameness” is explored as both an historical and an institutional confrontation of meanings, social factors, normative oppositions. Thus, it stands as a never-settled matter throughout time and space. If one wishes to name such a methodological vein, the Marxian notion of a “determined abstraction” seems to fit nicely here, at least on the assumption that such an abstraction—rather than precluding access to a real state of affairs—discloses and provides us with the factors and concrete relations from which the abstraction results.

By carefully distinguishing comparatively between self-interpretations and objective historical functions, be they French or American, British or Spanish or European Union enterprises, Rosenfeld shows the most relevant constitutional trajectories, “moments,” and restorations, i.e. the constitutional subject fatigue. In this way, he avoids the many shortcuts of stereotyped narratives.

Given the scope of this note, I shall focus a bit more closely only on some aspects concerning the structuration of constitutional identity and comment, briefly, on its “beyond the State” dimension.

2. For Rosenfeld, the “constitutional” nature of identity is constrained by its “modern” definition, namely, limited government, the rule of law, and fundamental rights; however, the constraint is incapable of telling the whole story. Constitutional identity is never given; even when it is produced, it tends to undergo transformations, and its constant pursuit locates it within an essential and unavoidable “lack.” According to Rosenfeld, as Freud and Hegel have taught, the self aspires to self-achievement by shifting attention from the object to “the other.” With the Hegelian Phenomenology of Spirit, the relation to the other develops through conflict, domination, and recognition, much as, with Freudian psychoanalysis, the relation to the other is the


3 See, in the American literature, the outstanding elaboration of the Hegelian process, as to the self, the community, the normative, identity and recognition, in the works of Robert Brandom; for example, “Some Pragmatist Themes in Hegel’s Idealism: Negotiation and Administration in Hegel’s Account of the Structure and Content of Conceptual Norms,” in European Journal of Philosophy, VII, 1999, 164. As Brandom says, “reciprocal recognition . . . is for Hegel the structure that makes the normative intelligible as such” (Ibidem, 178).
key to self-identity. Therefore, only constitution making as inherently pluralist can make up for the ontological “lack.” An essential wedding with pluralism leads to the inclusion of the other, which then becomes a premise for the legitimate nature of a new order. Each time the self comes to a settlement, albeit provisional, it has allowed for the other to take part, as in the United States’ account for a plurality of factions or as in the Rousseauian “general will,” where the “individual must split into two oppositional figures,” the citizen and the bourgeois.

Understandably, the constitutional subject is thus an ongoing discourse, rather than some sort of personified entity, such as makers, writers, judges, or people. It is the product of construction, deconstruction, reconstruction. This reconstructive moment offers most of the normative tension in Rosenfeld’s analysis. The crisis in the constitutional identity generated by “the effects of the Supreme Court decision in Roe,” Rosenfeld writes, requires a subsequent harmonization of the “fragmentary” reality by recourse to “counterfactual imagination.” However, this happens through a psychoanalytic process that spreads out with the movements of the subject through negation (of the past, bearing “determinative” consequences), metaphor (condensation), and metonymy (displacement). The complex fabric of these transformations opens up an epistemic view that locates each step in the sequence of a potential thesis-antithesis process. Tellingly, the birth of a constitution, even when meant as a violent or radical denial of the past and rather than the creation “ex nihilo” (Preuss) it purports to be, brings the past within itself: the “past sought to be countered determines the content of constitutional provisions elaborated by revolutionary constitution makers.”

As I understand it, the whole process is made so as to balance opposites, to reveal the false truth that unilateral steps, be they forward or backward, prove to be when seen from the fundamental normative insight of constitutionalism.

As one can see, a dialectical conception of the constitution is being upheld, and the point is, among other things, to better illuminate the ways and outcomes of constitutional interpretation. This standpoint, moreover, might integrate the (traditional) history of the concept of a constitution; one can perceive that taxonomies of constitutional types tend to somehow freeze their objects. In such taxonomies, and rightly so, the American Constitution figures as a constitution-as-guarantee, whereas the nature of others, like some European constitutions of the twentieth century, resembles the constitution-as-project. Ancient concepts of constitution, taken in the sense of the Schmittian concept of Verfassung, do mean the mirroring of a given order, while other constitutions are better viewed as embracing the “normative” endeavor as constitutions-as-“norm.” Seen through the lens of a dialectical conception, the highly heuristic value of taxonomies does persist, but their environment seems less petrified. As contaminations and variables enter into the picture, they become part of the self-understanding of the constitutional self.

