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The Constitutional Imaginary and the ‘Metabolic’ Realities of European Integration

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KEYWORDS: Constitutional ideology, hysteresis, institutional change, metabolic constitution, power-legitimacy nexus

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Abstract

Understanding the European Union (EU) as an autonomously constitutional entity—what this volume evocatively calls the EU’s ‘constitutional imaginary’—has been central to judicial decision-making and legal scholarship on European governance over many decades. If our aim, however, is to understand what European governance actually is, rather than what the dominant discourse among lawyers, judges and law professors asserts it should be, then we must consider whether this discourse obscures more than reveals. The constitutional imaginary has primarily served, this chapter asserts, as an ideology that legal elites have deployed in a process of institutional change to overcome Europe’s polycentric, nation-state constitutional realities. The core weakness of this ideology as an agent of change, however, has been its almost exclusive focus on the ‘constraint’ function of constitutionalism rather than on the actual ‘constitution’ of power in a socio-political sense. The latter refers to the capacity of a system of governance not just to produce constraining legal norms but also to mobilise human and fiscal resources in a legitimate and compulsory fashion toward ends that governing bodies select. The construction of this sort genuinely ‘metabolic’ constitution in the EU—one unmediated through the member states—is the true Rubicon that European governance must cross in order to turn its ‘constitutional imaginary’ into a socio-political reality.

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Introduction: Beyond Power and Legitimacy

Understanding the European Union (EU) as an autonomously constitutional entity in its own right—what this volume evocatively calls the EU’s ‘constitutional imaginary’—has undoubtedly been central to judicial decision-making and legal scholarship on integration over many decades. As Jan Komárek puts it in this volume’s framing chapter, this constitutional ideology has done some ‘very important work for the whole construction to be sustainable and for supranational institutions to maintain authority over individual member states’.¹ Given this function, the

* University of Connecticut School of Law (USA). Thanks go to Jan Komárek for his patience and helpful comments, and to Maxx Berteletti for his able research assistance.

¹ Jan Komárek, ‘European Constitutional Imaginaries: Utopias, Ideologies and the Other’, this volume.

present volume's effort to make the EU's constitutional ideology a central object of critical discussion is both welcome and essential.²

My own contribution to this project will, however, begin with one small quibble. In his otherwise excellent framing chapter, Komárek writes that my 2010 book, *Power and Legitimacy: Reconciling Europe and the Nation-State*,³ is basically correct 'about the administrative, not constitutional character of the EU integration project'.⁴ But he also asserts that, even if one may 'accept Lindseth's characterization of the EU', one could still 'point to a missing element in it: the role of constitutional ideology in the more critical sense ... as something that conceals the gap between the claim to authority by the EU and beliefs of its subjects as regards what can possibly justify such authority'.⁵ I thoroughly agree that European constitutional ideology has concealed many such gaps, as this chapter will elaborate.⁶ Nonetheless, I would also assert that Komárek's characterization of *Power and Legitimacy* requires an important measure of further nuance. The constitutional ideology of European integration is less 'missing' from my argument, I would say, than it is 'taken as a given'. Indeed, that 'given', as the present volume rightly seeks to show, is a very powerful ideology that has dominated discussion of EU public law and legal integration for decades (even as, for a variety of reasons, its grip may well now be slipping). Constitutional ideology thus serves as the foil against which the entire argument of *Power and Legitimacy* was and is constructed. Only by taking account of this fact can one understand the book's central claim—that European integration is not 'as autonomously constitutional as conventionally supposed' (emphasis in original)⁷ but is, '[t]o put it bluntly, ... administrative, not constitutional' (again, emphasis in original).⁸

² This project is arguably in line with a similar effort by Morten Rasmussen and his team of historians to trace the emergence of what they call the 'constitutional practice' in EU law. See eg Morten Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65' (2012) 21 *Contemporary European History* 375 (part of a special issue, co-edited with Bill Davies, on developing a 'new history' of EU public law).

³ Peter L Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press 2010).

⁴ Komárek, 'European Constitutional Imaginaries' (n 1).

⁵ *ibid.*

⁶ See eg nn 24-25, 40-41, 44-50 and 53-69 below and accompanying text.

⁷ Lindseth, *Power and Legitimacy* (n 3) xiv.

⁸ *ibid* 1.

The aim of *Power and Legitimacy* was perhaps more historical and socio-political than a legal scholar of integration might typically prefer, although the book's historical and socio-political insights certainly do have legal-normative implications. The book sought to describe what European governance actually *is*—an extension of administrative governance—rather than what the dominant discourse among lawyers, judges and law professors asserts it *should be*—a new form of constitutional authority beyond the state. Indeed, one might say that the underlying socio-political reality of European governance—its ultimately administrative character—has also done, to borrow Komárek's words, 'very important work for the whole construction to be sustainable'.⁹

European governance depends, first and foremost, on a delegation of regulatory power from constitutional principals on the national level to primarily technocratic and juristocratic (ie 'administrative') agents on the supranational level. EU institutions also enjoy an electoral component by way of the European Parliament (EP)—something that many lawyers, judges and law professors often see as essential to advancing the EU's autonomously democratic and constitutional legitimacy. Nonetheless, this electoral dimension of European governance via the EP has in fact done little to alter the fundamentally administrative character of European integration.¹⁰ The essential purpose of delegating regulatory power to EU institutions has been to create mechanisms to police the member states' fulfilment of their legal 'pre-commitments' to each other (most importantly, but hardly exclusively, in the area of free movement in all its forms). In fulfilling this function, these supranational agents—above all the European Commission and the Court of Justice, joined more recently by the European Central Bank (ECB)—possess considerable technocratic and legal legitimacy as well as normative autonomy (again, supplemented by an electoral component via the EP). Nonetheless, despite the 'constitutional imaginary' often used by legal elites to describe these supranational agents, they

⁹ See text accompanying n 1 above.

