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Institutional Change and the Continuity of Law

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Essay

Institutional Change and the Continuity of Law

PETER L. LINDSETH

This contribution offers reflections on Richard Kay's theoretical and historical scholarship regarding processes of institutional (and, by extension, constitutional) change. The focus here is on Kay's 2014 legal-historical monograph, The Glorious Revolution and the Continuity of Law. Kay's analysis draws theoretical inspiration primarily (though hardly exclusively) from an Anglo-American tradition, based particularly on the work of H. L. A. Hart. This Essay argues that Kay's Hartian approach ultimately depends on a somewhat strained distinction between law and non-law in processes of change that does not map well onto the historical record that Kay otherwise cogently analyzes. Kay is forced, therefore, to supplement his Hartian framework with a distinction between the "axiological" underpinnings of a revolution (be they social, political, or cultural) and its "legal" manifestation, i.e., the replacement of an old rule of recognition with a new one. In doing so, Kay's analysis begins to point toward more complex dynamics of change that this Essay argues are more robustly captured by an alternative theoretical framework drawn from a more French tradition. Kay's analysis resonates in particular with the institutional theory of Maurice Hauriou, who was also among the greatest administrative law scholars in France over the late-nineteenth and early-twentieth centuries. This Essay explores how Hauriou's institutional theory could reinforce Kay's work in this area, using the example of Kay's seminal 2011 article, Constituent Authority, to demonstrate the potential connections. The Essay then returns to Kay's analysis of the Glorious Revolution, arguing that the effort of its protagonists to retain the language of law and to operate within its forms was arguably a vindication of Hauriou's central insight about the crucial role of law in allowing revolutionary change to achieve legitimacy and durable institutionalization over time.

ESSAY CONTENTS

INTRODUCTION 1475

I. LEGAL RHETORIC, AXIOLOGICAL UNDERPINNINGS, AND
REVOLUTIONARY CHANGE..... 1479

II. HAURIOU’S INSTITUTIONALIST THEORY AND THE DIMENSIONS
OF LEGAL AND POLITICAL CHANGE 1483

III. WHITHER “LAW”? 1490

CONCLUSION 1495

Institutional Change and the Continuity of Law

PETER L. LINDSETH *

INTRODUCTION

It is a great pleasure, along with so many distinguished scholars, to have this opportunity to contribute to a special issue in honor of our very own Rick Kay. Our focus, of course, is on Rick's scholarship, and I will turn to that topic in a moment. At the outset, however, I would be remiss not to note how grateful we all are at UConn School of Law for Rick's many contributions to our scholarly community over nearly a half-century. In my own case, as a younger academic trying to break into law teaching, I was fortunate to have Rick as my "shepherd" during my call-back on campus two decades ago. His careful handling of me on that fateful day, I like to think, helped pave the way for me eventually joining this faculty, and for that reason alone I owe him a special debt of gratitude. Rick, however, has been a "shepherd" to so many of us, not merely at UConn but also in the broader world of comparative law.¹ He has been a model of academic citizenship and a source of wise counsel over many decades. It is thus altogether fitting and proper that the *Connecticut Law Review* should open its pages to this most well-deserved *Festschrift*, as a sign of our collective sense of appreciation and thanks.

Rick's scholarly achievements are many and varied, but I would like to focus here on his contributions to the field of comparative public law, and more particularly to the theoretical dimension of that field. In principle, Rick and I both specialize in comparative public law, he as a leader in its now flourishing constitutional branch, and I in its newer and perhaps less studied administrative off-shoot. But in many ways the two subfields are quite distinct, at least in terms of who populates them and the literature each group produces. In this sense, comparative constitutional and administrative law are built on different "epistemic communities," as

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¹ His leadership in the field is most tangibly reflected in his current role as President of the American Society of Comparative Law. *ASCL Executive Board*, AM. SOC'Y COMP. L., <https://ascl.org/about/officers/> (last visited Feb. 20, 2020).

international-relations theorists might put it.² Rick and I have no doubt overlapped loosely in the study of certain aspects of European integration,³ and we have also had the chance to share manuscripts from time to time and also cite each other on occasion.⁴ But, given the distinctly different sets of interlocutors that make up our two respective subfields, we have probably not engaged with each other's work as directly or as deeply as we might have liked (or at least that is certainly true in my case).

This is unfortunate for one simple reason: Upon closer inspection, it is clear that Rick and I share a common interest in certain threshold theoretical questions. The most important of these, I would submit, relate to how governing institutions (and by extension, constitutions) are founded and change over time, as well as how law and legal rhetoric impact those processes.

In approaching these questions, Rick draws his theoretical inspiration primarily (though hardly exclusively)⁵ from an Anglo-American tradition, based particularly on the work of H. L. A. Hart.⁶ My theoretical inspiration, on the other hand, comes from a more French tradition, drawing primarily from the work of Maurice Hauriou.⁷ Because so little of Hauriou's thinking has found its way into English (apart from old translations of excerpts and slivers here and there),⁸ his work has received relatively little attention in scholarly discussions in the English-speaking

² See, e.g., Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L. ORG. 1 (1992).

³ See, e.g., MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* (3d ed. 2008); PETER L. LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* (2010).

⁴ See, e.g., Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 752 n.198 (2011) (citing LINDSETH, *supra* note 3); Peter L. Lindseth, *The Perils of 'As If' European Constitutionalism*, 22 EUR. L.J. 696, 708 n.42 (2016) (citing Kay, *supra*, at 716).

⁵ One need only read, for example, the range of authors on which Rick draws in *Constituent Authority*, *supra* note 4, to gain the full breadth of his theoretical influences.

⁶ See Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187, 188 & n.4 (1981) (explaining Hart's constitutional theory and opining that it is "powerful and enlightening"); see also Richard S. Kay, *Constitutional Change and Wade's Ultimate Political Fact*, 35 U. QUEENSLAND L.J. 31, 37 (2016) (explaining Hart's analysis of the "rule of recognition"); Richard S. Kay, *Legal Rhetoric and Revolutionary Change*, 7 CARIBBEAN L. REV. 161, 181–82 & n.45 (1997) (citing H. L. A. HART, *THE CONCEPT OF LAW* 89–91, 116–23 (2d ed. 1994) in analyzing the Southern secession crisis preceding the U.S. Civil War).

⁷ See, e.g., Peter L. Lindseth, *Between the 'Real' and the 'Right': Explorations Along the Institutional-Constitutional Frontier*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 60, 62–64 (Maurice Adams et al. eds., 2017) (citing Hauriou's theories as the "starting point" for understanding institutional change). Portions of this Essay draw on this book chapter.