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4 See supra fn. 1, 44.
5 Ibidem, 39.
7 Cf. Schmitt, Verfassungslehre, Duncker & Humblot 1928.
Nonetheless, if a question can be raised, it should be whether the Hegelian dialectic grid and the Freudian tools which Rosenfeld applies do finally explain what prompts, protects, and reestablishes constitution making and constitutions as bearers of the ideals of the Enlightenment. Such ideals entail the notions of reason, liberty, and equality for all.9

Now, the Hegelian dialectic did express progress, both historical and institutional, toward a point of achievement, which was intended to be the nether force of the triadic process, that is, the engine which sets in motion Hegel’s philosophy of history. It is the “Spirit,” the inherent force that generates reality, not only something that allows us knowledge. Therefore, what replaces such a metaphysical engine when dealing dialectically with the constitutional self? Why, for instance, compensate unbalances, fractures, or include the other? And who or what takes the burden, should the constitutional subject itself not be a premise of dialectic adjustment but only our epistemic bridge among imagined communities? The question arises whether the constitutional self is the inner generator of its own transformations. From an observational angle, the issue, in fact, is what prompts the subject that might have experienced a loss of its internal equilibrium to reinstate it, moving toward a new synthesis.

Rosenfeld’s excellent elaborations on psychoanalytic figures purport to explain the moves of the self; for example, negation is essential to cope with contradictions. Thus, “condoning slavery” by the original U.S. Constitution occurred “in relation both to its own historical and ideological premises, and to the fundamental prescriptions of constitutionalism.”10 The Supreme Court’s interpretation of procedural due process in the Dred Scott case, as protecting the substantive property rights of the slave’s owner, could only be possible through the negation of “membership to human race for African American.”11 Metaphor is another figure, that is, the Freudian concept of condensation (in Jacques Lacan’s elaboration), which in constitutionalism works so as to concentrate on similarities (such as “all men are created equal”). And, finally, metonymy, which, in Freud, under the notion of “displacement,” allows for the desires toward an inhibited object to be redirected onto a convenient (albeit implausible) alternative. The decision in Lynch, Rosenfeld reminds, was anything but neutral and, behind a mask of fairness, it was “an impermissible endorsement of religion,” while the display of a crèche was assimilated to any other object for commercial purposes, that is, justified through metonymy.12 The path drawn, thereby, aligns constitutionalism with the pursuit of overdetermination; in Freudian terms, a sign of behavior bears multiple functions and allows us to cope with more than one incompatible wish. This dimension comes close to suggesting reconciliation, which in the constitutional subject will link singularity, internal plurality, and aspiration to universalizability.

9 Rosenfeld, supra n.1, 67 passim.
10 Id., 49.
11 Id., 50.
12 Id., 59, 162.
13 Like vomiting: Id., 65.
The seductive originality of this analysis almost answers the question asked above because it orients us toward the “self,” that is, toward the acknowledgment of contradictions and decouplings as symptoms of illness in a (necessarily) presupposed subject. Now, behaviors are signs expressing the arresting uneasiness and disease arising from inhibited and civilization-incompatible aspirations. Thus, what, in the absence of a substantive “normative” force (say, the Hegelian Spirit or the Marxian dynamic of production), can explain that which moves the self toward overcoming its impairment? Is it constitutionalism or the constitutional identity?

The examples offered are apt to clarify that constitutional identity endangers itself while opting for solutions incompatible with constitutionalism (as the choice is of a masked endorsement of religion and unfairness toward nonreligious groups). However, it is uncertain where the pull toward constitutionalism, as a drive to reconciliation, comes from, unless one presupposes a further normative identity ethos of inherent constitutionalist substance. One may think that, at least in a sense, the described processes seem to be not only aimed at an identity but also to result from it, as in cases of the “reinvention of tradition” (such as Griswold, Eisenstadt, Roe), which are bound “by the expression of a shared identity along a metaphorical axis.”

If this presents Rosenfeld’s tenets correctly, their general, distinctive orientation might be better explained in some lineage of Carl Gustav Jung’s works, and not by chance. Freudian signs, expressed in negation, condensation, displacement, overdetermination, and the like, are made to correspond, in Rosenfeld’s narrative, with ways of arranging more or less provisional states of affairs that reinvent, reconcile, or somehow accommodate divergent needs or problematic choices within a unique constitutional identity. However, with Freud, the same signs or symptoms are expressions of an arrested libidinal development, an illness to be traced back to the causal determinants deriving from repressed infantile fantasies. From this point of view, they cannot be, at the same time, an overcoming and Aufhebung; and, critically speaking, they should fail in both the removal of primary causes and the pursuit of the ideals of the self, that in constitutionalist terms are pluralism, self-limitation, equality (and justice)—as Rosenfeld depicts cases like Lynch or Roe through “metonymic” or “metaphorical” resemblances.