¹⁰ Cf. Anne Elizabeth Stie, *Democratic Decision-Making in the EU: Technocracy in Disguise?* (Routledge 2012). For an earlier formulation of this administrative/technocratic perspective, see Peter L Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99 *Columbia Law Review* 628. See also, more recently with regard to the EP, Peter L Lindseth, 'Executives, Legislatures and the Semantics of EU Public Law: A Pandemic-Inflected Perspective', in Diane Fromage, Anna Herranz-Surrallés, Thomas Christiansen, eds., *Executive-Legislative (Im)balance in the European Union* (Hart Publishing forthcoming).

have never attained autonomous democratic and constitutional legitimacy of their own, even as their ‘pre-commitment’ function has had important consequences for the operation of democratic and constitutional power on the national level.¹¹

The core aim of *Power and Legitimacy* was to show that the actual socio-political development of European governance over the last seven decades—again, despite the ‘constitutional imaginary’—has conformed much more consistently with what I have called the ‘postwar constitutional settlement of administrative governance’.¹² Most importantly, the delegation of power to European institutions has given rise to a *disconnect* that is quite typical of administrative governance—between the *legitimacy* of robustly democratic and constitutional principals on the national level (executives, legislatures and courts), and the regulatory *power* that belongs to their increasingly far-flung agents in a diffuse administrative sphere, one that now extends to the supranational level. It is precisely because the EU lacks robust democratic and constitutional legitimacy of its own (in line with similar entities of an essentially delegated, ‘administrative’ character) that the integration project has depended, in socio-political fact, on a broad range of legal and institutional mechanisms to channel the legitimacy of national institutions to the supranational level, thus helping to bridge that disconnect. These mechanisms of ‘mediated legitimacy’ are the central focus of *Power and Legitimacy*, and they include various forms of national executive, legislative and judicial oversight, all of which sit uncomfortably within any purportedly autonomous constitutionalism at the EU level. Of course, one might argue that such mechanisms are simply ‘features which distinguish European from national constitutionalism’.¹³ However, that sort of ‘definitional fiat’ seems designed, above all, to preserve the EU’s ‘constitutional imaginary’ in the face of disconfirming evidence flowing from integration’s deeper socio-political realities as an extension of administrative governance.¹⁴

¹¹ The rise of the administrative state over the course of the twentieth century has had, one might say, a similar impact on democratic and constitutional governance on the national level. See eg Peter L Lindseth, ‘The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s’ (2004) 113 Yale Law Journal 1341.

¹² Lindseth, *Power and Legitimacy* (n 3) passim. See also Lindseth, ‘The Paradox of Parliamentary Supremacy’ (n 11).

¹³ See Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 43.

¹⁴ Peter L Lindseth, ‘The Perils of “As If” European Constitutionalism’ (2016) 22 European Law Journal 696, 699, n 8.

No doubt, as Komárek's framing chapter suggests, *Power and Legitimacy* left aspects of this thesis under-elaborated, leaving room for future scholarship to do further important work (something the book's preface specifically contemplated).¹⁵ Indeed, as the present contribution will describe, my own work over the last decade has tried to elaborate on two such under-developed aspects of the book's argument in particular.

The first, discussed in Part I below, involves the theory of institutional change that animates the analytical narrative set forth in *Power and Legitimacy*.¹⁶ Although the book was meant to exemplify that theory in operation, it in fact only briefly outlined its basic dimensions—functional, political, and cultural—early in the Introduction.¹⁷ Several of my subsequent writings have illuminated those dimensions in greater depth,¹⁸ while also making more explicit how their interaction explains institutional change in the case of European integration.¹⁹ Most importantly for our purposes here, this additional elaboration has made much clearer the place of constitutional ideology in European integration, operating as one of many competing conceptions of 'right' (legitimacy) operating in the third, 'cultural' dimension of institutional change.²⁰

The second aspect of my work over recent years, discussed in Part II below, has sought to further clarify the criterion by which one should distinguish constitutional from non-constitutional or sub-constitutional (ie administrative) domains of governance. This work has focused in particular on the 'metabolic' function of genuinely 'constituted' authority, ie the capacity of a constitutional level of governance not just to produce regulatory norms (something administrative bodies can do as well) but also to mobilise human and fiscal resources in a

¹⁵ Lindseth, *Power and Legitimacy* (n 3) xv.

¹⁶ See eg Peter L Lindseth, 'Between the "Real" and the "Right": Explorations Along the Institutional-Constitutional Frontier' in Maurice Adams, Ernst Hirsch Ballin and Anne Meuwese (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press 2017).

¹⁷ Lindseth, *Power and Legitimacy* (n 3) 13–14.

¹⁸ In addition to Lindseth, 'Between the "Real" and the "Right"' (n 16), see Peter L Lindseth, 'Evolutionary Public Law: Constituting and Administering Human Ultra-Sociality' in Peter Cane and others (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press forthcoming); Peter L Lindseth, 'Institutional Change and the Continuity of Law' (forthcoming) 55 Connecticut Law Review.

¹⁹ Lindseth, 'Between the "Real" and the "Right"' (n 16); Peter L Lindseth, 'Transatlantic Functionalism: New Deal Models and European Integration' (2015) 2 Critical Analysis of Law 83.