⁸ See, e.g., THE FRENCH INSTITUTIONALISTS: MAURICE HAURIU, GEORGES RENARD, JOSEPH T. DELOS (Albert Broderick ed., Mary Welling trans., 1970) (containing English translations of several works by Hauriou) [hereinafter THE FRENCH INSTITUTIONALISTS]. More recently, see MAURICE HAURIU, *TRADITION IN SOCIAL SCIENCE* (Christopher Berry Gray trans., 2011) (translating MAURICE HAURIU, *LA SCIENCE SOCIALE TRADITIONNELLE* (1896)).

world. That too is unfortunate, and not just because Hauriou was among the greatest administrative law scholars of the late-nineteenth and early-twentieth centuries. Rather, more importantly for our purposes, Hauriou was also the progenitor of what he called the “theory of the institution and the foundation.”⁹ Perhaps better than any other theorist, Hauriou understood how the transformation of “the real into the right” served as the very foundation of public law, whether administrative or constitutional.¹⁰ Rick and I are both fascinated by these sorts of liminal situations between real and right, in which social facts—economic, political, cultural, historical, ideological—are somehow transformed into authoritative law for a particular community. Such a transformation, of course, can be understood as giving rise to a new “rule of recognition” in a Hartian sense (Rick’s view), or to a new “institution” as Hauriou would have put it (my view). In either case, out of that transformation can come a particular and fundamental kind of “right”—ultimately a “constitution”—for a particular political community. Each of us puzzle over what precisely this means, both in socio-historical and legal terms.¹¹

Part I of this Essay explores Rick’s approach to this question by looking at his understanding of the relationship of law to processes of revolutionary change. The primary vehicle for this opening discussion is an examination of the theoretical dimension of Rick’s recent and fascinating 2014 legal-historical monograph, *The Glorious Revolution and the Continuity of Law* (hereinafter *GRCL*).¹² The discussion further explores how, in approaching the question of law and revolutionary change, Rick struggles to remain faithful to his Hartian framework. The problem is that this framework ultimately depends on a distinction between the interior and exterior of the legal system that does not map well onto his historical evidence. Thus, as a supplement to his Hartian framework, Rick introduces the distinction between the “axiological” underpinnings of a revolution (be they social, political, or cultural) and its “legal” manifestation, i.e., the replacement of an old rule of recognition with a new one. In doing so, Rick’s analysis begins to point us toward more complex dynamics in processes of revolutionary change that I would argue are more robustly captured by Hauriou’s theory of the institution.

⁹ Maurice Hauriou, *The Theory of the Institution and the Foundation: A Study in Social Vitalism*, in *THE FRENCH INSTITUTIONALISTS*, *supra* note 8, at 93.

¹⁰ Maurice Hauriou, *An Interpretation of the Principles of Public Law*, 31 HARV. L. REV. 813, 815 (1918).

¹¹ Compare Kay, *Constituent Authority*, *supra* note 4, at 715 (“What makes a constitution a constitution?”), with Peter Lindseth, *The Metabolic Constitution and the Limits of EU Legal Pluralism*, in *RESEARCH HANDBOOK ON LEGAL PLURALISM IN EU LAW* 223 (Gareth Davies & Matej Avbelj eds., 2018) (“What does it mean for power to be ‘constituted’? What are the normative or practical implications of this ‘constitutional’ phenomenon?”).

¹² RICHARD S. KAY, *THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW* (2014).

Part II then explores Hauriou's theory in more detail, drawing linkages between it and Rick's work. The discussion begins, however, not with Hauriou but with Rick's seminal 2011 article, *Constituent Authority*.¹³ In that piece, Rick confronts squarely the question whether "successful constitution-making must involve something more than the expression of will"¹⁴—again one of those liminal situations at the boundary between law's seeming interior and exterior. As Part II will show, consistent with Rick's position in *Constituent Authority*, Hauriou also finds it implausible that "constituted law" is merely a matter of will, force, or power—or, as Hauriou once put it, "an attack that has succeeded."¹⁵ All institutions, Hauriou theorized, begin with some kind of exercise of will. But thereafter, he posited, they must "put [themselves] in harmony with the conscience of jurisprudence,"¹⁶ thus suggesting that exercises of power and law are inextricably intertwined. Part II builds on Hauriou's approach to advance a theory of institutional (and by extension constitutional) change across three dimensions—functional, political, and cultural—whose complex interaction, as well as potential reconciliation, help us better understand the foundations of stable social, political, and legal order over time.

This Essay then concludes, in Part III, by returning to the role of law in this overarching process. Despite Rick's intense focus on law in his work, he is surprisingly ambivalent about its role. As he describes in the introduction to *GRCL*—somewhat jarringly—the English revolutionaries of 1688-89 "crammed irregular decisions into the regular forms; they described illegal actions with legal terminology. In short, they faked it."¹⁷ One might take this as an expression of a deep (perhaps even overwhelming) skepticism toward the purported "continuity of law" at the heart of the account advanced in *GRCL*. Was it really a "fake" continuity after all, given that, consistent with a Hartian framing, it ultimately entailed the replacement of the prevailing rule of recognition? If so, then perhaps *GRCL* is misleadingly titled. Perhaps it is really an account of legal rupture, as well as about the manner in which legal-sounding rhetoric can, in the right circumstances, be used to mask that rupture, to create a sense of comforting continuity where little or none in fact exists. Part III argues, however, that it is precisely the effort to retain the language of law and to operate within its forms that differentiates the change wrought by the Glorious Revolution from other political transformations that ultimately proved more fragile. This, I would suggest, is a vindication of both of Rick's title as well as Hauriou's central insight about the crucial role of

¹³ Kay, *Constituent Authority*, *supra* note 4, at 721–22.

¹⁴ *Id.* at 721.

¹⁵ Hauriou, *An Interpretation of the Principles of Public Law*, *supra* note 10, at 816.

¹⁶ *Id.*

¹⁷ KAY, GLORIOUS REVOLUTION, *supra* note 12, at 17.

law in allowing revolutionary change to achieve legitimacy and durable institutionalization over time.

