WHAT’S IN A LABEL? THE EU AS ‘ADMINISTRATIVE’ AND ‘CONSTITUTIONAL’

Peter L. Lindseth
University of Connecticut School of Law

[NOTE: As a late addition to the conference program, I was only able to pull together this basic outline of the contribution I plan to make to the second edition. I am nonetheless anxious to receive feedback regarding the ideas I sketch here, many of which will be deeply familiar to those who know my work. The outline below is informed by the institutionalist and historiographical theories outlined in the attached book chapter: “Between the ‘Real’ and the ‘Right’: Explorations Along the Institutional-Constitutional Frontier,” forthcoming in Constitutionalism and the Rule of Law: Bridging Idealism and Realism (Maurice Adams, Ernst Hirsch Ballin and Anne Meuwese, eds., Cambridge University Press). I look forward to the discussion in New Haven.]

One of the most enduring clichés regarding the EU is that supranational governance is “sui generis,” with a character that cannot be captured by “statal” categories. The EU is “much more than an international organization” but “much less than a federal state” – or so the old saying goes.

While this old saying is no doubt true, it does little to help us understand the nature of the EU from a specifically legal-historical perspective. Perhaps more importantly, it does not tell us how that history helps to determine the limits of the integration project. Indeed, much of the effort to capture the essence of European governance through labeling is often guided by normative considerations as to what the integration phenomenon should become rather than a more historically informed understanding of where it has come from. This normative approach leads, in my view, to ultimately misguided claims that the EU enjoys a kind of autonomous democratic and, more importantly, constitutional legitimacy in its own right. This is in fact a category mistake and a dangerous one at that, as the recent series of crises besetting European integration attest.

The EU is better understood as a supranational extension of administrative governance as it developed on the national level over the course of twentieth century, indeed before. Its legitimacy is ultimately administrative in the sense that constitutional “principals” (the historically “constituted” bodies of the member states) have delegated quite significant amounts of regulatory power to EU technocratic and adjudicative bodies to act as their “agents.” The EU’s legitimacy – despite the often-lazy invocations of its sui generis “constitutional” character – is ultimately derivative of the member states that created it, even as the EU exercises important powers of supervision over those very same principals.

The EU’s normative and regulatory power is not merely “technical” nor is it somehow “non-political” – as some critics of my administrative label have mistakenly suggested is my meaning. Rather, anyone familiar with modern governance knows that administrative actors engage in the very essence of politics (confronting questions of values and the allocation of scarce resources) and this is certainly true of the EU as well. Nor does my administrative framework deny that EU public law is deeply concerned with the rights of private parties vis-à-vis public power wherever located – this too has been one of the deepest preoccupations of administrative law as it has developed over the last 150 years (see, e.g., the French Conseil d’Etat).
This chapter will advance the argument regarding the EU’s ultimately administrative character by looking at four interrelated elements of the EU’s legal and political history:

• First, and most fundamentally, *nondelegation*: The EU’s normative and regulatory power is vast but it is not unlimited; more importantly, it is not unlimited in ways that point directly to the EU’s administrative character. For all the EU’s normative and regulatory power (not untypical of administrative governance on the national level), it lacks the crucial attribute of historically “constituted” governance: the autonomous capacity to mobilize resources, whether human (defense or policing) or fiscal (taxation, spending, and borrowing). The significance of this factor is explored in detail in the attached book chapter, and hopefully you’ll get a chance to read it.

• Second, *mediated legitimacy*: As to those (primarily regulatory) powers that the member states have been willing to delegate, the EU has been unable to develop the capacity to fully legitimate their exercise without the oversight of the historically “constituted” bodies – executive, legislative and judicial – on the national level. Although the member states, as “principals,” have chosen to relinquish the direct capacity to control their supranational agents (for sound reasons), the lack of direct control does not render the EU an autonomously “constitutional” level of governance. Rather, the evolution of EU public law over the last 65 years – particularly the evolution of national forms of oversight (if not control) – tells a different story: The ultimate democratic and constitutional legitimacy of supranational normative and regulatory power (rather than, say, the technocratic and legal legitimacy) has remained surprisingly national, despite the vast shift in regulatory power to the EU. This is the thesis of my book *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010).

• Third, *canons of construction*: Here, admittedly, my argument shifts from legal-historical description to more explicit normative critique. Despite the “administrative” character of EU as I have just described it (bound up, I should add, with deeper socio-political/socio-cultural questions of the absence of a European “demos”), the European Court of Justice (ECJ) has chosen a different interpretive approach: It has generally interpreted the EU’s “enabling legislation” – the European treaties – as if they were a “constitution” and as if the rulemaking and enforcement apparatus that they create enjoy autonomous democratic and constitutional legitimacy in their own right. On crucial questions of treaty interpretation (particularly as to filling gaps or resolving ambiguities), the ECJ has fairly consistently sought to maximize the power of EU institutions vis-à-vis the member states, regardless of the purported intent of the drafters or any claim of original public meaning. The Court’s primary justification for expansive interpretation has been the functional necessity of the goals of integration as the Court expansively defines them, combined with strategic invocations of private-rights protection. The Court has thus generally ignored the impact that this functionalist, teleological and rights-based approach on democracy and constitutionalism on the national level. In my view, the Court should have proceeded much more cautiously, with a deep sense of the EU’s more limited legitimacy vis-à-vis the experience of self-government on the national level. First, as to treaty interpretation, the Court should apply a version of “constitutional avoidance” guided by a “clear statement” rule in interpreting gaps and ambiguities (rather than the “teleological method of interpretation” that has long prevailed). Moreover, in the interpretation of EU rulemaking
pursuant to the treaties, the Court should apply a doctrine modeled on *Chevron* and defer to the reasonable interpretations of the more democratically legitimate member states in the face of gaps and ambiguities in EU legislation. This section of the argument draws from positions I first staked out in “Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community,” 99 *Columbia Law Review* 628 (1999) and returned to more recently in “Equilibrium, Democracy and Delegation in the Crisis of European Integration,” 15 *German Law Journal* 529 (2014).

• Fourth and finally, *consequences*: There are risks in overestimating the nature of the EU’s autonomous legitimacy, treating as democratic and constitutional what is, in socio-political/social-historical reality, an essentially technocratic and juristocratic (i.e., “administrative”) form of governance. These risks are manifest not merely in the populist backlash currently afflicting the EU today, born of long concerns over the EU’s “democratic deficit.” Rather, the EU is afflicted by a “democratic disconnect,” which has arguably led European elites into profound errors of institutional and policy design over the last two decades, notably the Economic and Monetary Union (EMU) and Schengen border-free zone. Both projects went forward without regard to the deeper limits of the EU’s capacities (and more importantly, legitimacy), which I would argue are derived from the ultimately “administrative” character of the integration project. The attached book chapter again summarizes this argument, but I have explored it previously elsewhere as well, e.g., in “Author’s Reply: ‘Outstripping’, or the Question of ‘Legitimate for What?’ in EU Governance,” 8 *European Constitutional Law Review (EuConst)* 153 (2012) [special book symposium on Power and Legitimacy].

Again, I look forward to the discussion in New Haven.

-P.L.L.
Between the ‘Real’ and the ‘Right’: Explorations Along the Institutional-constitutional Frontier

PETER L. LINDSETH*

The aim of this chapter is to offer some fragments of a theory of institutional (and by extension constitutional) change that might shed some light on the interplay between idealism and realism at the heart of this volume. The chapter first lays out some sources and influences for my own understanding of that interplay, using the work of Maurice Hauriou (1856-1929) as the point of entry into the discussion. Hauriou was perhaps France’s greatest administrative law scholar of the late-nineteenth and early-twentieth centuries and, more importantly for our purposes, the progenitor of the ‘theory of the institution and the foundation’. More clearly than any other theorist in my view, it was Hauriou who articulated the ‘special phenomenon of the institution [as] the transformation of an organization of fact into an organization of law, of the real into the right’. Building on Hauriou’s insights (particularly as to the role of ideas in institutional evolution), this chapter attempts to distill out elements of a theory of institutional change in three primary dimensions – functional, political, and cultural – while also introducing certain extensions and complications. From there, the discussion turns to a particular form of interaction between the ‘real’ and the ‘right’: the transformation of a set of ‘institutions’ into a robust ‘constitution’ for a political community. This transformation may be analogized to a kind of ‘phase transition’, to use the language of the natural sciences. Its key manifestation is the manner in which certain institutions attain a legitimacy to exercise not merely regulatory or normative power but also the power of compulsory mobilization, whether human (defense or policing) or fiscal (taxation, spending, and borrowing). Legitimate compulsory mobilization, this discussion suggests, is a crucial element in the political metabolism of a community, converting social resources into work for public ends. It is the ultimate boundary – the Rubicon, if you will – between a merely ‘institutional’ regime as opposed to a robustly ‘constitutional’ order for a particular political community. To illuminate the significance of this institutional-constitutional frontier, the chapter concludes with discussion of an historical example – the emergence and evolution of supranational governance in Europe over the last six and half decades.