²⁰ See nn 36-38 below and accompanying text.

legitimate and compulsory fashion, and then redirect those resources toward the ends that those constitutional institutions define as essential to the well-being of the polity.²¹ This second aspect of my work points to perhaps the greatest weakness with Europe's 'constitutional imaginary': its almost exclusive focus on the 'constraint' function of constitutionalism rather than on the actual 'constitution' of power to mobilise human and fiscal resources in a legitimate and compulsory fashion.²² The success of any fundamentally regulatory (ie 'administrative') regime like the EU ultimately depends on whether and how this metabolic function has in fact been constituted in socio-political and not just legal terms.²³ In the EU, as is well known, this 'metabolic' constitution of power remains almost entirely national, highlighting perhaps the most fundamental 'gap' concealed by Europe's constitutional imaginary, something that European constitutionalists have consistently 'ignore[d] at their peril'.²⁴

The construction of a genuinely metabolic constitution at the European level—one characterised by an autonomous capacity to mobilise fiscal and human resources in a legitimate and compulsory manner, unmediated through the member states—is the true Rubicon that integration must cross in order to turn its 'constitutional imaginary' into a socio-political reality.²⁵ The recent struggles over the 'Next Generation EU' (NGEU) recovery instrument, to which this contribution will turn at the end of Part II, reveals the depth and breadth of this Rubicon quite nicely. As of this writing (December 2020), there are indications that the EU may finally be initiating a genuinely 'constitutionalising' dynamic in the metabolic sense that I am using the term here, based on the common borrowing of NGEU and the imposition of 'rule-of-

²¹ Lindseth, 'The Perils of "As If" European Constitutionalism' (n 14); Peter L Lindseth, 'The Metabolic Constitution and the Limits of EU Legal Pluralism' in Gareth Davies and Matej Avbelj (eds), *Research Handbook in Legal Pluralism in EU Law* (Edward Elgar Publishing 2018); Peter L Lindseth, 'The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance' in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020).

²² Lindseth, 'The Metabolic Constitution and the Limits of EU Legal Pluralism' (n 21).

²³ See generally Lindseth, 'Evolutionary Public Law' (n 18).

²⁴ Lindseth, 'The Perils of "As If" European Constitutionalism' (n 14) 702.

²⁵ For more detail, see Cristina Fasone and Peter L Lindseth, 'Europe's Fractured Metabolic Constitution: From the Eurozone Crisis to the Coronavirus Response', LUISS School of Government, SOG Working Paper 61 (October 2020), <https://sog.luiss.it/research/working-papers>.

law conditionality’ to distribute the proceeds. But, as will be explained further below, it is too soon to tell whether that dynamic will gain sufficient traction, notably in supplementing common borrowing with a genuinely autonomous taxing authority, to gain a durable institutional existence over the long term.²⁶

I. Constitutional Ideology and the ‘Cultural’ Dimension of Institutional Change

One cannot understand the role of Europe’s ‘constitutional imaginary’ without first appreciating the broader process of institutional change in European governance.²⁷ Indeed, European integration can and should be understood as fundamentally a process dealing with ‘institutional change’; that is, the many ways that the forms of governance inherited from the past (notably Europe’s polycentric, nation-state constitutional system) have been transformed by the establishment of a set of ‘pre-commitment’ agents operating at the supranational level. *Power and Legitimacy* builds on a theory of institutional change operating in three dimensions—‘functional’, ‘political’, and ‘cultural’—whose demands have shaped the shifting contours of European and national governance across time.²⁸ Admittedly, the specific treatment of this theory in *Power and Legitimacy* was all too brief and left several key questions under-elaborated: How should we properly understand how those dimensions interact to cause institutional change? And more importantly for our purposes here, how should we understand the role of constitutional ideology within those various dimensions? To begin to answer these questions, let us start by outlining the three key dimensions of institutional change in a bit more detail.

The first, as noted, is ‘functional’. By this I am referring to the idea, well known in the historical-institutionalist literature, that institutions often evolve as a *function* of the problems they seek to solve. From this classically functionalist perspective, actors are compelled to respond to objective demands (‘needs’) presented by their natural or social environment, subject

²⁶ See nn 56-65 below and accompanying text, as well as, more generally, Peter Lindseth and Cristina Fasone, ‘Rule-of-Law Conditionality and Resource Mobilization – the Foundations of a Genuinely “Constitutional” EU?’, *Verfassungsblog* (11 December 2020), <https://verfassungsblog.de/rule-of-law-conditionality-and-resource-mobilization-the-foundations-of-a-genuinely-constitutional-eu/>.

²⁷ The discussion in this Part draws significantly from Lindseth, ‘Between the “Real” and the “Right”’ (n 16).

²⁸ Again, see Lindseth, *Power and Legitimacy* (n 3) 13–14.

to functional constraints on available resources, whether environmental or technological, among others. Supplementing these fundamental drivers of (and constraints on) change, however, are those relating to interest-based conflict in the second—‘political’—dimension. The analysis here focuses on the fact that ‘the world is always already institutionalized’,²⁹ and that actors necessarily struggle over the allocation of scarce institutional advantages, whether existing ones that they seek to preserve, or newer ones that others seek to realise. However, in this struggle over functional demands/constraints as well as the political preservation/realization of institutional advantages, actors will necessarily mobilise interpretive frameworks—conceptions of ‘right’ (or legitimacy)—in the third, ‘cultural’ dimension. The purpose of this mobilization is to help justify or resist functional and political pressures for change. As we shall see below, it is in this latter dimension that the mobilization of a constitutionalist ideology by European legal elites has played a key role in the process of European integration.

These various dimensions of change, it should be stressed, are obviously not hermetically sealed from each other. Instead, they overlap and interact in complex ways over time and place, and for this reason, any effort to isolate them for purposes of analysis is really just a heuristic step toward a broader historical synthesis that seeks to take full account of their overlapping and interactive character. With specific regard to European integration, for example, economic or social shifts in the functional dimension (eg the extension of markets beyond national borders) may, depending on the array of interests, trigger either support or resistance in the political dimension (eg 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 mobilised in the cultural dimension (eg theories of ‘constitutionalism’ or ‘democracy’ beyond the state, or invocations of ‘sovereignty’ to define the true locus of legitimate governance as ‘national’). Finally, the availability of cultural conceptions of right (or, conversely, their limited availability) can also be understood as a resource constraint that has evident functional and political consequences. In this way, the line of causation between these various dimensions 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

²⁹ Elisabeth S Clemens, ‘Rereading Skowronek: A Precocious Theory of Institutional Change’ (2003) 27 *Social Science History* 443, 446.

conceptions of legitimacy that may emerge—will, in themselves, inevitably lead to institutional change.