I. LEGAL RHETORIC, AXIOLOGICAL UNDERPINNINGS, AND REVOLUTIONARY CHANGE

In *GRCL*, Rick focuses on what he sees as “the distortion of legal concepts” inherent in a process of revolutionary change, as well as how those distortions can “influence[] the actions, the institutions, and the rhetoric of the new settlement.”¹⁸ In doing so, Rick is in fact returning to a topic that he had first explored nearly two decades previously, in a 1997 article aptly entitled *Legal Rhetoric and Revolutionary Change*.¹⁹

In that earlier piece, Rick had placed the English revolutionaries of 1688-89 at one end of an analytical spectrum, as self-perceived agents of a deeper legality against the asserted illegality of the government they sought to overthrow.²⁰ In such a “legalist revolution,” as Rick would later put it,²¹ it was only natural for the protagonists “to connect their actions . . . to the artifacts of the legal system they [were] displacing.”²² At the opposite end of Rick’s analytical spectrum were, quite fittingly, the Bolshevik revolutionaries in 1917 Russia, who saw themselves as agents of a thoroughgoing rejection and transcendence of the old regime.²³ As a consequence, much less than justifying their actions in terms of an older legality, the Bolsheviks felt themselves free to construct—indeed historically *compelled* to construct, according to their ideology—an entirely new governing system based on a revolutionary conception of law and public order at its core.²⁴

What, according to Rick, ultimately differentiated the English revolutionaries of 1688-89 from their Bolshevik counterparts in 1917? Perhaps less than one might suppose, at least from the ultimate perspective of law. Despite the hyper-legalist rhetoric of the Glorious Revolution, the English insurrectionists still engaged in what was, in Rick’s estimation, fundamentally an extra-legal enterprise. This is entirely in keeping with Rick’s ultimately Hartian understanding of the foundations of revolutionary change. For Rick, such change boils down to a “replacement of one rule of recognition with a distinctly new one.”²⁵ To achieve that

¹⁸ *Id.* at 2.

¹⁹ Kay, *Legal Rhetoric*, *supra* note 6.

²⁰ *Id.* at 166.

²¹ Richard S. Kay, *William III and the Legalist Revolution*, 32 CONN. L. REV. 1645 (2000).

²² Richard S. Kay, *Constitutional Chrononomy*, 13 RATIO JURIS. 31, 46 (2000).

²³ Kay, *Legal Rhetoric*, *supra* note 6, at 166.

²⁴ *Id.* at 205–06.

²⁵ Kay, *Constitutional Change*, *supra* note 6, at 37 (citing HART, *supra* note 6, at 117–23, 153; KAY, GLORIOUS REVOLUTION, *supra* note 12; Kay, *Legal Rhetoric*, *supra* note 6).

goal, however, “mere legal authority would be insufficient even though such changes might be articulated using the rhetoric of law.”²⁶ Because the replacement of a rule of recognition goes to the very heart of “some settled source of legal authority,” the replacement could only be effectuated “from a point of view external to the legal system . . . based on political history and morality.”²⁷

In short, from this Hartian perspective, both the English revolutionaries of 1688-89 and their Bolshevik counterparts in 1917 were engaged in an ultimately extra-legal insurrection. What differentiated them, rather, was what Rick would call the prevailing “axiological” environment in which they operated, i.e., the well of values and experiences—cultural, historical, social, political—from which they drew, which in turn impelled them toward revolutionary change.²⁸ In seventeenth-century England, adherence to law (or the appearance thereof) provided an independent source of axiological value from which otherwise extra-legal revolutionary impulses might be dressed up and thereby gain political-cultural traction. In the case of late-seventeenth century England, “the need to accommodate the law was not a mere irritant. It was a powerful constraint on what the revolutionaries did and, certainly, on what they said. The pull of legality and the shame of illegality were continuous, insistent, and intense.”²⁹ (Precisely because the English revolutionaries felt the need to avoid any appearance of being lawless, they needed to “fake[] it,” as Rick puts it.)³⁰ By contrast, the Bolsheviks in 1917 felt no similar need for this sort of legal subterfuge, because the axiological environment in which they operated gave them license to do so. This was so not just because of the Bolsheviks’ own utterly rejectionist ideology toward “bourgeois” legality and the state. Rather, it was also because of the thin—indeed, arguably non-existent—culture of legality of the Tsarist regime they were seeking to overthrow.³¹

To get a better handle on Rick’s understanding of how this sort of axiological background might influence revolutionary episodes, we can turn to the opening pages of *GRCL*, which provide further theoretical elaboration. As Rick explains there, a revolutionary change in regime—

²⁶ *Id.*

²⁷ Kay, *Legal Rhetoric*, *supra* note 6, at 182 (citing HART, *supra* note 6, at 89–91, 116–23; Kay, *Preconstitutional Rules*, *supra* note 6).

²⁸ KAY, GLORIOUS REVOLUTION, *supra* note 12, at 17–20 (following Jerzy Wróblewski, *The Analytical Concept of Revolution*, in ENLIGHTENMENT, RIGHTS AND REVOLUTION: ESSAYS IN LEGAL AND SOCIAL PHILOSOPHY 374 (Neil MacCormick & Zenon Bankowski eds., 1989)).

²⁹ KAY, GLORIOUS REVOLUTION, *supra* note 12, at 2.

³⁰ *Id.* at 17.

³¹ Kay, *Legal Rhetoric*, *supra* note 6, at 203–08.

legal, political, or otherwise—always requires an antecedent axiological shift.³² He explains:

The formal rules and institutions of any state are created and maintained in response to certain substantive social needs. The stability of formal arrangements will depend on how well they continue to fit the substantive desiderata. But the latter derive from social facts and values that are subject to inevitable change. As they change, the suitability of existing legal structures may diminish. Sooner or later, that is, constitutional rules are likely to chafe and the preconditions for revolution will be in place.³³

As Rick further notes, however, there are two factors complicating this seeming congruence between the axiological and legal/constitutional manifestations of revolution. The first flows from the fact that,

[i]f constitutions responded perfectly and instantly to altered social conditions and political convictions, the axiological and legal marks of revolution would appear simultaneously. But that is almost never the case. Typically, there will be a lag during which time the underlying social and political values remain unsettled while the old constitutional institutions remain in place.³⁴

This idea of “lag” is in fact well known to theorists of institutional change. In modern parlance, such lags reflect institutional “stickiness”,³⁵ that is, the remarkable resilience of certain socio-political or socio-legal arrangements in the face of pressures for change. Pierre Bourdieu, the French sociologist, called this phenomenon “hysteresis,”³⁶ drawing the concept from the natural sciences, where it is used to describe dynamic systems whose outputs are time-dependent on present and past inputs.³⁷ When we apply this idea to the social and political world, it helps us better understand the relative rarity of outright revolution. For such radical transformations to occur, there normally needs to be a “critical juncture,”

³² KAY, GLORIOUS REVOLUTION, *supra* note 12, at 19 (“The legal revolution . . . must—sooner or later—follow the axiological one.”).

³³ *Id.* at 18 (citing Kay, *Constitutional Chrononomy*, *supra* note 22, at 46).