Some Old Questions

How does a situation ‘of fact’ become one ‘of law’? How, in other words, is the ‘real’ transformed into the ‘right’? Conversely, how might conceptions of ‘right’ that prevail in a particular community help to shape or reshape its social or political realities? How, in short, do the realms of ‘real’ and ‘right’ interact in a social or political order over time?

* Olimpiad S. Ioffe Professor of International and Comparative Law, Director of International Programs, University of Connecticut School of Law
These admittedly abstract questions are as old (and as fundamental) as civilization itself, and I take them to be central concerns of this volume. When we inquire into the relationship between the real and the right, we are searching, at least initially, for an understanding of how a social fact evolves into something that is understood to exist by, under, or through law – however conceived, however aspirational, however even ironic – as in, say, ‘the law of war’. The latter example is suggestive precisely because it lays bare the perhaps innately human desire to impose order on even violence and chaos. But then the dynamics of ‘order out of chaos’ may be the thread that runs through this entire process, even as those dynamics are ultimately obscured, in the social and political domains at least, behind the institutional and legal constructions that we have built up over time.

These institutional and legal inheritances profoundly shape our present-day perspective, as well as the interaction between the real and the right going forward. As one historical sociologist has rightly observed, ‘the world is always already institutionalized. Change unfolds on historically specific terrain’. We cannot escape these inherited institutional and legal constructions. It is through them – and perhaps more importantly, through the cultural process of internalizing their seeming normative demands (whether explicitly or implicitly) – that we claim (hope) to live in a society governed by the ‘rule of law’ rather than by the whims of power and force.

This is a complex process, of course, and I do not pretend to offer a complete examination of it here. Rather, what I hope to offer are fragments of a theory of institutional (and by extension constitutional) change that might shed some light on the interplay between idealism and realism at the heart of this volume. After laying out some sources and influences for my own understanding of that interplay, I attempt to distill out elements of a theory in three primary dimensions – functional, political, and cultural – while also introducing certain extensions and complications. From there, the discussion turns to a particular form of interaction between the ‘real’ and the ‘right’: the transformation of a set of ‘institutions’ into a robust ‘constitution’ for a political community. This transformation may be analogized to a kind of ‘phase transition’, to use the language of the natural sciences. Its key manifestation is the manner in which certain institutions attain a legitimacy to exercise not merely regulatory or normative power but also the power of compulsory mobilization, whether human (defense or policing) or fiscal (taxation, spending, and borrowing). Legitimate compulsory mobilization, this discussion suggests, is a crucial element in the political metabolism of a community, converting social resources into work for public ends. It is the ultimate boundary – the Rubicon, if you will – between a merely ‘institutional’ regime as opposed to a robustly ‘constitutional’ order for a particular political community.

To illuminate the significance of this institutional-constitutional frontier, the chapter concludes with discussion of an historical example – the emergence and evolution of supranational governance in Europe over the last six and half decades. European governance is characterized by the migration of extensive regulatory and normative authority to supranational

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2 E. S. Clemens, ‘Rereading Skowronek: A Precocious Theory of Institutional Change’, *Social Science History*, 27 (2003), 446.
institutions. Nonetheless, it is also characterized by the retention of powers of legitimate compulsory mobilization (human and fiscal) in constitutional bodies at the national level. This distribution of power and legitimacy suggests that supranational governance in Europe—regardless of its obviously profound constitutional implications for the states and individuals that comprise it—should not be understood as autonomously ‘constitutional’ in its own right. Rather, European governance remains ‘institutional’—or, as I have characterized it elsewhere, ‘administrative’—relative to ‘constitutional’ bodies on the national level. This socio-institutional character (the ‘real’) defines the parameters for what European integration, in its current incarnation, can realistically achieve, and consequently also the legal character of the integration project (the ‘right’). The EU’s lack of autonomous constitutional legitimacy in the most robust sense—and hence the lack of autonomous powers of legitimate compulsory mobilization at the supranational level—helps to explain Europe’s response to a series of recent crises, whether in the Eurozone, the influx of refugees, or the response to terrorist threats.

Sources and Influences

Our point of entry into this discussion is an examination of the nature of institutional foundation and change. I begin, however, not with the burgeoning contemporary social science literature on the topic, no matter how important and rich that literature no doubt is. My starting point is rather both older and a bit more obscure (at least to an English-language readership): the work of Maurice Hauriou (1856-1929), the doyen de Toulouse and the progenitor of the ‘theory of the institution and the foundation’. Hauriou is recalled in France as perhaps the country’s greatest administrative law scholar and a giant in the glory years of French public law under the Third Republic. Because so little of his work has found its way into English (apart from old translations of excerpts and slivers here and

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5 Hauriou’s Précis de droit administratif appeared in eleven editions between 1892 and 1927, his Principes de droit public appeared in two editions in 1910 and 1916, and his Précis de droit constitutionnel appeared in two editions in 1923 and 1929. Hauriou also regularly published analyses of decisions of the French Conseil d’État which were collected in three volumes as Notes d’arrêts sur décisions du Conseil d’État et du Tribunal des conflits publiées au Recueil Sirey de 1892 à 1928 (1929).
there), Hauriou has received relatively little attention in scholarly discussions in the English-speaking world. That is unfortunate. It was Hauriou, more clearly than any other theorist in my view, who articulated the ‘special phenomenon of the institution [as] the transformation of an organization of fact into an organization of law, of the real into the right’. In this way, the institution came to constitute, for Hauriou, ‘the juridical basis of society and the state’. And as we will see below, his theory of law also helps us understand the institutional-constitutional frontier as well as the role that law plays in the overall process of institutional and constitutional change.

My focus in this section will be on what Hauriou called ‘institution-persons’, or social bodies like states, corporations, associations, labor unions, etc. Hauriou discerned three elements to their foundation: (1) the idea of the work or enterprise to be realized in a social group; (2) the organized power put at service of this idea for its realization; (3) the manifestations of communion that occur within the social group with respect to the idea and its realization. This theory of institutional foundation and evolution thus focuses on the interaction of ideational, political, and social factors rather than viewing any single factor as predominant.

In stressing this interaction, Hauriou was consciously staking out a position between two extremes he saw dominating the theoretical discourse of his time. At one end was the theory of droit objectif articulated by Léon Duguit, who emphasized social conditions in shaping the content of law and the direction of legal change. At the opposite extreme was what Hauriou characterized as the German notion of Herrschaft, which emphasized political factors, in extremis armed force and violence (in Hauriou’s gloss of Herrschaft, ‘[f]orce becomes law by success. Constituted law is an attack that has succeeded’). I take up Hauriou’s critique of each position in turn, because each again helps us understand Hauriou’s crucial insight: that institutional and legal change flows from the interaction of ideational, political, and social factors rather than the predominance of any one factor alone.

Léon Duguit was Hauriou’s principal interlocutor in France at the end of the nineteenth and beginning of the twentieth centuries. As a devoted follower of Durkheim, Duguit emphasized the predominance of ‘objective’ social forces in the creation of social ‘solidarity’, which Duguit deemed to be society’s predominant règle de droit. Duguit largely dismissed the role of the individual and ‘subjective’ rights, which in his view were consequential only to the extent that they conformed to the droit objectif, which had clear primacy. This is one reason why Duguit had great influence on the development of functionalist legal theories in the early twentieth century – i.e., the idea that law evolves as a function of objective social demand as well as the problems that society is seeking to solve at any given time. From this functionalist perspective,
political will or power could play at most a secondary role in the process of institutional change, particularly as it related to the origins and contours of the state.13

Hauriou did not deny the role of social conditions or of functional demand in the process of social, political and legal change. Rather, his concern was the failure of Duguit’s theory to account for agency: In Hauriou’s view, ‘the social milieu has only a force of inertia that finds expression in either a power of reinforcement of individual proposals when it approves them, or a power of opposition and reaction when it disapproves them; but of itself it has neither initiative nor power of creation’.14 The ‘social milieu’, in other words, has no agency of its own, even if it no doubt created conditions that would shape human agency. For this reason, Hauriou found Duguit’s social or functional objectivism to be ‘excessive’.15 He emphasized, rather, the historical complexity of the relation between individualist and socializing tendencies in law and history:

There has always been and there will always be something of the social function beside the individual right, something of the social institution beside contract, but also always something of the individual right beside the social function and something of the contractual beside the social institution. There is a duel of antagonistic forces here like that of the earth and the sea.16

Hauriou thus saw a dialectic of individual and social forces (interests/ideas and conditions/structures) in the process of institutional emergence and change. According to Hauriou, one of Duguit’s principal failings was his failure to see that ‘currents of ideas’ could act as objective social facts (on this point, Hauriou admitted the influence of Fouillée’s concept of idée-forces). Hauriou concluded:

From the positive point of view, the question of the ‘individual’ and the ‘social’ proves to be reinscribed upon the current of ideas; some of them have individualist ends and others have social ends; both realize society and law. By their very opposition they keep each other in a certain state of balance. But this practical combination, while neutralizing certain of their effects, does not destroy either one of them; on the contrary, it utilizes both.17

But if ideas could have a social ‘force’ in this way, what then, in Hauriou’s view, is the role of political power, particularly naked expressions of armed force and violence pure and simple? Here we must shift our focus to Hauriou’s critique of Herrschaft, the other conceptual framework that Hauriou was arguing against in the construction of his own theory of institutional change.