Consequently, if we could truly isolate changes in the functional dimension from the political or cultural dimensions (which we often cannot), then perhaps we would observe much smoother evolutionary development in legal and political institutions, in which changing functional demands would lead inexorably to political and cultural change. Instead what we find is notorious ‘stickiness’, in which institutions often show remarkable resilience in the face of functional, political, or cultural pressures. Pierre Bourdieu alluded to this effect when he spoke of ‘hysteresis,’³⁰ borrowing a concept from the natural sciences, where it is used to describe dynamic systems whose outputs are time-dependent on present and past inputs.³¹ Overcoming such hysteresis often requires a ‘critical juncture’, as the historical-institutionalist literature puts it;³² that is, a relatively rare confluence of functional, political, and cultural shifts that radically undermine existing institutional settlements, thus opening the way for genuinely new institutional configurations.

It is certainly true that European integration represents a profound change in the nature of governance as compared to what came before it—the quasi-anarchic European state system. But this polycentric reality in all its dimensions—functional, political, and cultural—has nonetheless operated as a significant drag on the process of integration even as it has also served as one of the central problems European integration was designed to solve. The emergence of supranational forms of governance in the postwar decades undoubtedly benefited from the catastrophic events of 1914-1945, which arguably entailed the sort of confluence of functional, political, and cultural factors that could (and partially did) radically undermine existing institutional and constitutional structures. The result, however, was as much about the ‘rescue’ of

³⁰ See generally Cheryl Hardy, ‘Hysteresis’ in Michael James Grenfell (ed), *Pierre Bourdieu: Key Concepts* (2nd edn, Routledge 2014).

³¹ The concept now has a wide range of applications across several scientific fields (notably physics) as well as engineering and economics. See generally Mark A. Krasnosel’skii and Aleksei V. Pokrovskii, *Systems with Hysteresis* (Springer 1989).

³² Giovanni Capoccia, ‘Critical Junctures and Institutional Change’ in James Mahoney and Kathleen Thelen (eds), *Advances in Comparative-Historical Analysis* (Cambridge University Press 2015).

the nation-state as its transcendence.³³ The most persistent manifestation of this ‘hysteresis’ was the consistent refusal of Europeans to transfer power of legitimate compulsory mobilization of fiscal and human resources to the supranational level. Rather, instead they gave extensive regulatory power to supranational ‘pre-commitment’ bodies—again, most importantly, the European Commission and Court of Justice—in order to police the member states’ compliance with various legal obligations to each other, especially with regard to free movement in its various manifestations.

On the basis of that functional pre-commitment power, European judges, lawyers, and law professors have nonetheless argued, in the political domain, for an expansive understanding of supranational authority, one that they then buttressed, in the culture domain, by recourse to a constitutionalist ideology. By establishing themselves, according to that ideology, as defenders of a new patrimony of seemingly constitutional rights (generally market-based) against national encroachments, the Court and its allies were able to draw on what Joseph Weiler famously called ‘the deep-seated legitimacy that derives from the mythical neutrality and religious-like authority with which we invest our supreme courts’.³⁴ This constitutionalist ‘ethos’, however, was as much (if not more) the product of the special historical conjuncture of the postwar era as it was the expression of essential aspects of constitutionalism writ large.³⁵ It is the historical contingency of the postwar era that gave special force to the cultural conception of ‘right’ (legitimacy) that would become central to integration’s ‘constitutional imaginary’. This powerful cultural current allowed the ECJ to present itself as ‘simply a continuation of the traditional role of European courts and, indeed, liberal courts everywhere: the protection of individual rights against the state’.³⁶ The constitutional framing of EU law proved similarly empowering to lawyers and legal scholars, who could now assert that they were no longer operating within the traditional paradigm of international law, with its questionable binding force. Rather, they were now specialists in a new kind of genuinely ‘constitutional’ law—a ‘higher law’ over and above the

³³ See, most famously, Alan S Milward, *The European Rescue of the Nation-State* (2nd edn, Routledge 2000).

³⁴ JHH Weiler, ‘The Transformation of Europe’ (1991) 100 Yale Law Journal 2403, 2428.

³⁵ See generally Lindseth, ‘The Paradox of Parliamentary Supremacy’ (n 11).

³⁶ Anne-Marie Burley and Walter Mattli, ‘Europe Before the Court: A Political-Theory of Legal Integration’ (1993) 47 International Organization 41, 64.

member states³⁷—which offered considerably more constraining authority on national conduct, not to mention professional prestige for the legal advocates and theorists advancing these claims.³⁸

The problem with this understanding, however, has always been rooted in its hyper-legalism, which has led to an almost exclusive focus on the constraint function of constitutionalism to the exclusion of the actual ‘constitution’ of power in a deeper ‘metabolic’ sense. Above all, this ‘constitutional imaginary’ conveniently ignored the fact that all law—including sub-constitutional (ie ‘administrative’) public law—also serves such a constraint function, and that the existence of a constraint function alone tells us nothing about what differentiates the realms of specifically constitutional from non- or sub-constitutional law, in the EU or otherwise.³⁹ And yet, by providing a kind of interpretive *lingua franca*, the constitutional ideology socialised generations of European elites (many legally trained) to overlook the EU’s lack of the necessary socio-political underpinnings for genuine constitutional authority: the autonomous capacity to mobilise fiscal and human resources (about which more in Part II below). In this way, Europe’s constitutional imaginary arguably contributed to deeply flawed institutional and policy choices that led to the many crises of the last decade. The common currency, for example, presupposed a degree of centralised political power and legitimacy, most importantly relating to shared taxing and borrowing authority, which the EU obviously has long lacked and only recently, via the NGEU pandemic recovery instrument, has seemed any closer to attaining (and in that case only with regard to borrowing). Moreover, the still tenuous border-free zone in Schengen, which was placed under great strain both by the migration crisis of the mid-2010s as well as by the coronavirus pandemic that overtook Europe in 2020, ultimately

³⁷ See eg Tuori (n 13) 10–11.