³⁴ *Id.*

³⁵ See, e.g., Peter J. Boettke, Christopher J. Coyne & Peter T. Leeson, *Institutional Stickiness and the New Development Economics*, 67 AM. J. ECON. & SOC. 331, 332 (2008) (discussing how certain institutional arrangements tend to get “lock[ed] in”).

³⁶ See Cheryl Hardy, *Hysteresis*, in PIERRE BOURDIEU: KEY CONCEPTS 132–34 (Michael Grenfell ed., 2008) (defining the concept of “hysteresis”).

³⁷ 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. KRASNOSEI’SKII & ALEKSEI V. POKROVSKII, *SYSTEMS WITH HYSTERESIS* (Marek Niezgódka trans., 1989).

as the literature puts it,³⁸ that is, “a rare confluence of functional, political, and cultural shifts that radically undermine existing institutional settlements,” which then help to overcome hysteresis “and thereby open[] the way for genuinely new institutional configurations.”³⁹

As Rick further suggests, however, there is a second potential factor that, in his view, can complicate the congruence between the axiological and legal manifestations of revolution. This one flows from the fact that “legal regularity may itself comprise a significant social-political value” in certain contexts.⁴⁰ This adds a twist to Rick’s insistence, following Hart, that revolutionary change must be effectuated “from a point of view external to the legal system . . . based on political history and morality.”⁴¹ How can the commitment to legal regularity operate in this extra-legal sense? Rick fully acknowledges this problem:

The awkwardness of any legal revolution in such circumstances will be apparent. The new system will have to commend itself to the society, in part, by embracing the value of fidelity to law. Yet, by definition, it will itself be a breach of law. Such a revolution subverts its legitimacy by its own example.⁴²

This awkwardness for Rick summarizes the peculiar character of the Glorious Revolution: In order “to reconcile those axiological imperatives with the irresistible culture of legal propriety,”⁴³ the revolutionaries of late-seventeenth century England needed “to employ the rhetoric, if not the reality, of legal regularity.”⁴⁴ This is a somewhat peculiar argument, depending as it does on a strained, ultimately Hartian distinction between law and non-law that does not map very well onto the historical record presented in *GRCL* or indeed elsewhere. Not only are the realms of law and non-law not so clearly distinct in revolutionary moments, they are also deeply interdependent and permeable at all times. Thus, despite his formal Hartian framing, I would say that Rick is substantively on the right track when he seeks to understand revolutionary change in terms of a “reconcil[iation]” between the axiological and the legal⁴⁵ (or, as my Hauriou-inflected approach would put it, between the socio-political “real”

³⁸ Giovanni Capoccia, *Critical Junctures and Institutional Change*, in *ADVANCES IN COMPARATIVE-HISTORICAL ANALYSIS* 147–48 (James Mahoney & Kathleen Thelen eds., 2015).

³⁹ Lindseth, *Between the ‘Real’ and the ‘Right’*, *supra* note 7, at 73–74.

⁴⁰ KAY, *GLORIOUS REVOLUTION*, *supra* note 12, at 19.

⁴¹ Kay, *Legal Rhetoric*, *supra* note 6, at 182 (citing HART, *supra* note 6, at 89–91, 116–23; Kay, *Preconstitutional Rules*, *supra* note 6).

⁴² KAY, *GLORIOUS REVOLUTION*, *supra* note 12, at 19.

⁴³ *Id.* at 20.

⁴⁴ *Id.* at 19.

⁴⁵ *Id.*

and the legal-normative “right”).⁴⁶ Nonetheless, we are left to wonder whether recourse to a different analytical framework might better allow us to capture the complex dynamic processes that such reconciliation actually entails.

II. HAURIUO’S INSTITUTIONALIST THEORY AND THE DIMENSIONS OF LEGAL AND POLITICAL CHANGE

To understand how Hauriou’s approach might usefully inform Rick’s own, we should turn first to Rick’s article *Constituent Authority*,⁴⁷ and examine some of its theoretical implications in more detail. In this piece, Rick offers a critique of the traditional concept used to identify the law-maker behind a constitution—“constituent power”—whose drawbacks compel Rick to offer an alternative concept—“constituent authority”—in order to capture better what he sees as the realities of the constitution-making process.⁴⁸ The entire analysis in *Constituent Authority* reflects a profound discomfort with the idea of constituent power as merely a “raw force, physical, psychological and emotional,”⁴⁹ referring to a phenomenon seemingly external to law *par excellence*. Although the intellectual sources for this idea are many, Rick often invokes Carl Schmitt as its most articulate exponent. Rick quotes Schmitt, for example, for the proposition that the will of the “constitution-making power is existentially present: its power or authority lies in its being.”⁵⁰ For Rick, “[t]his cannot be the whole story.”⁵¹ As he elaborates in a crucial passage:

There is always a reason why an attempted assertion of power is effective. Rules might, for some time, prevail solely because of the physical might the rule-maker can bring to bear on the addressees of its rules. But for a successful constitution to endure for an extended period, there must be something about it that persuades (or at least permits) its subjects to submit to it In the case of a constitution, it will be essential that there exists an explicit or implicit determination by some significant part of the population that the makers of the constitution are or were an appropriate source of constitutional rules. I use the term “authority” to underline the fact that successful constitution-making must

⁴⁶ Cf. Lindseth, *Between the ‘Real’ and the ‘Right’*, *supra* note 7, at 60–63 (describing a Hauriou-inspired approach for analyzing the “real” and the “right”).

⁴⁷ Kay, *Constituent Authority*, *supra* note 4.

⁴⁸ *Id.* at 717–22 (drawing a distinction between “constituent power” and “constituent authority”).

⁴⁹ *Id.* at 719.

⁵⁰ *Id.* at 721 (quoting CARL SCHMITT, *CONSTITUTIONAL THEORY* 64 (Jeffrey Seitzer ed. & trans., 2008)).