16 Ibid., 46.
17 Ibid., 50. In his stress on the role of ideas and the individual in processes of social change, Hauriou drew from (and consciously took the side of) Gabriel Tarde in his ongoing debate with Durkheim. For more details on that debate, see M. Candea (ed.), The Social After Gabriel Tarde: Debates and Assessments (Routledge, 2010).
Once again, in Hauriou’s gloss of *Herrschaf*, ‘[f]orce becomes law by success. Constituted law is an attack that has succeeded’. 18 Hauriou, however, refused to equate law with a superior physical force. Rather, he argued that

[if] an organization is created simply by force, … it then desires to live in peace. But to obtain a peaceful existence the new organization must obtain a pardon for its origin, must modify itself, must put itself in harmony with the conscience of jurisprudence. Peaceful existence is possible only when the demands of the law are satisfied. Until that is achieved the usurper must maintain an armed peace, and an armed peace is not a peaceful existence. So any organization derived from force becomes neither institutionalized nor legitimate save when law has beatified it. Nor does law beatify by reason of force alone.19

One might fairly ask, however: What is this ‘law’ that ‘institutionalizes’, ‘legitimizes’, ‘beatifies’, and/or legalizes by ‘peaceful existence’? Hauriou insisted that he was not speaking of ‘natural law’, at least not of a sort that is identifiable a priori. Hauriou’s institutionalizing and legitimizing ‘law’ is revealed socially and culturally, in the continuing process of historical development manifested in the balance of forces that society realizes in itself over time. This explains why – beyond the ‘idea’ and ‘organized power’ in service of that idea – Hauriou added the third element in the process of institutionalization: ‘manifestations of communion that occur within the social group with respect to the idea and its realization’.20 It is through these ‘manifestations of communion’ that a social group takes a kind of ownership of an organization of fact (whether created by political force or in response to functional demand). And it is through this process of internalization that a social legitimacy emerges, one that truly allows the ‘real’ to be viewed as ‘right’ for that particular community. The forms of law play a crucial role here, because, as Hauriou maintains, institutions are fundamentally both historical and legal constructions – they are ‘born, live, and die’ through acts of foundation, administration, and/or dissolution that the community experiences, in a cultural sense, as having a specifically legal effect.21

If one senses religious overtones in some of Hauriou’s terminology (e.g., ‘beatify’ or ‘communion’), it is no coincidence. Beyond his committed liberalism, Hauriou regarded himself as a ‘Catholic positivist’ who, in effect, sought to accommodate the role of tradition in era of dramatic social change (see, e.g., his first major work entitled *La Science sociale traditionnelle* (1896); now available in translation).22 But his theory of institutional foundation and change, despite its religious overtones, was not inherently conservative or traditionalist, even if his own personal preferences may have tended in that direction. His emphasis on the interplay of social, political, and ideational factors has echoes in the work of several later, distinctly non-conservative thinkers who stressed similar dynamics in their inquires into the nature of historical change.

Consider, for example, Michel Foucault. Foucault found that there were ‘manifold relations of power which permeate, characterize and constitute the social body’, which depend on ‘discourses

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18 Hauriou, ‘An Interpretation of the Principles of the Public Law’, 816.
19 Ibid.
20 Hauriou, ‘La Théorie de l’institution et de la fondation’, 100–1.
21 Ibid., 100.
22 Hauriou, *Tradition in Social Science.*
of truth’ in order to establish and maintain that power.\textsuperscript{23} Likewise, Hauriou saw a multiplicity of law-giving powers in society, the institutionalization of which depended on the organization of ‘power’ that served to realize the ‘idea’ that animated (and in some sense defined) the life and contours of an institution.\textsuperscript{24} Hauriou would have concurred with Foucault that one must ‘conduct an ascending analysis of power, starting, that is, from its infinitesimal mechanisms, which each have their own history, their own trajectory...’ (emphasis in original).\textsuperscript{25} Hauriou, in an analogous manner, argued that ‘the sources of law most directly derived from government are subordinated to those hardly derived from that source at all’.\textsuperscript{26} In some sense anticipating the recent insights of what has come to be known as ‘legal pluralism’,\textsuperscript{27} Hauriou called this the ‘decentralization’ of law. From this perspective, custom was superior, not in any normative sense but in a positive or realist one: Constitutions, statutes, ordinances, decrees, and all other manner of acts reflecting a subjective political will, need to contend with custom (not merely explicitly held ideas but also practices) in order to be ‘legalized by peaceful existence’. Hauriou shared with Foucault the desire to understand these mechanisms historically and in an ascending fashion, from their most decentralized manifestations (for example, the ‘infinitesimal’ power of custom) rather than their more centralized forms (the state, constitutions, etc.).

Consider also the historiographical theory of E.P. Thompson. According to Thompson, ‘historical change eventuates ... because changes in productive relationships are experienced in social and cultural life, refracted in men’s ideas and their values, and argued through their actions, their choices and their beliefs’.\textsuperscript{28} Given its Marxist underpinnings, Thompson’s historiographical approach always included a historical-materialist focus on ‘changes in productive relationships’ – that is, on changes in the relationship of individuals or social groups to the ownership of the means of production. But Thompson was not exclusively concerned with material-structural change in an economic sense. Rather, understanding the direction of history required, in his view, an understanding of how such change was ‘experienced in social and cultural life’ (my emphasis), an approach that found clear expression in his masterwork, The Making of the English Working Class (1964). Understanding this sort of experience involved, for Thompson, two inter-related aspects: first, how material-structural changes are interpreted (‘refracted’) in the prevailing system of ideas and values; and second, how those interpretations


\textsuperscript{25} Foucault, Power/Knowledge, p. 99.

\textsuperscript{26} Hauriou, ‘An Interpretation of the Principles of the Public Law’, 818.


\textsuperscript{28} E. P. Thompson, ‘History and Anthropology, Lecture Given at the Indian History Congress (Dec. 30, 1976)’, in Making History: Writings on History and Culture (New York: Norton, 1994), 222.
motivate, or give meaning to, subsequent social and political action. To borrow from a more recent historical-institutionalist approach, ‘individuals do not intervene in the world on the basis ad hoc generalizations distilled from randomly gathered information. Instead, complex sets of ideas, such as ideas about the workings of the economy, allow agents to order and intervene in the world by aligning agents’ beliefs, desires, and goals’. 29

This dialectical interplay between socio-economic conditions and the prevailing system of ideas and values (and more importantly how this interplay feeds into political agency) echoes Hauriou’s intuition that ‘the social milieu has only a force of inertia … but of itself it has neither initiative nor power of creation’. It is only through the mobilization of ideas and cultural experience (values, conceptions of ‘right’) in the realm of politics that one locates ‘initiative or power of creation’. It also here, however, that we locate the reciprocal influences that reshape cultural systems of interpretation as they interact with social/functional demand and political interest over time. As the cultural historian Sarah Hanley once succinctly put it:

[T]he historical process [is] a renewable dialogue or cultural conversation, wherein history is culturally ordered by existing concepts, or schemes of meaning, at play in given times and places; and culture is historically ordered when schemes of meaning are revalued and revised as persons act and reenact them over time. One might regard this process of reordering as one that ‘counterfeits culture’; that is, as a process that replicates the perceived original but at the same time (consciously or unconsciously) forges something quite new. 30

This process of political-cultural interaction, I would submit, has a crucial role to play in illuminating the process of ‘communion … within the social group’ that Hauriou identified as the capstone of the process of institutional change.

Distillations, Extensions, and Complications

It is time to take stock of where these theoretical fragments may be leading us. Distilled down to certain essentials, what might the basic elements of a theory of institutional emergence and change look like? How might it apply to the field of public law, the focus of our concern here?

We must begin with the proposition that ‘the world is always already institutionalized’. As such, the process of institutional change always takes place against a background of existing institutions, some of which have attained the status of ‘constitutional’ bodies for particular communities (about which more in the next section). Historians of public law should focus on how changing structures of public governance (the ‘real’) have been ‘experienced’ in relation to ideas and values of legitimate government (the ‘right’). Whether driven by functional demand or political interest, these changing structures of governance will never be perfectly congruent with prevailing understandings of legitimate governance inherited from the past. This inevitable disconnect between real and right – sometimes great, sometimes small – provides the fuel for a Thompsonian politics ‘through actions, choices, and beliefs’. The gap between socio-institutional

reality and historically embedded conceptions of right need not necessarily lead to a breakdown in the system. The gap will, however, lead to a dialectic in which both structures of governance and understandings of a legitimate legal and political order are forced to adjust in the face of the reciprocal influences of the other. In turn, the perceived disconnect between real and right inevitably influences subsequent political choices about how to structure the system of governance in the future.