³⁸ Cf. Turkuler Isiksel, ‘Functional Constitutionalism in the European Union’, EUSA Biannual Meeting, Boston, March 2015, <https://eustudies.org/conference/papers/download/196>, 5-6 (explaining the shift to a constitutional discourse in terms of ‘epistemic empowerment’ for scholars). For a further exploration of the implications of Europe’s ultimately ‘functional constitutionalism’, see Turkuler Isiksel, *Europe’s Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016).

³⁹ Lindseth, ‘The Perils of “As If” European Constitutionalism’ (n 14) 704.

presupposed a degree of centralised political power and legitimacy to mobilise human resources (policing, defence and border control) that the EU has been struggling to develop, albeit slowly.⁴⁰

In this way, the last decade of crisis directs our attention to a fundamental contradiction which the ‘constitutional imaginary’ has ultimately been unable to conceal in the face of the EU’s deeper socio-political realities: ‘National institutions are increasingly constrained in the exercise of their constitutional authority’—the classic constraint function of constitutionalism on which this imaginary depends—‘but supranational institutions cannot fill the void because they are unable to transition to genuine constitutionalism—that is the autonomous capacity to mobilise fiscal and human resources in a compulsory fashion’.⁴¹ Unless and until Europe transcends this ‘as if’ constitutionalism and replaces it with the genuine article, the European project will continue to struggle to meet the many geopolitical and macro-economic challenges facing it in the years to come.

II. Demos-Legitimacy and the Metabolic Constitution of European Integration

To understand why this contradiction continues to exist in European integration inevitably requires us to return to the deeper socio-political consequences of the (alas, persisting) ‘no-demos’ problem in EU public law. The ultimately national foundations of Europe’s political metabolism—the legitimate compulsory mobilization of resources—is intimately bound up with the sociological difficulty of constructing an autonomously constitutional *demos-kratia* at the EU level. This dimension of integration is something that the ‘constitutional imaginary’ almost entirely ignores, or at least sees as a problem of institutional engineering and political will, not socio-political transformation. However, as Robert Dahl long ago reminded us, a constitutional

⁴⁰ Frontex, which was re-established in 2015 as the European Border and Coast Guard Agency in response to the migration crisis, may suggests some modest movement in a positive direction. Its expanding powers include, *inter alia*, deployment of teams for joint operations with member states as well as rapid interventions where a member state’s border control proves deficient and an urgent need for EU assistance exists. This is an important if small step in the development of the EU’s coercive policing powers, leading the agency’s chief to say in a 2018 interview: ‘I would not object if you define us as a law enforcement agency at EU level.’ Nikolaj Nielsen, ‘Frontex: Europe’s New Law Enforcement Agency?’, *EU Observer* (22 February 2018), <https://euobserver.com/justice/141062>. For further discussion, see Lindseth, ‘The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance’ (n 21).

⁴¹ Lindseth, ‘The Perils of “As If” European Constitutionalism’ (n 14) 701.

demos-kratia cannot be simply engineered through mechanisms of representation in which an electorate (however randomly defined) is allowed to select their representatives to govern the polity.⁴² The more difficult, and antecedent, question has always been whether and to what extent that electorate *experiences itself* as part of a demos; that is, as part of a robustly coherent polity in which the power of the majority to rule over the minority can operate without that rule being experienced as domination by an ‘other’.

The most important consequence of this need for robust demos-legitimacy is, I would suggest, ‘metabolic’: In a democratic age, only when elected representatives possess this highest form of political legitimacy can they extract resources from society in a legitimate and compulsory manner and then redirect them, on behalf of the demos, toward public ends that those representatives define. This ‘metabolic’ capacity to convert social resources into public goods goes well beyond the primarily regulatory power that the EU enjoys, whose legitimacy need only be technocratic and juristocratic, even if supplemented by an electoral component in the EP. Genuine demos-legitimacy requires an antecedent socio-political transformation that we could analogize to a ‘phase transition’ from liquid to solid, to borrow a notion from the natural sciences.⁴³ European governance may well eventually achieve such a transformation when or if Europeans begin to experience democratic self-government in truly supranational terms. Only then will EU institutions be able to exercise legitimate compulsory mobilization of resources unmediated through the member states (contra what the ‘own resources’ requirements of Article 311 TFEU, for example, require).⁴⁴

The current limits in EU power, as well as its ultimate grounding in legal, technocratic and juristocratic legitimacy, is a reflection of what my more recent work has been calling the

⁴² Robert Dahl, ‘Can International Organizations Be Democratic? A Skeptic’s View’ in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy’s Edges* (Cambridge University Press 1999). For the classic effort to translate this concern into the European context, see JHH Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’ (1995) 1 *European Law Journal* 219.

⁴³ Lindseth, ‘Between the “Real” and the “Right”’ (n 16).

⁴⁴ Article 311 TFEU requires unanimity in the Council and only the consultation of the European Parliament, and its entry into force is conditional upon the approval of the Member States according to domestic constitutional requirements (ie normally the approval of individual national parliaments).