⁵¹ *Id.*

involve something more than the expression of will. It calls for the "augmentation and confirmation of will by some sort of reasoning."⁵²

There are evident traces in this passage of Rick's emphasis on the axiological context as a predicate to legal change that we discussed in Part I. But Rick adds here a skepticism of power and will as adequate in themselves, within the axiological realm, to precipitate durable and legitimate constitution-making. For the "reality" of power to effectively bring about a new realm of "right" expressed in a constitution, there must be a socio-historical and socio-political identity and legitimacy between the community and the purported makers of the constitution. There must, in other words, be a normative and legitimating foundation in the axiological context. Indeed, this antecedent normative basis to the transformation of "real" into "right" is reflected directly in the very next passage in *Constituent Authority*:

Authority involves an evaluation of the rightness of the constituent events This does not make its existence any less a fact but it is a certain kind of fact, one that includes the collective critical judgments of some number of individuals in certain times and places. It is this continuing normative attitude that distinguishes constituent authority from simple constituent power.⁵³

These passages provide the basis to demonstrate the overlap between Rick's position and Hauriou's approach, which, as I hope to show in the subsequent discussion, is in fact profound. Hauriou was similarly critical of the view (which he associated with "German jurisprudence") that "equates law with force Force becomes law by success. Constituted law is an attack that has succeeded."⁵⁴ An extended quotation of Hauriou's subsequent critique of this view is worthwhile:

It is easier to protest against the cynicism of such an outlook than formally to refute it. At first sight history seems to prove it. In international conflict and political revolution brutal conquest has long been responsible for the forcible union of peoples, and insurrection has given rise to legitimate government [However,] [w]e have to analyze with exactness the events that have occurred. Around an organization of fact which the process of history has

⁵² *Id.* (quoting Carl J. Friedrich, *Authority, Reason and Discretion*, in *AUTHORITY* 28, 32 (Carl Friedrich ed., 1958)) (other citations omitted).

⁵³ *Id.* at 721–22.

⁵⁴ Hauriou, *An Interpretation of the Principles of Public Law*, *supra* note 10, at 816.

institutionalized and made legitimate we have in reality a succession of phenomena In the first phase an organization is created simply by force, and it then desires to live in peace. But to obtain a peaceful existence the new organization must obtain 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 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.⁵⁵

As suggested by this passage, Hauriou discerned an intimate linkage between institutionalization and the emergence of legitimacy and law. But the relationship, as I hope to show, is always recursive and reflexive, each operating on each other in complex ways. Indeed, one might argue that, while Hauriou viewed constituted law as the culmination of the process, law itself was inextricably tied to—and ultimately inseparable from—antecedent processes of institutionalization and the emergence of legitimacy. Only with all three could “an organization of fact . . . obtain a peaceful existence.”⁵⁶

I will outline the particular elements of Hauriou’s theory of the institution in a moment.⁵⁷ But allow me to stress first that, among its many other virtues, Hauriou stressed that it could provide, *inter alia*, “a satisfactory explanation of the difficult problem of legitimacy arising from prescription.”⁵⁸ “In law, as in history,” he wrote in his 1925 definitive summation of his theory, “institutions stand for duration, continuity, and reality; the process of their foundation constitutes the juridical basis of society and the state.”⁵⁹ The process involved, Hauriou maintained, a

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *infra* notes 61–62 and accompanying text.

⁵⁸ Hauriou, *An Interpretation of the Principles of Public Law*, *supra* note 10, at 816.

⁵⁹ Hauriou, *The Theory of the Institution and the Foundation*, *supra* note 9, at 93. Hauriou distinguished between two types of institutions, both relevant for our purposes: “*institution-persons*” and “*institution-things*.” The former refer to social bodies like states, corporations, guilds, associations, etc., that have come to have legal personality of their own. In this category states hold a unique place, however, in that only states possess the autonomous capacity to mobilize resources in their own right in a legitimate and compulsory manner (other social bodies, like corporations or guilds, also require mobilization of resources from their members but ultimately depend on the state to enforce that capacity, often through mechanisms of private law, such as contract). Consequently, for most social bodies short of the state, their character is dependent on what Hauriou called *institution-things*, or the juridical rules existing within society, such as property and contract, which borrow the power of sanction from the state as the ultimate social body in the collectivity. *Id.* at 99–100 (emphasis added).

complex interaction between “objective” social, political, and historical forces—what Rick might call the “axiological” context—and “subjective” exercises of will in pursuance of particular ideas about that context more broadly. As Hauriou wrote, “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.”⁶⁰ For Hauriou, subjective will, motivated by an idea, creates change when it interacts with those “objective” social, political, and historical forces.

At the most abstract level, the process of institutionalization, as Hauriou understood it, involved three elements: “(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.”⁶¹ I would restate the elements of institutionalization in slightly different terms,⁶² viewing them instead as sets of variables whose coordinates, if you will, can be described along three inter-related dimensions:

- the *functional*, in which actors seek to respond to objective demands (‘needs’) presented by their natural or social environment, subject to functional constraints on available resources, whether inherent in the human species or environmental, cultural, or technological;
- the *political*, in which actors, while responding to these functional needs/constraints, struggle over the allocation of scarce institutional advantages within their collectivity or beyond, either as to the existing institutional advantages they seek to preserve or the new ones they seek to realize;
- and finally, the *cultural*, or the realm in which actors mobilize competing notions of legitimacy (conceptions of ‘right’), often religiously or legally expressed, either to justify or to resist changes in institutional and legal categories/structures in their response to functional needs/constraints.

⁶⁰ *Id.* at 97.

⁶¹ *Id.* at 100–01.

⁶² The reasoning behind this revised approach is set out in greater detail in: Lindseth, *Between the ‘Real’ and the ‘Right’*, *supra* note 7, at 63–70.

The complexity of the interplay between these various dimensions is a principal reason why we observe a large degree of variation in institutional forms in human evolution—what Nobel laureate Elinor Ostrom, the leading institutional theorist of the past half-century, has called the great “diversity of regularized social behavior that we observe at multiple scales.”⁶³ The three dimensions of institutional change—functional, political, and cultural—should always be understood as overlapping and interpenetrating, with varied and multidirectional causal relationships operating among them. As a leading comparative historian once rightly reminded us: “Where a historical problem is big enough to matter, causation is invariably multiple, the factors intertwined and interdependent.”⁶⁴ How a particular society views social and economic (i.e., “axiological”) demands at any given moment, for example, will depend significantly on the cultural system of interpretation that is then dominant, as well as on how competing interests mobilize interpretative frameworks to serve their political goals. A functional concept like “[n]eed, to make the obvious point, is subjective, political, time-dependent, and cultural.”⁶⁵ Moreover, a functional resource like property (or, indeed, legality)⁶⁶ can also operate to define interests in the political dimension while also constituting an ideology in the cultural dimension.⁶⁷ Finally, legitimacy—the seemingly quintessential cultural element of institutional change (as to both governing structures and legal rules)—can also be

⁶³ ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 6 (2005). Like Ostrom, I seek to explain this institutional variation by reference to “a universal *framework* composed of nested sets of components within components for explaining human behavior.” *Id.* at 7 (emphasis in original). See Elinor Ostrom, *Background on the Institutional Analysis and Development Framework*, 39 POL’Y STUD. J. 7, 8 (2011) (“The study of institutions depends on theoretical work undertaken at three levels of specificity that are often confused with one another. These essential foundations are (i) frameworks, (ii) theories, and (iii) models.”). Further potential linkages between my (Hauriou-inspired) framework and Ostrom’s Institutional Analysis and Development (IAD) Framework will need to be explored in greater detail in another venue. For present purposes, however, it is worth noting the cross-resonance and potential overlap between the three “external variables” that Ostrom identifies as foundational to her IAD framework—“biophysical conditions,” “attributes of community,” and “rules-in-use”—and the three dimensions (functional, political, and cultural) that I identify as fundamental to the process of institutional change. See, e.g., Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, Prize Lecture for The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2009 at Aula Magna, Stockholm University (Dec. 8, 2009), in THE NOBEL PRIZES 414–15 (Karl Grandin ed., 2009), <https://www.nobelprize.org/prizes/economic-sciences/2009/ostrom/lecture/> (last visited Feb. 21, 2020).