In light of the theoretical fragments outlined in the prior section, one can view the process of institutional (and, by extension, constitutional) contestation and change as operating along three inter-related dimensions:

• the **functional**, in which existing institutional structures are brought under pressure and even transformed as a consequence of objective social demands (‘needs’), as well as by constraints imposed by the availability (or lack) of resources and technology;

• the **political**, in which actors with divergent interests struggle over the allocation of scarce institutional advantages and resources in responding to these functional pressures (whether in seeking to preserve existing advantages/resources or realize new ones);

• and finally the **cultural** (in the sense that a historian like Thompson or Hanley uses the term), encompassing the ways in which competing notions of legitimacy (conceptions of ‘right’), often legally expressed, are then mobilized by social and political actors either to justify or to resist changes in institutional and legal categories or structures. Beyond these three primary dimensions, however, it is important to identify three secondary dimensions:

• the **interactive**, meaning that the three primary dimensions are constantly overlapping and influencing each other, and their separation above is in many respects simply an analytical heuristic;

• the **temporal**, meaning that the interaction of the three primary dimensions happens across time, thus necessitating a kind of ‘thick’ analysis in order to understand the process of institutional change in specifically historical terms; and

• finally, the quest for **settlement** – in effect, ‘order out of chaos’ – in which actors seek a **reconciliation** between developments in the various dimensions in some roughly stable way; that

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32 In admittedly speculative terms, these functional, political, and cultural dimensions could be said to correspond to what were once conceptualized as various ‘wills’ inherent in human psychology (i.e., the ‘will to pleasure/avoidance of pain’, the ‘will to power’, and the ‘will to meaning’). Whether such a conceptual apparatus is helpful to our understanding remains to be explored and developed. Nonetheless, these categories point potentially to various means by which human beings, as both individual and social actors, process and respond to environmental stimuli/information, something essential to the process of institutional change.
is, they seek to satisfy functional and political demands while still recognizing the outcome from the perspective of persistent, though evolving, cultural conceptions of legitimacy.

There is a temptation in recent historical-institutionalist literature in the social sciences to try to isolate ‘independent variables’ driving the process of change. These might be material/economic (which I associate primarily with the functional dimension), interest- or power-based (which I associate primarily with the political dimension), or ideational or social-psychological (which I associate primarily with the cultural dimension). However, the central intuition that one should draw from the theoretical fragments above is that the three primary dimensions of institutional change overlap and the causal relationship among them is varied and multidirectional. As a leading comparative policy historian rightly reminds us: ‘Where a historical problem is big enough to matter, causation is invariably multiple, the factors intertwined and interdependent’. The result is an inherently complex combinatorial dynamic, the understanding of which may demand more synthetic approaches drawing on the concepts and tools of ‘complexity science’, ‘complexity theory’, and ‘complex adaptive systems’ as they relate to socio-political phenomena.

Among materially inclined observers, functional demands, as well as the associated political interests to which they give rise, are often taken as the prime movers; from this perspective, ‘social development’ is ‘jurisgenerative’ even if ‘seldom synchronized’ with law. However, it is important to remember that a functional concept like ‘[n]eed, to make the obvious point, is subjective, political, time-dependent, and cultural’. How a particularly society views social and economic demands at any given moment will depend significantly on the system of interpretation that is then dominant, as well as how competing interests mobilize interpretative frameworks to serve their goals in political action. Moreover, a functional resource like ‘property’ can also operate to define ‘interests’ in the political dimension while also constituting an ‘ideology’ in the cultural dimension. The same might be said of claims of ‘interdependence’ as a key driver in a complex process like European integration (interdependence may be less an objective fact than an ideological presupposition mobilized for strategic purposes). Finally,

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34 These include (conceptually) open systems, interconnection, interdependence, nonlinearity, networks, adaptation, co-evolution, self-organization, feedback, emergence, etc., combined with (analytically) mathematical modeling and computer simulation via agent-based computational models. There is a potential connection between Hauriou’s institutionalism and modern complexity theory, which may be found in Hauriou’s attempt to draw on the lessons of thermodynamics for social analysis. See generally M. Hauriou, _Leçons sur le mouvement social: données à Toulouse en 1898_ (Paris: Larose, 1899). Thermodynamics has of course been central to the development of modern complexity theory in the natural sciences. See, e.g., Prigogine and Stengers, _Order Out of Chaos_. For further background, see M. Mitchell, _Complexity: A Guided Tour_ (OUP 2009).
36 Rodgers, _Atlantic Crossings_, p. 199.
37 See, e.g., ibid., 200 (referring to ‘acclimated rights of property’ in the US playing major roles as both ‘interests and ideology’ in the reception of European models of social policy in the late-nineteenth and early-twentieth centuries).
‘legitimacy’ – the seemingly quintessential cultural element of institutional change (as to both governing structures and legal rules) – can also be understood as a functional ‘resource’ that enables or constrains action in the political dimension.\(^{39}\)

Consequently, if we could truly isolate changes in the functional dimension from the political or cultural dimensions (which arguably we cannot), then perhaps we would observe much smoother evolutionary development in legal and political institutions. Instead we find notorious ‘stickiness’, which arguably results from the same complex interplay of functional, political, and cultural factors over time. Economic or social shifts in the functional dimension (e.g., the extension of markets beyond national borders) may, depending on the array of interests, trigger either support or resistance in the political dimension (e.g., the creation of, or opposition to, transnational forms of governance to regulate those markets). Moreover, this functional/political interaction will be subject to varying and potentially contradictory interpretations mobilized in the cultural dimension (e.g., theories of constitutionalism or democracy ‘beyond the state’, or invocations of ‘sovereignty’ to define the true locus of legitimate governance as ‘national’). The line of causation will always be multidirectional, and there is no guarantee that new functional demands – or, for that matter, new arrays of political interests or even alternative conceptions of legitimacy that may emerge – will, in themselves, inevitably or inexorably lead to institutional change.

Indeed, if there is a bias in the system, it is arguably in favor of gradual change in the intermediate term, which will generally occur within the confines of a more enduring institutional ‘settlement’ rather than cause radical change leading to a new ‘settlement’ itself. The historical process, as noted above, often entails an effort to replicate a ‘perceived original but at the same time (consciously or unconsciously) forges something quite new’.\(^{40}\)

Consequently, while we are not prisoners of inherited models and systems of interpretations – we do retain agency\(^{41}\) – our natural inclination has been to seek to understand (i.e., ‘to reconcile’) corresponding shifts in structures of governance in terms of conceptions of legitimacy that are recognizable in historical and cultural, if still evolving, terms.\(^{42}\)

This process of reconciliation inevitably acts as a drag on the process of institutional change, an example, perhaps, of what Bourdieu called ‘hysteresis’, specifically drawing from the natural sciences.\(^{43}\) Dramatic moments of change – what specialists in the field today refer to as ‘critical

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\(^{40}\) Hanley, ‘Engendering the State’, 6.

\(^{41}\) As the anthropologist Marshall Sahlins reminds us: ‘For if there is always a past in the present, an \textit{a priori} system of interpretation, there is also a “life which desires itself” (as Nietzsche says)’. M. Sahlins, \textit{Islands of History} (University of Chicago Press, 1985), p. 152.


junctures\footnote{See G. Capoccia, ‘Critical Junctures and Institutional Change’, in J. Mahoney and K. Thelen, (eds.), Advances in Comparative-Historical Analysis (Cambridge University Press, 2015).} – only arise when there is a rare confluence of functional, political, and cultural shifts that radically undermine existing institutional settlements, thus overcoming this drag/hysteresis and thereby opening the way for genuinely new institutional configurations.

Phase Transition – from ‘Institution’ to ‘Constitution’ – and the Role (‘Rule’) of Law

The bias against radical institutional change is particularly manifest in the constitutional domain, a core focus of this volume. I am speaking here not of a ‘constitution’ in the merely formal sense as an act of positive law, i.e., a written document designated as such or an amendment thereof. Rather, I am speaking of a constitution in the most robust and substantive sense, something with strong socio-historical, socio-cultural, and socio-political underpinnings within a particular community. Hauriou alluded to these underpinnings when he spoke of ‘constitutional superlegality’; that is, ‘a sort of constitutional legitimacy that occupies a place above even the written constitution’.\footnote{N. Foulquier, ‘Maurice Hauriou, Constitutionnaliste (1856-1929)’, Jus Politicum, 2 (2009), 12-3, available at http://juspoliticum.com/IMG/pdf/JP2_Foulquier_Maurice_Hauriou.pdf, quoting M. Hauriou, Précis de droit constitutionnel (1st edn. 1923), 296 [my translation].} My colleague Rick Kay has staked out a similar position, arguing that what he calls ‘constituent authority’ – in effect, the ultimate socio-political, socio-cultural foundation of constitutional legitimacy in an ongoing sense – cannot be found merely in positive law.\footnote{See R. S. Kay, ‘Constituent Authority’, The American Journal of Comparative Law, 59(3) (2011), 716 (‘constituent authority cannot be legal authority’).}

The transformation of a mere ‘institution’ into something genuinely ‘constitutional’ for a particular community – that is, the creation of a body or bodies capable of ruling legitimately and durably on the community’s behalf – requires a special kind of transformation, something akin to a ‘phase transition’ from liquid to solid, to again borrow a notion from the natural sciences. In the democratic age in which we (hopefully) still find ourselves, this process is intimately tied to the historical emergence of a sense that a particular political community, as a collectivity, is ‘entitled to effective organs of political self-government’\footnote{N. MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (Oxford University Press, 1999), p. 173 (emphasis added).} through institutions that the community ‘constitutes’ for this purpose.