‘power-legitimacy nexus’.⁴⁵ This nexus derives from the fact that the nature of a polity’s underlying socio-political legitimacy also ultimately determines the scope of power that the polity can effectively and durably exercise. As Dahl rightly suggested, for representative institutions to be experienced as robustly demos-legitimate, both the electorate and the broader polity require socio-political underpinnings which the polycentric character of European history makes quite difficult to realise at this point (at least in a ‘metabolic’ sense). In a manner consistent with Dahl, Neil MacCormick also rightly recognised that democratic and constitutional legitimacy is tied to the sense that a particular political community, as a collectivity, sees itself as ‘*entitled* to effective organs of political self-government’⁴⁶ through institutions that the community constitutionally establishes for this purpose. As MacCormick further taught us, a demos need not be grounded in exclusionary ethnic, religious, or linguistic affinities—in other words, demos-legitimacy can also be ‘civic’—but it still must be grounded in a ‘historical’ and indeed ‘cultural’ experience for a particular community.⁴⁷ It was arguably out of concern for these socio-political underpinnings that MacCormick—himself a great pluralist—eventually developed deep reservations about excessively pluralist theories of governance beyond the nation-state. In his view, these excessively pluralist perspectives (not unlike the constitutional pluralist views that dominate much EU legal discourse) paid too little attention to problems of ‘societal insecurity that lie at the heart of Hobbes’s vision of the human condition ... The diffusionist [ie, 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’.⁴⁸

The value of such sovereigns, if they are worth having at all, is precisely in their capacity to mobilise fiscal and human resources in a legitimate and compulsory fashion to meet collective challenges that confront a given society.⁴⁹ Unfortunately, the EU, as currently constructed, lacks

⁴⁵ See eg Lindseth, ‘The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance’ (n 21); Lindseth, ‘The Metabolic Constitution and the Limits of EU Legal Pluralism’ (n 21); Lindseth, ‘The Perils of “As If” European Constitutionalism’ (n 14).

⁴⁶ Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999) 173 (emphasis added).

⁴⁷ *ibid* 169–74.

⁴⁸ *ibid* 78.

⁴⁹ Cf Lindseth, ‘Evolutionary Public Law’ (n 18).

such a ‘strong central authority’ in this metabolic sense. The EU depends, rather, on a constitutional metabolism operating almost exclusively at the national level, and in this crucial respect (to borrow a term from one avowed EU constitutionalist), it is ‘parasitic’ on democratic and constitutional authority of its member states.⁵⁰ While functional pressures seem to persistently favour ‘more Europe’, the robust demos-legitimacy tied to national institutions have acted as a clear counterweight to these functional pressures, reflecting Bourdieu’s ‘hysteresis’ in action.⁵¹ This robust national legitimacy—best evidenced by the traditional concentration of compulsory mobilization powers at the national level—continue to define political interests and shape discourses in favour of a more incremental, sub-constitutional approach to European governance, even as the ‘constitutional imaginary’ still broadly retains appeal in the legal domain.

One might raise the question, at this point, as to whether the ‘Next Generation EU’ (NGEU) pandemic recovery instrument constitutes an important step toward the Europeanisation of fiscal capacity, at least in terms of borrowing if not of autonomous taxing authority. In this regard, it is important to remember that the treaty requirements on ‘own resources’ under Article 311 TFEU—unanimity in the Council, EP involvement limited to consultation, and entry into force strictly subject to the approval of the member states according to domestic constitutional requirements (ie, national parliaments)—apply *both* to taxes as well as common borrowing under the Multiannual Financial Framework (MFF). NGEU did not change any of that; indeed, the instrument was in fact adopted on the basis of those requirements. The MFF has traditionally been financed by national contributions (nearly 80%), while only the remainder has come from ‘own resources’—historically sugar levies, custom duties, and a percentage of the harmonised Value Added Tax (VAT)—all of which are in fact collected nationally.⁵² The pandemic response has altered this reality only slightly, by adding a layer of shared EU debt to these national contributions and nationally-collected ‘own resources’, allowing the MFF to reach a level of roughly 2% of GNI for a limited two-year period. Moreover, the entirety of the ‘own resources’

⁵⁰ Tuori (n 13) 3–4.

⁵¹ See n 30 and accompanying text.

⁵² C. Fasone and N. Lupo, ‘The Union Budget and the Budgetary Procedure’, in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law*, Vol. I (Oxford University Press 2018) p. 809 at 814-816.

tax revenues needed to support the borrowing to finance the recovery fund will still be mobilised at the national level. There remains, in other words, no EU tax collection authority that ‘wears the EU badge’, so to speak, operating on the basis of the EU’s own autonomous legitimacy to extract fiscal resources from society rather than the legitimacy of the member states.

This fact, perhaps more than any other, shows why the financing of NGEU is not some kind of ‘Hamiltonian moment’ for the EU (a point on which there was considerable scepticism in any case).⁵³ Many observers fixate on debt-mutualisation as the primary sign of such a moment, when in historical fact the true Hamiltonian innovation of the founding period in the United States was the conferral of taxing authority on the federal government in the US Constitution.⁵⁴ The current situation in the EU—in terms of the actual mobilisation of resources—might be analogized to the ‘pre-constitutional’ United States under the Articles of Confederation, in which the ‘confederal’ level, such as it was, remained entirely dependent on the polycentric legitimacy of its constituent states to mobilise resources on the confederation’s behalf. Thus, in terms of the metabolic constitution that actually supports European integration, NGEU will not cross the crucial Rubicon, that of a Europeanising taxation authority to accompany the increased borrowing under the MFF. The financial underpinnings of the new recovery fund are still entirely in keeping with how the Member States financed the response to the Eurozone crisis over the prior decade—ultimately through their own fiscal capacities, whether directly or indirectly (for example, through the capital backing such mechanisms as the ESM or the ECB).⁵⁵

All that said, there may still be room for a measure of (very cautious) optimism regarding the ‘constitutionalising’ potential of NGEU, particularly when conjoined with the sort of ‘rule-of-law conditionality’ that raised such hackles among the Polish and Hungarian leadership in the

⁵³ As Wolfgang Münchau (@EuroBriefing) tweeted soon after the Macron-Merkel agreement on joint debt in May 2020: ‘A useful first step, but please spare us all this Hamilton nonsense’ (9:02 CET, 19 May 2020) <https://twitter.com/EuroBriefing/status/1262639673043816448?s=20>. See also Sony Kapoor, ‘This Isn’t Europe’s “Hamilton” Moment’, *Politico.eu* (22 May 2020) <https://www.politico.eu/article/this-isnt-europes-hamilton-moment/>.

