

# 1. Treading alongside the legitimacy pathways: an introduction

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Well before starting to plan this volume, we were convinced that good European lawyers and political scientists have to double up as comparatists. Many of the principles and norms making up EU law have resulted from Treaty makers, legislators and judges distilling common norms from the several national legal orders of the Member States. Moreover, the common constitutional and legal traditions of the European states not only remain a fundamental source of democratic legitimacy for the European Union, but also provide a vital yardstick with which to assess and, if needed, criticise EU law. At the very same time, however, we felt that the tools, not least the conceptual ones, of comparative constitutional law as practised in most cases were not always fit to “do” European Union law.

We were thus in search of a renewed approach to comparative constitutional law which could fit our “European concerns”. This made it unavoidable that we would cross tracks with Bruce Ackerman. We read *We the People*, his influential trilogy on US constitutional law,<sup>2</sup> not only as a constitutional history of the United States of America, but also as a *general* theory of constitution-making and constitutional transformation. His *The Rise of World Constitutionalism*,<sup>3</sup> which makes of general constitutional theory a self-standing object of research, was a logical next step. This seminal article has been followed by

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<sup>1</sup> This introduction is the result of a collective intellectual effort. As academic authorities in some European countries require specific allocation of the different sections, we specify that sections 1 and 5 can be attributed to Agustín Menéndez, sections 2 and 3 to Marco Goldoni, section 4 to Marco Dani.

<sup>2</sup> Bruce Ackerman, *We the People* (Harvard University Press; 1991 (volume I); 1997 (volume II); 2014 (volume III)).

<sup>3</sup> Bruce Ackerman, ‘The Rise of World Constitutionalism’ (1997) 83 *Virginia Law Review* 771-797.

a three-part book project, of which the first, *Revolutionary Constitutions*, was published in 2019.<sup>4</sup>

The latter not only sparked our interest, but also contributed to focus our thinking. Key in that regard was the main conceptual contribution of the book, namely the articulation of three different “pathways” to the founding and consolidation of a constitutional order: the revolutionary, the establishment, and the elite pathways.<sup>5</sup> At once encouraged and provoked by the book, we invited a group of colleagues from different European countries to engage in a collective exercise of constitutional comparison which could double up as a reflection on the proper tools and concepts that European lawyers and political scientists needed. The two ensuing workshops, which we had planned as *in persona* events, became online seminars due to the COVID-19 syndemic. However, the conversation was very fluid and the exchanges intense, thanks in particular to the generous and indefatigable engagement by Professor Ackerman. The final result of such endeavours is the book that the reader has in her hands (or has uploaded into an e-reader or is simply scrolling in her portable).

This introduction is structured in four parts. We start by highlighting why this book regards Ackerman’s comparative constitutional analysis as its point of departure but, at the same time, departs in many aspects from the frame drawn by the Yale professor (section 1). Then we zoom in on the three main ways in which the different contributions to the book elaborate upon and at the same time transcend Ackerman’s work: on the character and consistency of constitutional pathways (section 2), on the influence exerted by origins in determining the constitutional course followed by political communities (section 3), and on the extent to which comparative constitutional law can throw light on the causes and courses of the process of European integration, in particular on its ongoing existential crisis (or polycrisis) (section 4). The last section holds the conclusions.

## 1. ACKERMAN’S COMPARATIVE CONSTITUTIONAL THEORY AS POINT OF DEPARTURE

As will become evident in the rest of this introduction, and indeed in the different chapters of the book, not only do the aim and purpose of this volume differ

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<sup>4</sup> Bruce Ackerman, *Revolutionary Constitutions* (Harvard University Press 2019).

<sup>5</sup> The concepts had already been introduced in ‘Three Paths to Constitutionalism – and the Crisis of the European Union’ (2015) 45 *British Journal of Political Science* 705-714.

from Ackerman's, but also, while sympathising with Ackerman's research agenda and building on it, we depart from many of the theses that Ackerman puts forward.