Crucial in this transition is collective historical memory, or the manner in which certain institutions are able to derive legitimacy from their popular association with the certain critical ‘moments’ in the community’s past.\footnote{See, e.g., P. L. Lindseth, ‘Law, History, and Memory: “Republican Moments” and the Legitimacy of Constitutional Review in France’, Columbia Journal of European Law, 3 (1997), 49–83.} This democratic and constitutional self-consciousness – what we often call the sense of being a ‘demos’, ‘people’ or ‘nation’ – need not be grounded in exclusionary ethnic, religious, or linguistic affinities, nor does it preclude cooperation with other polities on the basis of reciprocity and interdependence. As Neil MacCormick has shown, this demos-consciousness can be ‘civic’ – based in shared ideals rather than ethnic, linguistic, or
religious affinities – although it still must be grounded in a ‘historical’ and indeed ‘cultural’ experience for that particular community.49

Through this special process of transformation – again, this ‘phase transition’ – mere institutions may gain a legitimacy not only to engage in regulatory actions of various kinds but also to exercise the core prerogatives of public power on a societal scale: the legitimate compulsory mobilization of resources, both human (policing, defense, i.e., coercion both internal and external) as well as fiscal (most importantly taxation, but also spending and borrowing). These compulsory mobilization powers, as well as the robust constitutional legitimacy that supports them, could be analogized to an ‘emergent property’ in a complex adaptive system (as ‘consciousness’ is an emergent property out of the biology of the human brain).50 It is here that legitimacy makes itself felt not merely as a cultural conception of ‘right’ but truly as a functional resource that can be mobilized for political ends.51

Only certain kinds of institutions cross this threshold of legitimacy to overt societal mobilization, for good or ill.52 Any regulatory system that ultimately requires a significant degree of mobilization in order to achieve its goals (nearly all do) must eventually attain constitutional legitimacy in its own right or find a way to borrow the capacities of bodies elsewhere that possess it. (This is the typical strategy, frankly, for administrative governance both ‘within’ and ‘beyond the state’, in which regulation ultimately relies on the mobilization powers of the state’s ‘constitutional’ bodies – legislative, executive, and judicial.)53 The linkage between legitimate resource mobilization and effective regulation poses an unavoidable challenge to legal-pluralist theories that celebrate moving ‘beyond constitutionalism’ into a more pluralist realm as a means of effective transnational regulation.54 A robust constitution must exist at some level of governance in order to achieve effective regulation, whether pluralist, transnational, or otherwise.

The emergence of a robust constitution for a particular community – one capable of legitimate compulsory mobilization (human and fiscal) – necessarily stretches beyond law even if the realm of law serves as a key forum within which the deeper functional, political, and cultural developments play themselves out. In this sense, the transition of a mere institution into a genuinely constitutional body for a particular community cannot be simply a formal process, the product of legal/institutional engineering by, say, an elite, however motivated. Without

49 MacCormick, Questioning Sovereignty, pp. 169–74.
50 That is, if we choose again to theorize in terms of complexity theory (see n.34 above and accompanying text).
51 See n.39 and accompanying text.
52 The prominent example, in the North Atlantic world, is the emergence of the elected assembly within the nation-state over the course of the nineteenth century. See n.85 below and accompanying text. Tocqueville anticipated this development when he spoke of the process of ‘centralization of government’, particularly in elected assemblies, with the English Parliament being his paradigmatic example. A. de Tocqueville, Democracy in America (1835) (London: Longmans, 1889), pp. 64–7 (associating ‘centralization of government’ with the elected legislature, distinguishing it from decentralized ‘local administration’ in the United States).
53 See, e.g., below nn.93-98 and accompanying text (discussing the EU).
54 MacCormick was arguably alluding to this challenge when he criticized pluralism for its inattention to ‘societal insecurity that lie at the heart of Hobbes’s vision of the human condition … The diffusionist [i.e., pluralist] picture is a happy one from many points of view, but its proponents must show that the Hobbesian problems can be handled even without strong central authorities, last-resort sovereigns for all purposes’. MacCormick, Questioning Sovereignty, p. 78. For an attempt to respond from a more strongly pluralist perspective, see N. Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (OUP, 2012), p. 234 et seq.
‘manifestations of communion within the social group’ in a Hauriou sense, an elite’s attempt at constitutional engineering will, at a minimum, be subject to ongoing contestation of a fundamental nature, at least if unaccompanied by the legitimacy needed to support the reallocation of compulsory mobilization powers.\footnote{This is a concrete manifestation of what Hauriou termed the ‘decentralization of law’. See above nn.26-27 and accompanying text.}

Moreover, even if such legitimacy were to exist within the cultural dimension, it does not automatically follow that constitutionally autonomous institutions will emerge. Rather, the cultural sense of entitlement to self-government must give rise to successful human agency, pursuing political interests in the face of functional demands/constraints. In other words, not all communities that see themselves as entitled to ‘self’-government necessarily achieve it (for a contemporary example, think of the Kurds). Nor will political elites within a community that seek to achieve such ‘self’-government durably achieve it against the oppositional mobilization of significant sub-groups (think of the EU, as the subsequent sections discuss). Social actors within the community must possess the material and social resources (functionally) as well as the will or interest (politically) to realize the entitlement to ‘self’-government not merely as a legal right (culturally) but also as an objective fact, against whatever functional, political, or cultural elements that may impede it.

It must be stressed, moreover, that even if this ‘emergent property’ of robust constitutional power and legitimacy is achieved at a particular point in history, its indefinite existence is not guaranteed. Constitutional legitimacy is, to borrow from Renan, a ‘daily plebiscite’.\footnote{E. Renan, ‘What Is a Nation?’ (1882), in G. Eley and R. G. Suny (ed.), \textit{Becoming National: A Reader} (Oxford University Press, 1996).} Just as institutions may be ‘born, live, and die’ (as Hauriou taught us), so too may ‘constitutional’ bodies, as well as the self-conscious political communities to which they correspond. This process of decay will also involve the complex interplay of functional, political and cultural factors over time. As with their emergence, the decay of constitutional institutions and their corresponding political communities will also stretch beyond formal legal processes, even if their transformation will no doubt find expression, at least in significant part, in the forms and processes of the law.

In this sense, the role (and ‘rule’) of law may be understood as a realm of functional, political, and cultural contestation in which constitutional institutions – indeed, legal institutions more generally – are ‘born, live, and [perhaps even] die’. In this process of contestation, rather than marking seemingly clear lines between ‘valid’ and ‘invalid’ exercises of authority, the rule of law becomes more a system of ‘resistance norms’, operating ‘as a “soft limit” which may be more or less yielding depending on the circumstances’.\footnote{E. A. Young, ‘Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review’, \textit{Texas Law Review}, 78 (2000), 1594.} The rule of law, moreover, should not be understood exclusively in relation to collective constitutionalism – in effect, ‘sovereignty’ writ large (which might itself be understood as a kind of emergent property). Sovereignty is in fact tripartite, involving constitutional, representative, and individual elements.\footnote{Hauriou, ‘An Interpretation of the Principles of the Public Law’, 820–821.} Judicial power is best understood as an expression of the constitutional sovereign, in alignment with the individual sovereign; it does not belong to momentary possessors of representative sovereignty...
in the legislature or the executive. The latter may well control the centralized instruments of rulemaking or enforcement, but their legitimacy is subordinate to the decentralized constitutional legitimacy of the community itself, whose ultimate interest the judiciary should seek to vindicate, even if episodically and cautiously, by virtue of rendering justice in the particular case.\(^{59}\)

Hence the importance that Hauriou assigns to the sovereignty of the individual within the nation-state, aligned with judicial power, as a necessary counter-balance to the more collective forms of sovereignty and their possession of powers of regulation and legitimate compulsory mobilization. ‘[T]he idea of sovereignty retained by the individual’, Hauriou wrote, ‘provides room for the two essential elements of a constitutional regime, individual liberty and the element of publicity’.\(^{60}\) It is through such individual rights, as well as through transparency of public action, that private actors can both participate in ‘the spontaneous collaboration for the public good’ – notably through the legitimate mobilization of resources (human and fiscal) – as well as provide the necessary counterbalance to the pretenses of public power wherever located.