⁵⁴ See generally M.M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Ebsco Publishing 2003).

⁵⁵ See generally Lindseth, ‘The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance’ (n 21). See also Fasone and Lindseth (n 25).

lead up to the European Council meeting of 10-11 December 2020.⁵⁶ The massive borrowing operation needed to finance NGEU (up to 750 billion euro)—by far the most significant such operation in the history of the EU—‘will see [the Union’s] balance sheet transformed from occasional issuer to market stalwart’.⁵⁷ This extensive borrowing, even if temporary, will give the EU a capacity to mobilize fiscal resources on a scale that it has never previously enjoyed. This program may well give rise, in effect, to the long sought European ‘safe asset’—a ‘Eurobond’ in all but name.⁵⁸ These new bonds ‘could boost integration between national financial systems, reduce the risk of runs on national bond markets, and help detangle the “doom loop” of interdependence among banks and local sovereigns’.⁵⁹ Given the functional benefits this borrowing offers, it will not be surprising to see significant pressure—despite resistance from the usual quarters⁶⁰—to make similar operations a permanent feature of the EU fiscal landscape. Indeed, authoritative voices in Europe—namely the ECB’s President Christine Lagarde⁶¹ and the ESM Managing Director Klaus Regling⁶²—have already advocated turning NGEU-type borrowing into a permanent instrument.

This capacity will, of course, still depend on the backing of taxes imposed and collected at the national level, drawing on the member states’ more robust democratic and constitutional

⁵⁶ See generally Lindseth and Fasone, ‘Rule-of-Law Conditionality and Resource Mobilization’ (n 26). See also Eszter Zalan, ‘Poland and Hungary say rule-of-law link needs treaty change’, *EU Observer* (27 November 2020), <https://euobserver.com/political/150206>.

⁵⁷ Rebecca Christie, ‘Thinking big: debt management considerations for the EU’s pandemic borrowing plan’, *Bruegel Blog* (9 December 2020), <https://www.bruegel.org/2020/12/thinking-big-debt-management-considerations-for-the-eus-pandemic-borrowing-plan/>.

⁵⁸ Alexander Lehmann, ‘Common eurobonds should become Europe’s safe asset – but they don’t need to be green’, *Bruegel Blog* (28 September 2020), <https://www.bruegel.org/2020/09/publish-on-monday-common-eurobonds-should-become-europes-safe-asset-but-they-dont-need-to-be-green/>.

⁵⁹ Christie (n 57).

⁶⁰ ‘Large-scale joint EU borrowing should remain one-off: Weidmann’, *Reuters* (19 October 2020), <https://www.reuters.com/article/us-ecb-policy-weidmann/large-scale-joint-eu-borrowing-should-remain-one-off-weidmann-idUSKBN274281>.

⁶¹ Interview with Christine Lagarde, President of the ECB, conducted by Marie Charrel and Eric Albert of *Le Monde* (19 October 2020), <https://www.ecb.europa.eu/press/inter/date/2020/html/ecb.in201019~45f5cf8040.en.html>.

⁶² Klaus Regling, ESM Managing Director, ‘Europe’s response to Covid-19’, UniCredit European Conference Online (21 October 2020), <https://www.esm.europa.eu/speeches-and-presentations/europes-response-covid-19-speech-klaus-regling>.

legitimacy. Nonetheless, NGEU will create tangible incentives to ensure debt sustainability through more extensive, nationally-coordinated tax legislation. And while this coordination will remain under the rubric of the ‘own resources’ decision adopted under Article 311 TFEU, the obvious functional advantages of common borrowing could be conducive to facilitate, over time, a *de facto* fiscal mobilization capacity in the EU that is much less fragmented among the member states than it is today. In this regard, the common borrowing of NGEU holds out the possibility of ‘reshap[ing] the EU’s political economy’.⁶³

With that reshaping, moreover, also could come a kind of polity-building power that reaches well beyond the sort of technocratic and juristocratic ‘pre-commitment’ authority that has underpinned European integration up to this point. No doubt rule-of-law conditionality is not new—it was widely used in the EU enlargement process and remains a tool in the distribution of structural funds. What is new, however, is the genuinely ‘constitutional’ scale of the supranational resource-mobilization that, via NGEU, this new conditionality mechanism will support, vastly increasing the EU’s collective leverage over the conduct of national governments. In so doing, the combination of NGEU and the rule-of-law conditionality may help to create a new constitutional dynamic toward a new kind of post-pandemic EU, one that will have the effect of defining the boundaries of full membership in a much more robust sense than Articles 2 and 7 TEU could ever achieve on their own. This arguably explains the intense resistance of the Hungarian and Polish governments, as well as their insistence that the conditionality compromise negotiated by the German Presidency and agreed by the European Council in December 2020⁶⁴ not come into effect until reviewed by the CJEU. In this respect, the German compromise, while certainly not beyond criticism,⁶⁵ clearly moves the integration project in the right direction.

But even if this deal fails to get the Court’s endorsement (despite the tremendous pressure from the EU25 and the EP), this entire episode will arguably have brought European integration

⁶³ See Martin Sandbu, ‘EU Crosses the Rubicon with Its Emergency Recovery Fund’ *Financial Times* (22 July 2020), <https://www.ft.com/content/bd570dde-3095-4074-bd37-18003f2bd3c2>. He argues that, because ‘what can be done once can be done again’, this means that national leaders ‘have boarded the train towards more common taxation and cannot get off and turn back’.

