Constitutional identity has become one of the most important and hotly contested concepts in contemporary constitutional theory and practice. It has been repeatedly invoked in debates concerning EU integration, constitutional reform and revolution, and the spread of ethno-nationalist populism, democratic backsliding, and constitutional retrogression. Yet the concept’s precise foundations, meaning, scope, and dynamics of continuity and change remain somewhat unclear and under-explored. This contemporary and definitive volume aims to address this stark gap. Featuring some of the world’s leading scholars of comparative constitutionalism, constitutional theory, and constitutional politics, this book provides a comprehensive, first-of-its-kind theoretical, comparative, normative, and empirical account of the concept of constitutional identity. It will be of great interest to scholars, students, jurists, and constitutional drafters alike.

Ran Hirschl is the David R. Cameron Distinguished Professor in Law and Politics at the University of Toronto and a Fellow of the Royal Society of Canada.

Yaniv Roznai is an Associate Professor at the Harry Radzyner Law School and Co-Director of the Rubinstein Center for Constitutional Challenges, Reichman University (Interdisciplinary Center Herzliya).
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THE FOUNDATIONS AND FUTURE OF CONSTITUTIONAL IDENTITY

Edited by
RAN HIRSCHL
University of Toronto

YANIV ROZNAI
Reichman University
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Aslı Bâli is Professor of Law at Yale Law School.

Christina Bambrick is the Filip Family Assistant Professor of Political Science at the University of Notre Dame.

Upendra Baxi is Emeritus Professor of Law at the University of Warwick and former Vice Chancellor of the Universities of South Gujarat and Delhi.

Gautam Bhatia is Postdoctoral Research Fellow at the SCRIPTS Centre for Excellence at Humboldt University.

Ngoc Son Bui is Professor of Asian Laws in the Faculty of Law at the University of Oxford and a Fellow of St Hugh’s College, Oxford.

Victor Ferreres Comella is Professor of Constitutional Law at the Pompeu Fabra University.

Oran Doyle is Professor of Law at Trinity College Dublin and Research Professor at the Academia Sinica, Taiwan.

Justin Buckley Dyer is Executive Director of the Civitas Institute, Professor of Government, and Jack G. Taylor Regents Professor at the University of Texas at Austin.

Zachary Elkins is Professor of Government at the University of Texas at Austin.

Connor M. Ewing is Assistant Professor in the Department of Political Science and Fellow of Trinity College at the University of Toronto.

Pietro Faraguna is Associate Professor of Constitutional Law at the University of Trieste.

Stephen Gardbaum is the Stephen Yeazell Endowed Chair in Law at UCLA School of Law.
List of Contributors

Tom Ginsburg is the Leo Spitz Distinguished Service Professor of International Law at the University of Chicago School of Law.

Mark A. Graber is a University System of Maryland Regents Professor at the University of Maryland Francis King Carey School of Law.

Gábor Halmai is a part-time professor at the Robert Schuman Centre at the European University Institute and Director of the project “TRust, Independence, Impartiality and Accountability of Legal Professionals under the EU Charter – Part 2” (TRIIAL 2).

Ran Hirschl is the David R. Cameron Distinguished Professor in Law and Politics at the University of Toronto.

Ridwanul Hoque is formerly Professor of Law at the University of Dhaka and currently a university professorial Fellow at Charles Darwin University.

Gary J. Jacobsohn is the H. Malcolm Macdonald Professor of Constitutional and Comparative Law in the Department of Government and Professor of Law at the University of Texas at Austin.

Heinz Klug is the John and Rylla Bosshard Professor of Law at the University of Wisconsin Law School.

Keigo Komamura is Professor of Law and Vice President of Keio University.

Hanna Lerner is Professor and Head of the School of Political Science, Government and International Affairs at Tel Aviv University.

Sanford Levinson is the W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law and Professor of Government at the University of Texas at Austin.

Eugénie Mérieau is Associate Professor of Public Law at the University of Paris 1 Panthéon-Sorbonne and a member of the Sorbonne Institute of Philosophical and Legal Research (CNRS).

Jaclyn L. Neo is Associate Professor of Law and Director of the Centre for Asian Legal Studies at the National University of Singapore.

Monika Polzin is Professor of Public Law and Public International Law at the Institute for European and International Law at Vienna University of Economics and Business.

Michel Rosenfeld is University Professor of Law and Comparative Democracy, the Justice Sydney L. Robins Professor of Human Rights, and Director of the Program on Global and Comparative Constitutional Theory at the Benjamin N. Cardozo School of Law of Yeshiva University.
List of Contributors

Yaniv Roznai is Associate Professor and Vice Dean at the Harry Radzyner Law School and Co-Director at the Rubinstein Center for Constitutional Challenges at Reichman University.