**European Integration and the Institutional-constitutional Frontier**

How might these theoretical fragments – along with the distillations, extensions, and complications described in the prior two sections – help us gain insight into an actual instance of institutional and constitutional change?

Consider the evolution of supranational governance in Europe from the postwar decades to the present.\(^{61}\) Over the last six and a half decades, EU public law has come to have a significant impact on legal relationships between and among institutions on both the supranational and national levels while also providing for a new patrimony of rights for private parties in the process of European integration. Given these structural and rights-based dimensions, it is perhaps unsurprising that the EU legal order is often described in ‘constitutional’ terms, at least among European judges and their followers in the academy. Nonetheless, this conceptual vocabulary operates against the backdrop of a deeper socio-political, socio-cultural reality in which the locus of legitimate compulsory mobilization, for better or worse, has remained almost entirely national. How might the theory outlined above help us understand this reality?

We must begin by acknowledging that European integration represents a profound change in the nature of governance as measured by what came before it – the quasi-anarchic European state system. The catastrophic events of 1914-1945 certainly entailed the sort of confluence of functional, political, and cultural factors that could, in principle, radically undermine existing institutional and constitutional structures. And this confluence of factors did indeed open the way for new structures of public governance beyond the state in the immediate postwar years.

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\(^{59}\) Ibid., 819.

\(^{60}\) Ibid., 820–1.

Whether one viewed the situation in terms of the functional demands of reconstruction,\(^62\) or in transcending the excesses of nationalism that were understandably viewed as responsible for the catastrophe,\(^63\) the postwar political environment clearly offered fertile ground on which to cultivate supranational structures of governance in Europe. And indeed, after various fits and starts, both the functionalist argument (now often cast in terms of interdependence and the demands of international competition), along with the political-cultural ideal of European unity as a value in itself, were mobilized by the drafters of the Schuman Declaration of May 1950, most importantly Jean Monnet and his team, to kick start the integration process as we know it today.

From the beginning, however, committed supranationalists understood the socio-political, socio-cultural challenge before them. Paul Reuter, the French law professor instrumental in writing the Schuman Plan for Monnet, placed a technocratic institution – the High Authority – at the heart of the integration project, and his reasons are telling. The creation of the High Authority (the future Commission) was, according to Reuter, ‘in some sense a desperate solution’ because, as he put it, there was ‘neither a European parliament, nor government, nor people’ on which to build an integrated polity or market; consequently, the purpose of supranational technocracy was ‘to build Europe without Europeans’ by ‘address[ing] ourselves to independent personalities’.\(^64\) By asking the member states to delegate significant normative authority to these ‘independent personalities’, the drafters sought to reduce the transaction costs of intergovernmental cooperation and to enhance the credibility of the member states’ mutual treaty commitments among to each other. According to this ‘pre-commitment’ strategy of supranational delegation, the normative and regulatory decisions of these ‘independent personalities’ would then be binding upon national governments, parliaments, and courts – a formula that has since been expanded to include not merely the normative and regulatory output of the Commission and EU legislature (Council and Parliament) but also that of the European Court of Justice and the European Central Bank, among others.

The marriage of the functional and political-cultural claims in support of integration would henceforth be the identifying characteristic of the most fervent advocates of supranational delegation in the European elite. Walter Hallstein, the lead German negotiator in the integration process in the 1950s and later the President of the European Commission in the 1960s, grounded his faith in Europe’s federal destiny in a purportedly ever-expanding Sachlogik, or substantive logic, entailing functionalist ‘spill over’ of integration from one interdependent domain to the next.\(^65\) Ernst Haas gave this faith an academic expression – via ‘neofunctionalist’ theory,\(^66\) – that

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would arguably become the guiding ideology of the Hallstein Commission.  The hope that the Commission would be the vanguard of an autonomous supranational regulatory system guiding the integration process would eventually be challenged, of course, by the reassertion of national executive prerogatives via the Council in the Luxembourg Compromise and beyond.  This gave rise to the classic interplay between intergovernmentalism and neofunctionalism as dominant explanations of the integration process.

Despite the reassertion of intergovernmentalism, the marriage of ideological functionalism and European idealism was difficult to suppress. Rather, it found perhaps an even more hospitable home in the European Court of Justice – the body of ‘independent personalities’ par excellence – notably in the ECJ’s major ‘constitutionalizing’ judgments of the 1960s and beyond. Undergirding this extensive case law was a method of treaty interpretation – the so-called ‘teleological method’ – which was based on the idea that ‘an ever closer union among the peoples of Europe’ (as set out in the preamble to the Treaty of Rome of 1957) constituted the very purpose – the telos – of European integration. This was a classic instance of mobilizing a conception of ‘right’ in the cultural domain to justify political action in pursuit of institutional change. The judicial elite’s overarching aim – its guiding ‘idea’ in a Hauriou sense – was the perceived need to promote the uniformity and autonomy of the supranational legal order. The Court used the teleological approach (and the related doctrine of effet utile) to overcome textual obstacles, ambiguities, or silences in the treaties to achieve the aims of integration as the judges understood them, looking to what they regarded as the ‘spirit’ and ‘general scheme’, and not just the ‘wording’ of the treaty.

This approach also allowed the judges on the Court, by the 1980s, to conclude that the treaties amounted to a ‘constitutional charter of a Community based on the rule of law’, in which the Court itself served as the ultimate legitimating mechanism. This was a crucial political pivot in the overarching process of contestation regarding the development of supranational governance in Europe. By establishing itself as a defender of a new patrimony of rights (generally market based) against national encroachments, the Court was able to draw on the perception that it was ‘simply a continuation of the traditional role of European courts and, indeed, liberal courts everywhere: the protection of individual rights against the state’. This discourse proved similarly empowering in the academy: Scholars could now assert that they were no longer

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68 Lindseth, ‘Transatlantic Functionalism’.


73 Burley and Mattli, ‘Europe Before the Court’, 64.
operating within the traditional international law paradigm, with its questionable binding force; rather, they were now specialists in a new kind of genuinely ‘constitutional’ law, which offered considerably more normative traction, not to mention academic prestige.\(^74\)

As crucial as this constitutional idealism proved to be, the fundamental lack of robust, autonomous constitutional legitimacy at the European level was hard to ignore, at least among observers who looked beyond the judicial into the political realms.\(^75\) Robust constitutional legitimacy must be sociologically grounded in a broad-based (i.e., ‘decentralized’) perception that supranational institutions embody or express the identity of a new European demos to rule over and above those of member states. Here the dynamic interplay between the ‘real’ and the ‘right’ proved critical: The strongest indicia of the reluctance of the polycentric demoi of Europe to confer any genuine constitutional legitimacy on the EU was (and still is) to be found in the persistence of two enduring features of European public law: first, the EU’s lack of any significant autonomous capacity to mobilize fiscal resources (apart from a supranational budget amounting to only one percent of the aggregated member-state GDPs – only a limited portion of which derives from the EU’s ‘own resources’); and second, the near total absence of any autonomous capacity to mobilize human resources in policing or defense (apart from limited staff available for border-control support via Frontex as well as even more restricted policing and defense coordination via entities like Europol and the EDA). In this respect, the ECJ has acted as a ‘pre-commitment’ mechanism in an institutional apparatus whose function has been almost entirely normative and regulatory. The supranational ‘constitutionalism’ and ‘rule of law’ articulated by the Court, while seemingly pervasive in the eyes of lawyers and judges, have actually been quite ‘weak’ in its socio-political, socio-cultural reality.\(^76\)

One obstacle to the emergence of an autonomous constitutional legitimacy for the EU has been the widespread perception of integration as a project by and for the elite. The principal beneficiaries of integration have been the educated and the socially mobile, exposing cleavages in European society that have proven quite challenging to manage politically.\(^77\) Integration undoubtedly has its strong supporters – many of whom believe profoundly that an autonomous democratic constitutionalism at the supranational level is possible, starting with a legally engineered expansion of the powers of the European Parliament.\(^78\) Nonetheless, for better or worse, the locus of democratic and constitutional legitimacy in Europe has remained ‘national’ – still a potent discourse in a Foucauldian sense, even if that discourse is not what it once was in the late-nineteenth century or, for that matter, the interwar period (thank goodness).

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Indeed, the power of the national discourse persists even as the functional and political demands of interdependence and international competition have undoubtedly transformed European governance over the last sixty-five years. This national legitimacy may well be eroding from below in countries like Spain, Belgium or the UK, as a consequence of political and cultural developments pushing legitimacy even further downward to national sub-units. But these developments simply suggest that the national discourse remains potent enough to support a continuing sense of ‘entitlement’ to ‘self’-government at a level below the EU, even as forms of supranational governance provide a conducive cocoon within which new forms of national autonomy might flourish.