⁶⁴ DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 200 (1998).

⁶⁵ *Id.* at 199.

⁶⁶ Arguably, as Rick shows in *GRCL*, legality was such a resource upon which the English revolutionaries of 1688–89 needed to draw. See *supra* notes 29–30, 44 and accompanying text.

⁶⁷ See, e.g., RODGERS, *supra* note 64, at 200 (referring to “accustomed rights of property” in the United States 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).

understood as a functional resource that enables or constrains action in the political dimension.⁶⁸

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 the 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 may, depending on the array of interests, trigger either support or resistance in the political dimension. Moreover, this functional/political interaction will be subject to varying and potentially contradictory interpretations mobilized in the cultural dimension. 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. Of course, sometimes such radical change *does* occur, as Rick explores in *GRCL*. But the more important point is that, while historical actors are not prisoners of inherited models and systems of interpretations—they do retain agency⁶⁹—their natural inclination has been to seek to understand (i.e., “to reconcile”)⁷⁰ corresponding shifts in structures of governance in terms of conceptions of legitimacy that are recognizable in historical and cultural, if still evolving, terms.⁷¹ This process of reconciliation inevitably acts as a drag on the process of institutional change, an example of Bourdieu’s “hysteresis” in action.⁷²

The bias against radical institutional change is particularly manifest in the constitutional domain, a core focus of Rick’s work. But to appreciate this bias fully, we must break from a narrow and positivistic conception of a constitution as “an identifiable text or set of texts containing rules at the

⁶⁸ See, e.g., LINDSETH, *supra* note 3, at 11 (expanding on legitimacy’s role in institutional change).

⁶⁹ As the anthropologist Marshall Sahlins reminds us: “For if there is always a past in the present, an *a priori* system of interpretation, there is also a ‘life which desires itself’ (as Nietzsche says).” MARSHALL SAHLINS, *ISLANDS OF HISTORY* 152 (1985).

⁷⁰ See *supra* notes 44–46 and accompanying text.

⁷¹ Cf. Peter L. Lindseth, *Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England*, 55 U. TORONTO L.J. 657 (2005); see also LINDSETH, *supra* note 3.

⁷² See *supra* notes 36–39 and accompanying text.

highest level of the formal legal hierarchy.”⁷³ This is Rick’s claimed approach in *Constituent Authority*. It allows him, definitionally, to argue that a range of social and political factors are extra-legal and extra-constitutional, even as they are nonetheless essential to the ultimate legitimacy and durability of the constitutional system as a whole.⁷⁴ The fact that they are so essential, however, suggests to me that we should not be using the term “constitutional” in the merely formal sense as an act of positive law. Rather, we should deploy it 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.”⁷⁵ Rick’s analysis effectively concurs, even if he insists, very much in a Hartian vein, that “constituent authority cannot be legal authority.”⁷⁶ As his analysis in *Constituent Authority* shows, the transformation of an institutional arrangement 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 that inevitably entails a legal-cultural component.

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”⁷⁷ 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.⁷⁸ 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, racial, religious, or linguistic affinities, nor does it preclude

⁷³ Kay, *Constituent Authority*, *supra* note 4, at 715.

⁷⁴ See, e.g., *supra* notes 52–53 and accompanying text.

⁷⁵ Norbert Foulquier, Maurice Hauriou, *Constitutionnaliste (1856-1929)*, 2 JUS POLITICUM 1, 12–13 (2009) (quoting MAURICE HAURIU, PRÉCIS DE DROIT CONSTITUTIONNEL 296 (1st ed. 1923) (Lindseth translation), hard-copy downloadable at <http://juspoliticum.com/article/Maurice-Hauriou-constitutionnaliste-1856-1929-75.html> (last visited Feb. 2, 2020)).

⁷⁶ Kay, *Constituent Authority*, *supra* note 4, at 716.

⁷⁷ NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 173 (1999) (Oxford Univ. Press Inc. ed., 1999) (emphasis added).

⁷⁸ See, e.g., Peter L. Lindseth, *Law, History, and Memory: “Republican Moments” and the Legitimacy of Constitutional Review in France*, 3 COLUM. J. EUR. L. 49, 54 (1997). See also, Kay, *Constituent Authority*, *supra* note 4, at 742 (on the role of historical memory). Cf. Kay, *Constitutional Chrononomy*, *supra* note 22 (on time and constitution-making).

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—although it still must be grounded in a “historical” and indeed “cultural” experience for that particular community.⁷⁹

It should be noted that Rick expresses some skepticism about the possibility of “a purely demotic polity, one based solely on loyalty to shared civic values.”⁸⁰ In our reading of that sentence, however, we must place emphasis on the words *purely* and *solely*. In *GRCL*, in fact, Rick’s entire argument is built around the idea that the prevailing “axiological” value system in late-seventeenth century England was informed, in significant part, by loyalty to at least one such civic value—adherence to law—which then deeply shaped the contours of the ensuing constitutional revolution.⁸¹ Although, as Rick suggests in *Constituent Authority*, it may well be impossible to “banish” from the act of constitution-making “the centrifugal tendency of distinct historical-cultural sympathies,”⁸² his account in *GRCL* suggests that values we now regard as “civic” may well be part of the “historical” and “cultural” experience for a particular community, precisely as MacCormick suggested. The only real question left opened by Rick’s account is not so much whether this value is part of the axiological context of the Glorious Revolution, but whether (oddly) it can also be understood as part of the system of “law” or understandings of “legality” through which the revolutionaries felt bound to pursue their goals.