Still, they are taken as accounting for the available potentialities and are held to reach some equilibrium; that is, as more or less successful redeterminations of constitutional identities. Tellingly, it was Jung who assumed that—instead of the “blocking” consequence of the past—neurosis consists of a one-sided development, requiring the rescue of the neglected opposite; that the self undertakes a durable process of individuation through which equilibrium is pursued by paying attention to those signs that are, in truth, symbols oriented toward the achievement of future levels, that is, upgraded scenarios of compensation. With Jung, conflicts are to be “outgrown,” their telos is not a renvoi to disinterring a pathological “past.” As in pluralist constitutionalism,

14 Ibidem, 86.
conflicts are often insoluble *ceteris paribus*; however, their relevance fades as their *ratio* comes to be embedded in a further stage of the self, that is, an innovative grade of reality. The very point in the construction of the constitutional subject (as Rosenfeld also shows) is the moving of the present contradictions toward new syntheses. This, however, entails a forward-looking orientation. The latter consists, I submit, of acknowledging the prospective meaning of present imbalances, rather than simply re-elaborating on them out of the arresting injustices of the past. Despite the fact that looking backward might play an undeniable role (as recalled above)—taken in itself and as the essential mode of coping with civilization’s discontents—it might foreclose teleological comprehension, the demands of totally new complexities, and would end up, rather, with merely reflecting a myopic sort of Freudian oedipal originalism.16

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The importance of a forward-looking orientation is of even greater moment, as Rosenfeld himself underlines,17 in the “unity in diversity” project of the unfinished European Union: not only because of the motivational insufficiency of the bitter legacies of the past but also because the construction of the constitutional identity cannot avail itself of the nation-fixing mode, such as the American melting-pot of “*e pluribus unum*.”

The main weakness of Europe, in this regard, lies in the absence of a moving reason for self-committing. Much might be added here regarding the flaws of conceiving of a constitution, essentially, as a constraint against passion (and despite the rational discourse of modern constitutionalism, Rosenfeld’s book doesn’t seem to endorse it), that is, only as the work of a rational precommitment: one that civilizes the self (again, both in the Enlightenment line and in the Freudian18 inhibitory mode) through preempting its desires by being tied to Ulysses’s mast.19 The point of commitment, it was aptly argued, relates instead “to a purpose, principle, relationship”; it depends on “a special reason to adhere to this purpose, principle, or relationship that someone else would not have.”20


17 Rosenfeld, supra n.1, 177 ff.


19 Against the frame of precommitment, that is, the enlightened preemptive function of the constitution (Peter sober) in constraining the citizens (Peter drunk) (S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, U. Chicago Press, 1995, at 135), J. Rubenfeld (*Freedom and Time. A Theory of Constitutional Self-Government*, Yale University Press, 2001) argues that Ulysses causes himself “to be unable to act on his future preferences; he does not give himself an obligation or a reason to resist the Sirens.” On the other side, instead, a commitment would afford such reason or such an obligation” (id., 117).

20 Id. This original lack might generate further consequences. As I submit, Joseph Weiler’s analysis (*On the Distinction between Values and Virtues in the Process of European Integration*, provisional draft, at http://www.iilj.org/courses/documents/2010Colloquium.Weller.pdf) of the decoupling of the European Union’s “constitutional” values and the cultivation of the corresponding (and necessary) “virtues” points equally to the same unresolved knot: the shortfalls of a dimidiated or divided constitutional self.
Given the lack of such a component—thus suggesting the weakness of such commitment—one can think that reincorporation and reinvention would hardly work of themselves (as, for instance, through a court’s self-driven decision making, and the like).

Apart from the question of commitment and the search for what would propel it (to which I shall briefly return at the end), there is another fundamental issue, one to which Rosenfeld himself refers; whatever the EU project, coping with striking a balance between ethnos and demos, it will have to locate itself by harmonizing national, supranational, and international dimensions. I would like to take this a bit further. Naturally, I believe, one should take account of the material determinants that have emerged on the global sphere, which is admittedly a unique novelty: one that is unmatched by any other reference points among those “normally” envisaged as the external “opposite,” through the “negation” of which an internal identity purports to forge itself.