Julian Scholtes is a Lecturer in Public Law at the University of Glasgow.

Miguel Schor is Professor of Law and Associate Director of the Constitutional Law Center at Drake University.

Howard Schweber is Professor of Political Science and Legal Studies at the University of Wisconsin–Madison.

George Thomas is Burnet C. Wohlford Professor of American Political Institutions at Claremont McKenna College.

Mila Versteeg is the Henry L. and Grace Doherty Charitable Foundation Professor of Law at the University of Virginia.

Joanne Wallis is Professor of International Security in the Department of Politics and International Relations at the University of Adelaide.
It has become a staple of much contemporary discourse that ample space be provided for airing both the misgivings and the endorsements that have accumulated around the vexed subject of identity politics. For some, the invocation of that term makes possible a necessary discussion of the injustices that have too often burdened marginalized groups, while for others it is an impediment to achieving progress in fulfillment of a societal common good. So far as I know, constitutional identity, this volume’s focus of interest, has not had a direct association with the politics of identity, which perhaps partly explains the congenial ambience that until recently has marked its relatively brief conceptual history. That may be changing.

My first engagement with the genome question had nothing to do with the controversies that now commonly attend discussions of the specific variant of identity that relates to constitutional orders. It was initially a decidedly academic exercise in an intellectual progression that followed several efforts to understand the role of antecedent principles in constituting a polity. What became plainly evident in the three cases that I had examined in some detail – the United States, Israel, and India – was that the presence of great variability in constitutional design and development did not cause me to question my increasing appreciation for the ubiquity of the process by which constitutional identity evolves.

To be sure, the very supposition that an evolutionary process is critical for thinking about the identity concept may be questioned. It presumes a dynamic aspect that is not obvious when viewed through the lens of centuries-old classical theories of personal identity, in which, as the eighteenth-century Scottish philosopher Thomas Reid argued, “an uninterrupted continuance of existence” is the essence of what constitutes an individual as a person. Moving from the individual to the community of individuals who collectively inhabit a polity, we might expect to find something similar, so that once constituted a state must, in James Madison’s famous account, rely on continuity to achieve its “requisite stability.” To the extent that a constitutional order’s identity is in flux, sadly we will accordingly find it “deprived of that veneration which time bestows on every thing.”

Preface

Gary J. Jacobsohn
But, as the United States illustrates in a way that is in some respects more discernible in Israel and India, a stable identity is at odds with the disharmonic reality that is endemic to the constitutional condition. For Americans who have often heard their exceptionalism described with reference to the people-constituting function of their founding text, it is chastening to be reminded of the alternative visions that were contained within the folds of that document. If creating a people was a hallmark of the Constitution, the tensions and incongruities with which it was encumbered ensured that this project would be ongoing and protracted. Add to this that it is no part of exceptionalism in the United States or elsewhere that a constitutional order also encompasses disharmonic interactions between the aspirations inscribed in its governing charter and the social order within which it functions, and the mutability of constitutional identity can no longer rightly be called into question.

Or so we might conclude if the scope of our vision extended no further than the rarefied confines of scholarly inquiry. Concepts, however, do not necessarily retain the properties of their rationally derived meaning when removed to the less detached setting of political contestation. Consider, for example, how the idea of democracy has fared in the grasp of political actors determined to obscure their autocratic aspirations through the assuasive and tendentious invocation of a popular-sounding system of rule. With identity, too, it should come as no surprise that there will be those who stand to benefit from a strategically deployed exercise of concept manipulation. Thus, in the three cases that provided me with the resources to begin theorizing about the instability of constitutional identity, the historical record is replete with examples of opportunistic denial of what an objective assessment of the concept divulges. Instead, a static conceptual understanding, according to which identity is selectively discovered in text or history and then largely regarded as unalterable, has often emerged at moments when the effects of constitutional disharmony have fashioned an outcome that is viewed as unacceptable to endangered holders of power.

Such a moment has arrived in a profoundly significant way in the wake of recent developments in Europe and elsewhere. Thus, invocation of constitutional identity as an integral cog in the scheme by which the concerning phenomenon of democratic backsliding has progressed is increasingly evident in the radical politicization of the concept. What had previously been prized for its heuristic properties is now appreciated as well by some for its instrumental value in preserving a particular regime type whose essential features manifest unmistakable authoritarian proclivities. Accompanying the resistance to this development are the governmental incumbents’ indignant allegations of illicit intrusion into the prerogatives of sovereign autonomy. Yet notable too is the reaction within the academic community to the nefarious purposes to which constitutional identity has been deployed. While some scholars have pushed back against the transformation of a conceptual tool into an implement of power maintenance, others have called for its terminological
abandonment, or at least for an acceptance of a seriously restricted scope for the idea’s application.