III. WHITHER “LAW”?

This brings us back, in closing, to the jarring comment in the opening chapter of *GRCL*: that the English revolutionaries of 1688-89, per Rick, “crammed irregular decisions into the regular forms; they described illegal actions with legal terminology. In short, they faked it.”⁸³ Or, as he puts it two pages later, they sought “to employ the rhetoric, if not the reality, of legal regularity” in bringing about a revolutionary change in regime.⁸⁴

Viewed from the broader institutionalist perspective outlined in Part II, Rick appears to be clinging here to an excessively literal understanding of law and legality in drawing his ultimate conclusions (which, it should be stressed, are otherwise deeply persuasive). This flows again from his

⁷⁹ MACCORMICK, *supra* note 77, at 169–74. See also Kay, *Constituent Authority*, *supra* note 4, at 740–43.

⁸⁰ Kay, *Constituent Authority*, *supra* note 4, at 743.

⁸¹ See *supra* notes 28–30, 44–46 and accompanying text.

⁸² Kay, *Constituent Authority*, *supra* note 4, at 743.

⁸³ KAY, GLORIOUS REVOLUTION, *supra* note 12, at 17.

⁸⁴ *Id.* at 19.

ultimate loyalty to a Hartian framing and its distinction between law and non-law. As Rick puts it in *Constituent Authority*, he is insistent that, “[l]ike it or not, a true constituent authority must act without the comfort of legal authorization.”⁸⁵ He acknowledges that “[i]n certain circumstances, [the] masking of an exercise of constituent authority behind a facade of legality serves important political interests.”⁸⁶ Nonetheless, that exercise will still necessarily—indeed definitionally—be extra-legal in character. This leads him inexorably to his theoretical and methodological conclusion: “The absence of a legal answer to the question of who has constituent authority obliges us to identify a social and/or political one.”⁸⁷

This separation of the legal from the social and political is not merely Hartian; it is also driven by Rick’s overarching (dare I say it, “originalist”) desire to identify specific starting points for legal and constitutional interpretation.⁸⁸ He insists: “Like every human phenomenon, a legal system must have a beginning.”⁸⁹ Moreover, not only must it have a beginning, but society and politics must be antecedent to that beginning rather than be intimately bound up with law in co-constitutive fashion.

Although this approach may make sense from the perspective of a kind of originalist legal doctrine, it is much more tenuous from the perspectives of history, sociology, or even anthropology (*i.e.*, the disciplines on which a more institutionalist approach to law ultimately draws). There may well have been a point in the very distant past of human development when functional needs first gave rise to social groupings, in turn precipitating the advent of an interest-based politics, culminating in cultural conceptions of legal “right,” both public and private. But once each of these domains first emerged, they began to influence each other in complex and multi-directional ways,⁹⁰ giving rise to the range of social, political, and legal institutions that, as Hauriou saw, have provided “the juridical basis of society and the state.”⁹¹

Thus, given the extent of this antecedent institutionalization, it is difficult to maintain that any *modern* legal system must have an identifiable “beginning” except in anything more than a formal or technical sense. As one historical sociologist once rightly observed, “the world is always already institutionalized. Change unfolds on historically specific

⁸⁵ Kay, *Constituent Authority*, *supra* note 4, at 735.

⁸⁶ *Id.* at 733.

⁸⁷ *Id.* at 735.

⁸⁸ See, e.g., Kay, *Constitutional Chrononomy*, *supra* note 22, at 31 (in applying a rule of law, one must look to the creation of it).

⁸⁹ Kay, *Constituent Authority*, *supra* note 4, at 735.

⁹⁰ See *supra* notes 62–72 and accompanying text (discussing the “elements of institutionalization”).

⁹¹ Hauriou, *supra* note 8, at 93.

terrain . . .”⁹² (of which, implicitly, conceptions of law and legality will always be a part). We cannot escape the inherited institutional and legal constructions of that terrain, including in our analysis of politics and society. Rather, it is through these constructions—and perhaps more importantly, through the cultural process of internalizing their seeming normative demands over time (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.

Hauriou is again helpful in spelling out for us the implications of this more institutionalist approach. When he spoke of how an “organization of fact . . . must obtain pardon for its origin, must modify itself, must put itself in harmony with the conscience of jurisprudence,”⁹³ he was in fact referring to the inescapability of antecedent legal conceptions in shaping the processes of institutionalization and legitimation. For Hauriou, this is the role of “law” writ large, to institutionalize, legitimize, and grant such an organization a “peaceful existence.”⁹⁴ This “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 the “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.”⁹⁵ 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). This ownership becomes part of the group’s identity. It is through this process of internalization and identification 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.⁹⁶

In this sense, the English revolutionaries of 1688-89 were not, to return to Rick’s phrase, really “fak[ing]” it at all.⁹⁷ Rather, they were engaged in a process of reshaping conceptions of “right” in the cultural dimension, a

⁹² Elisabeth S. Clemens, *Rereading Skowronek: A Precocious Theory of Institutional Change*, 27 SOC. SCI. HIST. 443, 446 (2003).

⁹³ Hauriou, *supra* note 10, at 816.

⁹⁴ *Id.*

⁹⁵ See *supra* note 61 and accompanying text.

⁹⁶ Hauriou, *supra* note 9, as translated in THE FRENCH INSTITUTIONALISTS, *supra* note 8, at 100.

⁹⁷ KAY, GLORIOUS REVOLUTION, *supra* note 12, at 17.

process that is inherent in the process of “reconciliation.”⁹⁸ 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 a perceived original but at the same time (consciously or unconsciously) forges something quite new.⁹⁹

The reason something new inevitably emerges out of this process of replication is that the process itself is always imperfect. Sometimes actors intentionally pursue a “counterfeit” law or politics but usually not; rather they are normally engaged in a sincere effort to express a genuine, if evolving, legal and political identity in the face of new social and political pressures. “Reconciliation” is unavoidable even to the most committed originalist.

The commitment to legal continuity was undoubtedly central to the identity of the English revolutionaries of 1688–89, and out of their efforts to displace James with William emerged a broadly legitimate regime in the eyes of an overwhelmingly Protestant population. Although there remained not-insignificant pockets of Jacobite resistance at the periphery,¹⁰⁰ the revolutionary effort at the core (including the purportedly “fake” legal continuity) undoubtedly contributed to building a greatly reinforced governing system. With that augmented legitimacy, the new regime would dramatically increase its capacity to mobilize fiscal and human resources and thus to project power much more expansively, both in Europe and indeed throughout the world, over the next century.¹⁰¹

⁹⁸ See *supra* notes 44–46, 70–72 and accompanying text.

⁹⁹ Sarah Hanley, *Engendering the State: Family Formation and State Building in Early Modern France*, 16 FRENCH HIST. STUD. 4, 5–6 (1989) (footnote omitted).

¹⁰⁰ In Scotland, there would be periodic Jacobite rebellions well into the next century. Moreover, in Ireland, following the Williamite War of 1688–91, the Protestant Ascendancy would need to maintain, in effect, “an armed peace,” to borrow the pertinent phrasing from Hauriou, the effects of which Ireland is still living with today. Hauriou, *supra* note 10, at 816.