⁶⁴ Conclusions, European Council Meeting (10-11 December 2020), <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>.

⁶⁵ Alberto Alemanno and Merijn Chamon, ‘To Save the Rule of Law You Must Apparently Break It’, *Verfassungsblog* (11 December 2020), <https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/>.

right up to the banks of the ‘constitutional’ Rubicon. On the opposite shore is a new socio-political terrain, one marked by several more demanding macroeconomic and geopolitical features, whether completing EMU, developing a genuine European security and defence capacity, or meeting the demands of the climate emergency that will no doubt reassert themselves once the pandemic has passed. These new challenges require something beyond the traditional forms of supranational governance in the EU; that is, something more than regulatory power and technocratic-juristocratic ‘pre-commitment’ mechanisms, combined with an electoral component in the EP. What these challenges will demand, in other words, will be something approaching both the power and legitimacy of genuinely autonomous metabolic constitution for the EU in its own right.

Conclusion: Constitutional Imaginaries, Legal Semantics, and Socio-Political Realities

There is of course nothing, in principle, preventing the EU from attaining its own demos-legitimacy to support its own autonomous metabolic constitution eventually (indeed, the terrible and shared experience of violence and destruction between 1914 and 1945 provided an important historical foundation for such an effort, as have the functional demands of the ‘polycrisis’ over the last decade).⁶⁶ If such a transformation were ever to occur, then the EU would almost certainly come to possess genuine fiscal capacities (not just borrowing but also taxation), along with the autonomous legitimacy to exercise them, which in turn could lead to all sorts of net-positives. For example, a true Eurobond—a European ‘safe-asset’—could complement new forms of EU taxing authority, giving the EU macro-economically salient borrowing capacities while also reinforcing the EU’s fragile banking system and perhaps advancing the status of the euro as a potential reserve currency to rival the US dollar. Armed with taxing and borrowing powers at the EU level (again, unmediated through the ‘own resources’ rules of Article 311

⁶⁶ Former European Commission President Jean-Claude Juncker coined the term ‘polycrisis’ to refer to the confluence of multiple, mutually reinforcing challenges facing the EU, from ‘the worst economic, financial and social crisis since World War II’ through ‘the security threats in our neighborhood and at home, to the refugee crisis, and to the UK referendum’, that ‘feed each other, creating a sense of doubt and uncertainty in the minds of our people.’ See Jean-Claude Juncker, ‘Speech at the Annual General Meeting of the Hellenic Federation of Enterprises (SEV)’, *Athens*, 21 June 2016, available at http://europa.eu/rapid/press-release_SPEECH-16-2293_en.htm.

TFEU), Europe-wide redistributive mechanisms would then become possible, allowing for a genuine recycling of surpluses from wealthier regions to the poorer (perhaps via unemployment insurance or some other solidaristic welfare mechanism), which in turn would help to address regionally asymmetric economic shocks. The Eurozone could then become the genuine ‘optimal currency area’ that it is far from being today. The broader EU could also then begin to mobilise human resources to project coercive and deterrent power both internally (through policing) and externally (through defence), crucial to the EU becoming a full-fledged geopolitical player.

But the EU is not at this point, at least not yet, revealing something more than just a ‘gap’ in EU authority that constitutional ideology ‘conceals’, to borrow Komárek’s phrasing.⁶⁷ Rather, this reality reflects a profound socio-political chasm between the imaginary and true nature of European governance as traditionally structured. The legal semantics of a purportedly *already*-‘constitutional’ EU may make judges, lawyers, and law professors feel more empowered and more justified in their legal constraint functions—no doubt a ‘good thing’. But this cultural appeal to the professional identity of jurists should not distract us from seeing how ultimately misleading and thin this ‘constitutional imaginary’ truly has been. To give socio-political backing to this cultural conception of ‘right’ in the most robust sense, the EU must go through the necessary ‘phase transition’.⁶⁸ Only then will it attain the *sine qua non* of genuinely ‘constituted’ power: legitimate compulsory mobilisation of fiscal and human resources.⁶⁹

Backed by such authority, the EU will then be in a much stronger position to live up to the role that the ‘constitutional imaginary’ currently ascribes to it: enforcing not just policy ‘pre-commitments’ but also more open-ended political values like the rule of law both within and among the member states, as well as on the international plane. If the EU were to go through a genuinely *constitutional* phase-transition of this type, it would emerge on the other side capable of great things. The most important would be moving beyond a mere ‘ever closer union among

⁶⁷ See n 5 above and accompanying text.

⁶⁸ See n 43 above and accompanying text.

⁶⁹ And for that, to borrow the words of one observer, the EU ‘will need nothing less than a federal political union. This cannot be fudged. If you conclude that a federal union is unfeasible or undesirable, it is probably better to take a step back rather than keep on resorting to hype’. Wolfgang Münchau, ‘Beware of Smoke and Mirrors in the EU’s Recovery Fund’ *Financial Times* (20 September 2020) <<https://www.ft.com/content/0ba23192-5f43-402d-8f26-6fce0ab669f3>> accessed 20 September 2020.

the [multiple] peoples of Europe' to a polity in which 'We the people [of Europe]' would become the true source of governing power. But that transition will not occur until something much closer to a coherent supranational demos is forged in Europe, one of the type that the meets the criteria articulated by Dahl and MacCormick.⁷⁰ Only then will the EU attain a legitimacy to govern via something more than legally-constraining technocratic and juristocratic bodies, moving to a form of governance capable of exercising genuinely constitutional power—that is, 'metabolic' power—in the most robust sense.

⁷⁰ See nn 42-47 above and accompanying text.

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