In this sense, the true locus of self-government specifically ‘of the people’ remains, by and large, focused on national or even sub-national constitutional bodies rather than EU institutions, most importantly the European Parliament, which is always advanced as the great hope of European constitutionalists.79 This is true even as vast amounts of regulatory power have migrated to supranational institutions over the last six and a half decades, often for sound functional reasons (not least to ensure the credibility of national ‘pre-commitments’ to core goals of integration, such as free movement in its various manifestations). The EP undoubtedly provides a crucial measure of electoral accountability in the EU’s regulatory system. Nonetheless, it has neither attained the status nor the powers of legitimate compulsory mobilization of a genuinely autonomous democratic and constitutional legislature representing a new, cohesive, ‘self’-governing polity called ‘Europe’.

The Contradictions of Supranational Governance in the EU

This disconnect at the heart of European integration – between supranational regulatory power, on the one hand, and national democratic and constitutional legitimacy, on the other – gives rise to a central feature of the public law of European integration that my work to date has attempted to highlight: the seemingly paradoxical combination of autonomy from, and yet dependence upon, national oversight mechanisms – executive, legislative, and judicial – in the legitimation of the integration process.80 These mechanisms are neither anomalous nor necessarily a sign of crisis in the European system.81 Rather, they operate as means of ‘mediated legitimacy’ in a supranational regulatory system that, lacking autonomous democratic and constitutional legitimacy of its own, must borrow it from the national level.82

To fully understand this state of affairs, we must go back to the early years of the integration project and think more deeply about the functional, political, and cultural reality at that time.

80 Lindseth, Power and Legitimacy. These mechanisms include, most importantly, collective oversight of the supranational policy process by national executives; judicial review by national high courts with respect to certain core democratic and constitutional commitments; and increasing recourse to national parliamentary scrutiny of supranational action, whether of particular national executives individually or of supranational bodies more broadly.
81 Contra G. Majone, Dilemmas of European Integration: the Ambiguities and Pitfalls of Integration by Stealth (Oxford University Press, 2005), p. 64 (describing the imposition of national constraints on supranational autonomy as ‘the symptom of a deeper crisis: a growing mistrust between the member states and the supranational institutions’).
82 See nn.53-54 above and accompanying text.
Contra the federalist historiography of Walter Lipgens, the magisterial work of Alan Milward taught us how the integration project was as much about the ‘rescue’ of the nation-state as the displacement of national sovereignty. ‘This is not surprising’, he continued, because in the long run of history there has surely never been a period when national government in Europe has exercised more effective power and more extensive control over its citizens than since the Second World War, nor one in which its ambitions expanded so rapidly. Its laws, officials, policemen, spies, statisticians, revenue collectors, and social workers have penetrated into a far wider range of human activities than they were earlier able or encouraged to do. If the states’ executive power is less arbitrarily exercised than in earlier periods, which some would also dispute, it is still exercised remorselessly, frequently, in finer detail and in more directions than it was. This must be reconciled in theory and in history with the surrender of national sovereignty.

There are, as Milward implies but does not explore, important linkages to be drawn between the development of the postwar administrative state and the shift of regulatory power to supranational bodies. Both depended on a combination of a seeming fusion of normative power in the national executive and a diffusion of power into a complex and far-reaching administrative sphere, one that operates at multiple levels within and beyond the state. Both, I would submit, were reflective of a conscious effort by major political actors to reinforce administrative governance – both national and supranational – by making it a more effective agent in the promotion of public welfare. This necessarily entailed the creation of an institutional apparatus separate from historically ‘constituted’ bodies of the state – legislative, executive, and judicial – to collect taxes, refine legislative/treaty frameworks (through regulations and decisions), gather information, and exercise other forms of enforcement power. We now call this institutional apparatus ‘administrative governance’ – not because it is somehow merely ‘technical’ – and certainly not because it is somehow not engaged in ‘politics’ (it clearly is). Rather, we call it ‘administrative’ because its legitimacy is derivative of, and ultimately mediated through, the ‘constitutional’ bodies of self-government located elsewhere, whether legislative, executive, or judicial.

In the democratic age, the increasing separation of administrative governance from strongly legitimated constitutional bodies has a historical pedigree of its own, stretching back (at least) to the final third of the nineteenth century. Despite the ‘remarkably resilient’ constitutional settlements of the 1860s and 1870s (with elected national parliaments at their core), the European nation-state also confronted extraordinary, countervailing functional pressures to address a range of new regulatory challenges posed by urbanization, industrialization, and the globalization of markets in goods, capital, and labor. Over the final third of the nineteenth century, these pressures forced the historically constituted bodies of the nation-state to begin

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83 Lipgens, Documents on the History of European Integration.
86 Rodgers, Atlantic Crossings.
transferring regulatory authority outward and downward, into an increasingly complex, multi-layered administrative sphere comprised of sub-constitutional institutions of varying types.

This separation of regulatory power from democratic and constitutional legitimacy would be one of the identifying attributes of modern governance over the course of the twentieth century, eventually spilling outside the confines of the state itself. Under the new settlement that eventually emerged after 1945, traditional constitutional bodies retained crucial roles in defining the terms of compulsory mobilization of resources (human and fiscal). Nonetheless, these bodies often relinquished the exercise of regulatory powers directly, choosing instead to delegate these powers to administrative institutions, usually within but sometimes eventually beyond the state (as in European integration). Historically ‘constituted’ bodies retained roles primarily as mechanisms of legitimation – legislative, executive, and judicial – exercising various forms of oversight (if not direct control) over diffuse and fragmented administrative actors. Over time, these mechanisms of mediated legitimation adjusted themselves to the functional demands of the integration project, emerging as crucial if often misunderstood dimensions of EU public law. National executive oversight of supranational action, first via the Council of Ministers and eventually also the European Council, provided the initial connection between supranational regulation and historically constituted representative government on the national level. As supranational regulatory power expanded (notably from the 1980s onward), additional legitimating mechanisms became necessary, including national judicial oversight, as well as increased national parliamentary scrutiny. In this way, European public law has developed oversight mechanisms and structural checks that, even if imperfectly, seek to do the work of ‘reconciliation’ not unlike similar mechanisms within the administrative state.

Let me stress, however, that one should not necessarily be sanguine about the capacity of national constitutional bodies to effectively oversee, and therefore legitimize, Europeanized administrative governance. Given the reality of multiple constitutional principals in the European system, the technocratic agents in Brussels and Frankfurt (or juristocratic agents in Luxembourg for that matter) are entrenched to a degree not found in instances of purely national forms of administrative governance (this was, recalling Paul Reuter, arguably the very purpose of supranational delegation). The fact of multiple national constitutional principals – and therefore of even more multiple ‘veto players’ – means that the political coordination needed to reverse supranational action is vastly more challenging than within a purely national administrative polity. This supranational entrenchment, combined with the overarching ‘pre-commitment’ function of supranational institutions (along with the ever-present capacity to mobilize functionalist and idealist arguments in favor of ‘more Europe’), can give rise to a seeming principal-agent inversion. In these circumstances, supranational bodies appear to take on the character of principals in the integration process, supervising the conduct of member states as their agents. In the face of the otherwise extensive shift of normative and regulatory power to the

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88 Ibid., ch. 3.
89 Ibid., ch. 4.
90 Ibid., ch. 5.
91 Lindseth, ‘The Paradox of Parliamentary Supremacy’; Lindseth, Power and Legitimacy.
92 See above n.64 and accompanying text.
EU level, all that remains to national institutions are the core constitutional powers of legitimate compulsory mobilization as the last true prerogatives of national ‘self’-government.

Recent years have brought the consequences of these contradictions in European governance to the fore, not least in the Eurozone crisis but also (as of this writing in November 2015) the increasingly intense refugee crisis, combined with heightened terrorist violence. As one commentator pointed out in early fall 2015, whether we are speaking of the introduction of the common currency or the creation of the increasingly tenuous Schengen border-free zone, ‘Europe embarked on highly symbolic projects before it had the tools to manage them properly’. It lacked those tools precisely because the ultimate management of each project, on a micro level, called for autonomous capacities of legitimate compulsory mobilization. The missing powers were both fiscal (taxing, spending, and borrowing) and human (policing and defense), for which the EU not only lacks the power but also, more importantly, the legitimacy. The existence of supranational normative and regulatory power (the ‘right’), no matter how extensive it might otherwise seemingly be, has simply not been enough to meet the demands of the profound socio-political, socio-economic challenges facing Europe (the ‘real’).

In short, both the Eurozone and the refugee crises, along with the increased threats of terrorist violence, have demonstrated once again the prescience of the warning of the Italian political theorist Stefano Bartolini in 2005: ‘the risk of miscalculating the extent to which true legitimacy surrounds the European institutions and their decisions … may lead to the overestimating of the capacity of the EU to overcome major economic and security crises’. In responding to both the Eurozone and refugee crises, the EU has been forced to rely on a strategy whereby all essential costs – political and economic – are borne internally, by the individual states, because that is where legitimate compulsory mobilization powers still reside. Moreover, to the extent that transnational coordination has been necessary, decision-making has been primarily national and intergovernmental rather than supranational (i.e., via the Commission and Court). This has been true even as supranational surveillance of national actors has sometimes played an important role, consistent with the function of EU bodies as agents of the member states in overseeing certain policy ‘pre-commitments’ (e.g., to fiscal discipline in the Eurozone crisis, or in the enforcement of obligations under the Common European Asylum System in the refugee crisis).