First, *The Legitimacy of European Constitutional Orders* is confined to the study of the constitutional orders of states which are or have been members of the European Union, while Ackerman's ambitions are global, extending to (potentially) all the constitutional orders in the world. As a result, our aim is in relative terms modest, even if a very tall order in itself, which can only be discharged through a collective effort and through a series of volumes — not only one. The book thematises traditions of constitution-making in the context of specific historical events (shared in many cases by many European states, but even then experienced in different manners) with special attention to the ongoing process of integration on the continent. In what follows, there is no methodological commitment that these findings necessarily apply only to the European context, but there is also no claim that they can be easily transplanted to other regions.

Second, we take Ackerman's comparative project as our point of departure, not as our ultimate reference point. This renders our book very different in spirit and in execution from *Revolutionary Constitutionalism*. In particular, our purpose of refitting comparative constitutional law to reconstruct and assess the European legal field results in three major differences with Ackerman's work.

For one, it seems to us that Ackerman over-emphasises the origin of constitutions. In his view, constitutional genesis seems to pre-determine in large part the constitutional pathway followed by each political community. Ackerman's constitutional pathways seem to be rather self-contained, so once a country has started to tread a given pathway, a certain path dependency kicks in. By contrast, it seems to us that the European experience, as reflected in this book, advises in favour of a more comprehensive approach, which pays attention to how the dynamics of constitution-making and constitutionalisation interact throughout the life of constitutional orders. As we will see in detail, this cannot but have implications for the choice of conceptual tools apt to distinguish and classify different constitutional pathways.

For two, and quite related to the first point, it seems to us that the global reach of Ackerman's theory comes at the price of a limited temporal focus, something which may account for the lack of theorisation of the mechanisms and processes through which constitutional histories shift from one pathway to another. The only exception in that regard are revolutionary constitutional experiences. Indeed, Ackerman considers how revolutions on a "human scale" result in the abandonment of the establishment or elite pathways. But for the rest, there is no consideration of how political communities may follow hybrid pathways.

For three, constitutional procedures and forms are of essence, and Ackerman provides sophisticated tools to make sense of them. But the life of constitutions is not exclusively legal and political. It is also substantive and material. The European case is in this regard far from idiosyncratic, but it illustrates particularly well the importance of the convergence or divergence of socio-economic structures over the life of constitutions. It is simply impossible to make full sense of the constitutional history of Europe without paying full attention to the development of that specific form of state that is the Democratic and Social State. As is well known, that state emerged in the interwar period, not only in Europe, but also in the USA (the New Deal experience, so dear to Ackerman, exerted indeed a global influence, not least in the aftermath of WWII). In our view, Ackerman underplays the contribution of political economy to the legitimacy of democratic constitutionalism, and doing so is especially problematic in the European case. As we will see, the very condition of possibility of integration into the EU has been the convergence of socio-economic constitutional models. States which followed very different constitutional pathways in Ackerman's categorisation have all become Democratic and Social States. By the same token, the existential crisis of the EU (a polycrisis that started at latest 2008 and still persists) is more closely linked to the growing divergence among Member States in socio-economic terms (ie to different forms of *déravage* away from the ideal of the Democratic and Social State) than to the divergence allegedly originating in Member States' various constitutional pathways (revolutionary, establishment, or elite).

## 2. PATHWAYS TO CONSTITUTIONAL LEGITIMACY: IDEAL TYPES V. PATCHWORKS

From a comparative perspective, it is possible to extrapolate a few common threads from the chapters, even though they deal with a broad variety of constitutional experiences and jurisdictions.

First of all, and as already hinted, the chapters suggest that Ackerman's modelling has captured something about the general traits of the traditions of constitution-making. However, applied to the European context, those ideal types come across as exceedingly abstract and, above all, unnecessarily mutually exclusive. Admittedly, ideal types carry by definition a risk of abstractness, especially when contrasted with more granular analyses. Yet, even accepting the level of generality intrinsic in ideal types, most of the instantiations of constitution-making described in this book rather convey to the reader the sense of patchworks combining, often through unpredictable trajectories, the revolutionary, elite and establishmentarian pathways. Thus, in terms of models of constitution-making, the main lesson to be brought home from these chapters is twofold: 1) there are elements of elite, estab-