Maybe, the globe seems too distant and abstract an interlocutor. Not by chance, scholarship has recurrently insisted on European–U.S. differences as an expedient method to make sense of a European identity. However, the rapidly changing environment suggests that this counterpoise of identity has no decisive grip; neither is it comparable with, say, what the British Parliament (a metonymy?) represented to the American founding fathers. All in all it misses the point. The deeper flaws (and myopia) of some residual self-referentiality of European nation-states will come from the growth of transnational governance, from supranational actors (including courts) framing the legal world, and by the double move of specializing issues (economy, trade, energy, agriculture, environment, human rights, security) and globalizing control. These developments do not empty constitutional domestic endeavors but may weaken the holistic prospective of states’ constitutionalism by cutting across their borders, their ethos, and by threatening their purview over the coherent singularity of the self. Universalization, therefore, does not simply emerge from the universal shareability of human-related ideals like those enshrined in the French Revolution and the Enlightenment. Universalization unfolds otherwise as well, through the different paths of globalised regulatory regimes gaining legalized power on crucial issues of alleged “coordination” by sidelining, replacing, or overwriting the thick normative fabric that domestic constituencies, demois, publics, national, or constitutional identities generate. What is more, on the bottom layer, such universalization ironically accounts for the widening divide between ethnos and demos, out of those trans-state processes crosscutting well-ordered territorial partitions (like those respected in the Spanish model or in the EU setting recalled by Rosenfeld). Universalization problems emerge out of the need for a politics of inclusion capable of coping with the decoupling of democratic citizenship from territorial shelves in the new scenarios of migrants and refugees (not drawing on an alleged tabula rasa, as was the case in the age of U.S. nation building and constitution making). The issue of countering the side effects of the imbalance of power resurfaces, as does that of disregard and exclusion stemming from the global exportation—uneartned from the state ethos borders—of some of the liberal
ideals of modernity. Among the answers to these new circumstances, ideas like global constitutional pluralism and transnational societal constitutionalism have developed and, in a different vein, a universal citizenship in democratic cosmopolitanism.

Were the EU to confront such challenges, or, at least, come to realize their depth, it might cease to be simply a negation of its past, or of something else, and start thinking about its role: potentially, the role of a regional centripetal force offering anticipated interpretations of the above-mentioned national, supranational, and global interplay, thus countervailing at the same time the centrifugal emptying of national constitutions’ control over their own identities.

Building Europe would in that case be a repositioning of the constitutional project by a qualitative re-elaboration of the kind of constitutionalism that Rosenfeld follows through the lines of the last centuries; it is one that can hardly survive, in a sheer formalized-universalized mode, and would fade if cut off from the richness and contents of plural forms of life and, in my view, of constitutional recognitions. But that re-elaboration consists of an up-to-date revision under epochal circumstances essentially not comparable with post–World War II needs and collective feelings. Still, such a task involves the upgrading to “unity in diversity” and ethnos/demos balancing, albeit in a very new light.

For the EU to be a community of destiny or a space for hope depends less on an ethnos-based world of affluent and civilized nation-states, and more on a perspective of rethinking universality, ethos, and diversity vis-à-vis, say, an invasive necessity of global governance. To put it in Rosenfeld’s style, the European constitutional selves have to reconstruct and reinvent themselves in a new dimension in order to preserve their acquis, albeit the measure of Aufhebung here is to be seen, I would underscore, much more in the supranational addition than in the negation process. This makes clear how, unlike the “e pluribus unum,” European order primacy is a second-level one, therefore rooted in a constant need for mutual recognitions and confirmation (as, one might say, in an everyday plebiscite).

This brings us to the issue—set aside earlier—of European constitution making and failures, namely, the question of what constitutionalism, as a doctrine and a movement, must offer as the moving reason for (European) self-committing. In Rosenfeld’s picture, it is somehow presupposed that the normative appeal of constitutionalism works through the routes afforded by material, cultural, and generally historical contradictions. What is said to be changing, however, are the dialectical results in constitutional identity and the interlinking with the multiple identities of the collective self. Still, when we approach the externalization and exportation toward regional/global

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holisms, when, as Rosenfeld rightly feels, whatever projection of used “patriotism” may fail to serve in the “positive” not purely negative mode, then maybe something more will be in order. What is to undergo a change—say, through a further reading of Jungian transformational symbolism\(^\text{24}\)—having to do with a forward-looking and newly forged engine, is the source of commitment and projection. And maybe that is constitutionalism itself.