¹⁰¹ See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 830 (1989) (“It is clear that the institutional changes of the Glorious Revolution permitted the drive toward British hegemony and dominance of the world.”); but see Steven C. A. Pincus & James A. Robinson, *What Really Happened During the Glorious Revolution?*, in INSTITUTIONS, PROPERTY RIGHTS, AND ECONOMIC GROWTH: THE LEGACY OF DOUGLASS NORTH 192, 221–22 (Sebastian Galiani & Itai Sened

The achievement of the Glorious Revolution stands in contrast with some prominent revolutions of the twentieth century that were less fastidious in “employ[ing] the rhetoric, if not the reality, of legal regularity.”¹⁰² The Bolshevik Revolution, which Rick touches on in *Legal Rhetoric and Revolutionary Change*,¹⁰³ was no doubt able to institutionalize itself sufficiently to support a dictatorial regime that would last over seventy years. But its ultimate collapse arguably owed as much to the cynicism and lack of legitimacy flowing from its rejection of “bourgeois legality” (and the many abuses both large and small that this engendered) as from the regime’s inability to meet the material needs of its population.

A second twentieth-century revolution would be the Nazi seizure of power in Germany in 1933, followed by its utterly failed effort to establish a “Thousand-Year Reich,” lasting a mere twelve years. Carl Schmitt, who joined the Nazi Party after the seizure in 1933, famously attempted to dress up the violence of the Nazi state with a patina of legality.¹⁰⁴ But leaving aside its colossal criminality and brutality, “the Hitler regime,” as one of its foremost historians has noted, would prove to be “inimical to a rational order of government and administration. Its hallmark was *systemlessness*, administrative and governmental disorder, the erosion of clear patterns of government, however despotic.”¹⁰⁵

In 1944, surrounded by the evidence of the resulting catastrophe for Europe and the world, Schmitt offered a set of reflections on the “plight” of European jurisprudence.¹⁰⁶ Taking refuge, in part, in French legal doctrine (notably that of Hauriou),¹⁰⁷ he wrote of the necessity for “a sense for the logic and consistency of concepts and institutions,” a “minimum of an orderly procedure, due process, without which there can be no law,” as well as “a recognition of the individual based on mutual respect.”¹⁰⁸ Although Schmitt had long claimed inspiration from Hauriou’s

eds., 2014) (critiquing the North and Weingast interpretation). More generally, see JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY, AND THE ENGLISH STATE, 1688–1783* (1988).

¹⁰² KAY, *GLORIOUS REVOLUTION*, *supra* note 12, at 19.

¹⁰³ See *supra* notes 19–27 and accompanying text.

¹⁰⁴ See, e.g., Carl Schmitt, *Der Führer schützt das Recht* (*The Leader Protects the Law*), 39 DEUTSCHE JURISTEN-ZEITUNG 945 (1934).

¹⁰⁵ IAN KERSHAW, *‘Working towards the Führer’: Reflections on the Nature of the Hitler Dictatorship*, in HITLER, THE GERMANS, AND THE FINAL SOLUTION 29, 35 (2008).

¹⁰⁶ Carl Schmitt, *The Plight of European Jurisprudence*, TELOS, Spring 1990, at 35, 44 (G.L. Ulmen, trans.). This essay originally appeared as CARL SCHMITT, *Die Lage der europäischen Rechtswissenschaft (1943/44)*, in VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924-1954: MATERIALIEN ZU EINER VERFASSUNGSLEHRE 386–426 (2d ed. 1973).

¹⁰⁷ See, e.g., Schmitt, *supra* note 106, at 52, 68 n.74.

¹⁰⁸ *Id.* at 67.

institutional theory,¹⁰⁹ his Nazi episode showed how he shared none of the French professor's commitment to constitutionalism grounded in separation of powers or the protection of individual rights.¹¹⁰ Schmitt even had the audacity to argue that it was now necessary to "defend this indestructible core of all law against all destructive enactments," a task "which today in Europe is more critical than at any other time and in any other part of the world."¹¹¹ One can only laugh even if otherwise overwhelmed by disgust by Schmitt's self-serving cynicism.

Rather than be taken in by that cynicism, however, we can instead see it as "the tribute that vice customarily pays to virtue," to borrow roughly contemporaneous phrasing from an American historian.¹¹² One hopes that there is indeed such an "indestructible core of law," whose continuity should be defended and preserved during all upheavals, revolutionary or otherwise. As Rick so ably describes, the English revolutionaries of 1688-89 felt a "pull of legality" and "shame of illegality" that "were continuous, insistent, and intense."¹¹³ Thank goodness they felt the necessity to "fak[e] it" in this way,¹¹⁴ because it set a good example for future revolutions to emulate, even if many have not, with disastrous consequences.

CONCLUSION

I can only close by thanking Rick again for the richness and sophistication of his work, and in particular for *GRCL* and *Constituent Authority*, the two pieces on which I focus here. Not only has Rick been, as I noted at the outset of this Essay, a model of academic citizenship and a source of wise counsel over many decades, he has also been a model of a scholarly life well lived. My only regret is that our different "epistemic communities"¹¹⁵ have kept us from engaging with each other's work in greater depth over our two decades on the faculty together. My hope is that this Essay can be the start of many more fruitful exchanges in the years to come. I am greatly looking forward to them.

¹⁰⁹ For an overview, see David Bates, *Political Theology and the Nazi State: Carl Schmitt's Concept of the Institution*, 3 MOD. INTELLECT. HIST. 415 (2006).

¹¹⁰ See Lindseth, *Between the 'Real' and the 'Right'*, *supra* note 7, at 77–78 (noting that Hauriou "assigns to the sovereignty of the individual within the nation-state, aligned with judicial power, as a necessary counterbalance to the more collective forms of sovereignty and their possession of powers of regulation and legitimate compulsory mobilization"). See also LINDSETH, *supra* note 3, at 70–73.

¹¹¹ Schmitt, *supra* note 106, at 67. See also Bates, *supra* note 109, at 441 (arguing that Schmitt here "was clearly trying to mask his deep engagement with the National Socialist program, and especially its racial agenda").

¹¹² CARL L. BECKER, *The Cornell Tradition: Freedom and Responsibility*, in CORNELL UNIVERSITY: FOUNDERS AND THE FOUNDING 203 (1943).

¹¹³ KAY, GLORIOUS REVOLUTION, *supra* note 12, at 2.

¹¹⁴ *Id.* at 17.

¹¹⁵ See *supra* note 2 and accompanying text.