lishment, and/or revolutionary action, in almost all European constitutional histories; 2) there are aspects of political mobilisation, elite-driven political pressure, and behind-the-scenes negotiations between insiders and outsiders in many (though not all) phases of constitution-making (this means that even in the presence of popular mobilisation, there may be still evident traces of other pathways at work in the background). The latter point may not be too problematic for Ackerman's approach: indeed, one might find a criterion that establishes which of these factors of constitution-making is predominant (what Ackerman calls, in the first page of his book, the fundamental rather than the accidental traits of constitution-making) and, therefore, determinative of the nature of the process. The former point, conversely, puts a lot of pressure on Ackerman's taxonomy. Indeed, in several circumstances it tends to blur the ideal types to such an extent that it becomes legitimate to question their usefulness towards understanding the specificity of constitution-making experiences and their capacity to ground a constitution's legitimacy.

A few chapters in the collection illustrate this danger. Arnaud Le Pillouer suggests that Ackerman can claim France as a clear case of revolutionary constitutionalism only by choosing the resistance against the Vichy regime as a starting point of the analysis. However, Le Pillouer emphasises the fact that this narrative downplays the path dependency created by the institutions of the Third Republic. Once the evolution into the Fourth and Fifth Republic are read against the *longue durée* of the Third Republic (that is, setting the origin of the timeline in 1875), the nature of the pathway becomes less adamant and the Gaullist constitution comes across as an instantiation of the elitist pathway.

In the case of the United Kingdom, Martin Loughlin puts it straightforwardly: whether the UK constitution is the outcome of an establishmentarian pathway or a mix of all pathways depends on the determination of the origin of the order. If the origin is identified as far back as the English Civil War or the Glorious Revolution, then there is enough room for stating that the UK constitutional tradition is not only establishmentarian. Loughlin asks whether starting from the Reform Act of 1832 would make more sense than starting from 1640, or why not give more emphasis to the Second Reform Act of 1867, which introduced a more extensive democratisation of the British political system.

Similar questions are posed directly or indirectly in the chapters by Marina Bán and Signe Larsen. The latter's extensive analysis of the Scandinavian culture of constitution-making resonates with some of the insights of Loughlin's chapter. Larsen shows that Scandinavian countries display a mix of pathways according to the temporal and the geographical starting points of the analysis. Larsen indeed complicates Ackerman's scheme by bringing into the picture the imperial dimension of these constitutional orders and, especially of course, those of Denmark and Sweden. The observation of the imperial aspect

entails a certain difficulty in adopting distinctive concepts of each pathway. Taking into account the imperial dimension not only has temporal and spatial implications for the analysis, but also poses a new challenge to the comparative scholar: should the relation between centre and colony be taken into account? Should the reconstruction of constitution-making start from the demise of the empire? Applied to Ackerman's analysis, this means, for example, that it is controversial to define the experience of Scandinavian countries as establishmentarian because in an empire the notion of who counts as outsiders becomes difficult to grasp. Moreover, the reconstruction of the former colonies' constitution-making pathways *qua* colonies should also be factored in.<sup>6</sup>

Bán's reconstruction of the Polish and Hungarian constitutional pathways recognises the validity of certain aspects of Ackerman's analysis, but it also highlights the presence of fundamental (and not accidental) aspects of both revolutionary break and strong elitism. Like Le Pillouer, Loughlin and Larsen, Bán as well takes a long-term perspective: starting from the aftermath of WWI, Bán maintains that there have been times of revolutionary upheaval in both Poland and Hungary, and that either such upheavals have been stifled by elitist intervention or there has been a mixed way of constitution-making from the very beginning. Ultimately, Bán's claim is not only that the cultures of constitution-making in Poland and Hungary are more similar than what it could be thought in the first place, but that they both constantly present an unstable mix of elite and revolutionary pathways which blurs these ideal types to the point of making them unintelligible.