The essential lesson here is that democratic and constitutional legitimacy, along with the concomitant powers of compulsory mobilization, are indeed a functional resource and not merely

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95 S. Bartolini, Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union (Oxford University Press, 2005), p. 175.
96 The primary exception has, of course, been the European Central Bank, but the ECB’s sometimes ‘heroic’ role (e.g., in QE) has been driven by the incapacity of the EU and member states to mobilize fiscal resources on a coordinated, supranational scale commensurate with the demands of the Eurozone crisis. See generally P. L. Lindseth, ‘Power and Legitimacy in the Eurozone: Can Integration and Democracy Be Reconciled?’, in M. Adams, F. Fabbrini, and P. Larouche (eds.), The Constitutionalization of European Budgetary Constraints (Oxford: Hart Publishing, 2014).
a cultural phenomenon. The creation of such legitimacy does not lend itself to straightforward legal or institutional engineering; rather, it is an ‘emergent property’ in a complex social and political system, and insofar as European integration is concerned, it has certainly not yet emerged on the supranational level. The continued locus of such robust legitimacy at the national level has had a direct bearing on the scope of power that can be successfully transferred to the EU institutions, whether in the Eurozone or refugee crises, or otherwise. As one observer rightly noted, there simply is ‘a line in the sand beyond which only [national] governments can set priorities and act’. 

Concluding Thoughts

The various crises afflicting the EU these last several years have contributed to a more general atmosphere of disillusionment with the integration project, certainly among eurosceptics but also among erstwhile supporters. In a widely read 2011 essay exploring the ‘political and legal culture of European integration’, Joseph Weiler lamented what he saw as the depressing combination of legalism, technocracy, and ‘political messianism’ that pervaded the integration project. Supranational governance in Europe had never been ‘particularly concerned with democracy (or, at inception, human rights). It sought its legitimacy in the nobility of its cause’. With such ‘messianism’ an all-purpose excuse to pursue integration regardless of its legalistic or technocratic character, Weiler questioned whether the vaunted supranational ‘rule of law’ promoted by the Court of Justice in fact qualified as such. The Court’s ‘formalist, positivist and Kelsenian’ conception of the rule of law failed, in Weiler’s estimation, because it is ‘not respectful of two conditions’ in balance: ‘rootedness in a democratic process of lawmakering and respectful of fundamental human rights’. Although the ECJ ‘accepted the second of these conditions in an activist jurisprudence, beginning in 1969’, it never developed a jurisprudence to address the first. Indeed, some observers who later developed Weiler’s critique came to question whether the Court’s conception of the rule of law is itself even all that concerned with human rights, focusing instead on the integrity of the internal market and the autonomy of the EU legal order. The result is a purported ‘justice deficit’ in the EU.

I highlight these critical voices in closing because they bring us back to certain key features of the theory of institutional and constitutional change that this essay seeks to advance. If change does indeed unfold ‘on historically specific terrain’, what does this suggest about the terrain in which supranational governance in Europe has developed? It suggests, I would argue, that the historic polycentricity of the European continent – most importantly in terms of the distribution of democratic and constitutional legitimacy, along with associated powers of compulsory

97 See n.39 above and accompanying text.
100 Ibid., 689.
101 Ibid., 691.
mobilization (human and fiscal) – is a functional, political, cultural reality that has not been easily overcome in the integration process. Again the notion of ‘hysteresis’ may be appropriate here to describe a dynamic system whose outputs are time-dependent on present and past inputs, leading to institutional and constitutional lags despite functional and political pressures for change.\textsuperscript{104} The ‘real’ in European integration has come back to bite the hoped-for construction of an autonomously ‘constitutional’ process of European integration, leading to a normative legal order (the ‘right’) of a vastly different character than what ‘constitutional’ label would suggest.

This has been true, in fact, despite strong functional and political claims to the seeming necessity of ‘ever-closer union’ in several different respects (interdependence, international competition, strategic coordination, etc.). These claims have been compelling enough to support the construction a highly technocratic and juristocratic normative and regulatory institutional apparatus. But the functional and even idealistic impetus behind integration has been insufficient to push the EU across the threshold of genuine democratic and constitutional legitimacy in a broader socio-political, socio-cultural sense. This explains Europe’s repeated recourse ‘to independent personalities’\textsuperscript{105} – i.e., Europeanized elites, whether in the Commission or the Court, as well as later the European Central Bank – with all their advantages as well as limitations. The development of nationally mediated legitimacy in European integration is, from this perspective, an entirely understandable reaction to the EU’s lack of democratic constitutional legitimacy of its own. It is the product of a dialectic between integration’s persistent ‘administrative character’ and the underlying ‘constitutionalist logic’ posited by its legal elites, calling for uniformity and autonomy.\textsuperscript{106} Nonetheless, despite this logic, European governance must borrow ‘mediated legitimacy’ from the national level in order to operate successfully, even within its primarily normative, regulatory domains.

There are limits, however, to this strategy of mediated legitimation – ones tied directly to the question of legitimate compulsory mobilization – which Europeans over the last two decades have unfortunately ignored at their peril. Whenever we talk about the legitimacy of European integration in its current incarnation, we must always ask the question ‘legitimate for what?’\textsuperscript{107} The scope and nature of the EU’s legitimacy (merely ‘institutional’ and ‘administrative’ as opposed to robustly ‘constitutional’) has had a direct bearing on the legal authority that the EU possesses or is effectively able to exercise. The EU is clearly legitimate, at least in a mediated sense, when it acts as a vehicle to harmonize regulatory standards in service of the internal market across a whole range of substantive domains. Indeed, it may well also be legitimate, in certain circumstances, as a vehicle to enforce national pre-commitments to fiscal discipline, although here the traditional forms of mediated legitimacy may become more precarious (as the Greek case in the summer of 2015 increasingly demonstrated).

However, the EU is not (yet) sufficiently legitimate in its own right to exercise autonomous taxing, spending, or borrowing power of any real macroeconomic or geopolitical significance, precisely because the EU does not (yet) possess the demos-legitimacy to support the exercise of

\textsuperscript{104} See above n.43 and accompanying text.
\textsuperscript{105} Reuter, La Communauté européenne du charbon et de l’acier, p. 51.
such power. Nor, for that matter, is the EU apparently capable of imposing a workable collective solution to the refugee crisis (at least as of this writing); hence the significant erosion of the Schengen border-free system, including the temporary reimposition of national border controls in certain states. The rise in the terrorist threat, exemplified in the horrendous Paris attacks in November 2015, only seemed to exacerbate the situation.

How long such a situation can last, I cannot say. If experience is any indicator, the EU may well find a way to muddle through, albeit in a highly sub-optimal way that reflects the contradictions that flow from the odd mix of supranational regulatory power on the one hand with national powers of compulsory mobilization on the other. My historical-institutionalist instincts tell me that muddling through, without addressing the fundamental disconnect between regulatory power and democratic and constitutional legitimacy, is increasingly unsustainable where the EU seeks to undertake ever more ambitious projects like EMU or Schengen. At some point, Europeans will need to make a decision regarding their understanding of what democracy and constitutional ‘self’-government are, as well as where they are located, particularly in the context of this increasingly ambitious integration agenda. An aspirational supranational ‘constitutionalism’ – no matter how appealing or empowering for supranational judges, lawyers, and law professors – may no be longer viable in the face of persistent polycentric distribution of democratic and constitutional legitimacy at the national level.

Until Europeans show the necessary ‘manifestations of communion’ in the EU in a broader, decentralized, societal sense, the legitimacy (and hence legal authority) of supranational governance in Europe will likely remain mired on the merely institutional side of the institutional-constitutional frontier. Europeans must thus find a way to marshal the cultural legitimacy and political will needed to ‘constitute’ supranational bodies equal to the functional task of the developing integration agenda – notably ones possessing the necessary powers of legitimate compulsory mobilization – if not on the scale of all current member states, then perhaps among some significant subset. If this proves impossible, then a strategic retreat from the ambitious agenda may prove to be the only viable option. In fairness, any solution should require an equitable sharing of the agenda’s unfortunate ‘legacy costs’ to date, which have been significant.108 But more importantly, it should entail an unblinkered assessment of what a sub-‘constitutional’, ‘institutional’ (and hence ‘administrative’) process of European integration is realistically for. It will no doubt be a painful process, especially for the EU’s judges, lawyers, and law professors invested in the constitutional paradigm. But it will be a necessary one in order to develop a more sustainable model of integration going forward.

108 See Lindseth, ‘Power and Legitimacy in the Eurozone’.