How, then, can we make sense of this abusive appropriation of the concept of constitutional identity by political actors intent on facilitating the demise of liberal constitutionalism? Perhaps by attempting to understand what they are doing in light of that other terminological adaptation, which is how we arrive at the door of identity politics. To be sure, the controversy surrounding this term underscores its elusiveness as an analytical marker; still, its ubiquitous usage is generally meant to convey important information about the historical injustices visited upon marginalized groups, and the consequent necessity for political action on behalf of those whose exclusion and subjugation have left them believing there are no options other than to pursue an identity-based effort to achieve rightful recognition in the social order. When viewed through this prism, identity politics is essentially inclusionary, as the goal of its promoters is integration – though not necessarily assimilation – into the broader societal mainstream.

Constitutional identity’s current quandary is the direct result of its having been implicated in the recent rethinking of identity politics to support an exclusionary raison d’être at odds with the political dynamic that inspired its early proponents. While this development is not confined to one geographic locale – in the United States, for example, it plays out in the rise of a Christian nationalism whose champions desire nothing more than a reconstruction of constitutional identity to conform to a presumed distant past – its most advanced progression is evident in Europe, and most unequivocally in the Hungarian case. As is clear in many of its populist-inspired undertakings, and especially notable in its response to the European Union’s migratory policies, that country’s government (abetted by a compliant supreme court) has embraced, for explicitly exclusivist purposes, an historically rooted inviolable concept of constitutional identity. Indeed, an imagined “historic constitution” now functions as the principal protective shield against what is tendentiously portrayed as a threat to the survival of the nation’s ethno-cultural identity. If the familiar version of identity politics is fueled by a felt need to counter a majority culture’s domineering denial of minority group self-determination, the legal narrative that we find increasingly associated with the phenomenon of democratic decline is best understood in opposition to it, namely as a grievance-generated constitutionally framed instantiation of majoritarian identity politics.

My hope is that this disturbing conceptual misappropriation will be short-lived, or at least that its insidious influence will diminish over time. To break the linkage between constitutional identity and identity politics will require more than any volume of essays can by itself achieve. Scholars, however, who analyze and reflect on the nuances of constitutionalism can through their efforts contribute to the necessary work of those in the political and judicial arenas whose resistance to the weaponization of constitutional identity should be encouraged. As will be gleaned from many of the pages in what follows, that effort is best situated in an
appreciation for the dynamic dissonance in constitutional identity rightly understood. Purging the idea of its disharmonic aspect enables its ill-intended guardians to attain their desired outcomes with unwarranted ease. The danger thus arises and becomes concerning when the failure to acknowledge ambiguity and incongruity in the genome of constitutionalism is allowed to go unchecked. If there is a salutary takeaway from this book, it lies in the greater awareness of what can be done to mitigate this possibility.
Acknowledgments

The idea to curate a volume of original essays centering on the key concept of constitutional identity, and on Gary J. Jacobsohn’s essential contributions to its formulation, was born in the pre-COVID era. Like many other dimensions of scholarly life, it was on hold due to the pandemic. We enthusiastically picked it up again in late 2021. All the chapters included in this volume have benefited considerably from discussion and detailed feedback during a three-day authors’ workshop in November 2021. We thank Antonia Baraggia, Amnon Cavari, Joey Cozza, Federico Fabbrini, Meital Pinto, Adam Shinar, Manal Totry-Jubran, and Han Zhai for chairing and commenting on the various papers. We thank the many contributors to this volume for their dedication, responsiveness, and of course for their rich, thought-provoking takes on constitutional identity. We are likewise grateful to Marianne Nield at CUP, as well as to the three anonymous reviewers for their exceptionally helpful suggestions on a draft of this project.

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We dedicate this volume to Gary J. Jacobsohn, a great thinker, mentor, and friend. Winner of the American Political Science Association Law and Courts Section’s 2019 Lifetime Achievement Award, his many writings over the years contributed considerably to the rise of comparative constitutional studies as one of the most vibrant areas of inquiry and practice in contemporary public law. Our understanding of constitutional identity – arguably one of the most important concepts in contemporary constitutional thought, constitutional law, and constitutional politics – would not be nearly as sophisticated without Jacobsohn’s decades-long groundbreaking scholarship in comparative constitutional theory.