### 3. THE UNIT OF ANALYSIS: AGENTS OF CONSTITUTION-MAKING, CONSTITUTIONAL TIME, ORIGINAL IMPRINTING V. REGIME

#### 3.1 Agents of Constitution-Making

One of the main imports from these chapters is that the formalisation of ideal types, although useful in itself for comparative purposes, is presented in Ackerman's work in too rigid a manner. There are a number of methodological reasons which might explain why the formalisation of the ideal types does not hold tight scrutiny. Paramount among which is the way in which the

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<sup>6</sup> Larsen has expanded on the imperial dimension of many European constitutional experiences in her ground-breaking article: 'European Public Law after Empires' (2022) 1 *European Law Open* 6-25. This type of approach can open comparative constitutional analysis up to uncharted territories. See, for a case study on the concept of settler constitutionalism in the US, Aziz Rana, *Two Faces of American Freedom* (Harvard University Press 2014).

agents of constitution-making are identified. In this regard, Hannah Arendt's influence seems to play a bigger role on Ackerman (though less visible and less present in *Revolutionary Constitutions*) than Max Weber's. In brief, Ackerman's typology is based on a predominantly institutional and political conception of constitutions. Although in his case studies there is a host of key players of constitutional development such as political parties, political leaders, social movements, and in a couple of circumstances, religious leaders, most of Ackerman's reconstructions rely ultimately on the brinkmanship of clever or astute statesmen. De Gasperi, De Gaulle, Adenauer, Wałęsa, and outside of Europe, Mandela, Nehru and Roosevelt, are at the forefront of Ackerman's narratives of constitution-making. At this point, we should hasten to add that this is no accusation of reductionism. It is undeniable that also in this specific respect Ackerman's scholarship has represented an important innovation compared to other versions of constitutional analysis fully centred on supreme or constitutional courts.<sup>7</sup> In both his history of US constitutionalism and this comparative constitutional project, other institutional features have been factored in: federalism, the relation between parliament and executive, or the dialogue between movements and political parties. The case of constitution-making in Italy, as the chapter by Marco Goldoni bears witness, reveals the extent to which political parties *qua* constitutional subjects can act as bearers of the constitutional order. At the same time Goldoni shows also how informal constitutional mutation may be advanced by a wider range of agents of constitution-making (and un-making). Both insights shed important critical light on Ackerman's approach. In the latter, as it is common for the dominant constitutional discourse around European integration, social conflict and non-political but influential agents of constitutional change occupy a marginal position in the whole picture. For this reason, for example, the rise of corporate actors and the institutionalisation of "markets" as input institutions of constitutional change has been overlooked for a long time not only by Ackerman, but by EU law and comparative constitutional scholars as well.<sup>8</sup> This gap in the analysis is reflected in overlooking the importance of other seemingly executive agencies *qua* constitutional organs like independent

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<sup>7</sup> Ackerman has not been the only one to advocate for a refocusing of constitutional analysis on separation of powers and dialogue between branches. In the US, Mark Tushnet's work went also toward this direction. The debate on political constitutionalism, in Commonwealth countries, also advocated a move away from the centrality of courts in constitutional analysis: see Richard Bellamy, *Political Constitutionalism* (Cambridge University Press 2007).

<sup>8</sup> See, recently, the analysis by Emilios Christodoulidis, *The Redress of Law* (Cambridge University Press 2021) part III.

central banks.<sup>9</sup> Furthermore, as illuminated by the case studies of France and Portugal, the military has often been a protagonist of constitutional transformations in recent European constitutional history, though one could say that it has not exerted the same constitutional centripetal pull it displayed in other regions of the world.<sup>10</sup>

### 3.2 The Constitutional Moment and Constitutional Time

This brings us to a second important point for the comparative constitutional analysis of European traditions. In Ackerman's work, the main unit of analysis is the constitutional moment. As he has incessantly reminded his readers, this is not a punctuated moment of popular outburst, but it is a process of regime-building that spans (on average) across 10 years (so much so that perhaps a term other than moment would have been more apt). At any rate, the constitutional moment is central for the pathway of revolutionary constitutions too. Other pathways operate according to a different logic of development, and it is legitimate to assume (while waiting for the publication of the other volumes) that the constitutional moment is not the main unit of that analysis. This seems to apply especially to the establishmentarian mode of constitution-making, where the dynamic of conflict and negotiation can extend for a longer time and, in principle and often in practice, can intermingle with ordinary politics. In other words, in both elite-driven constitution-making and the establishmentarian mode it tends to become more difficult to draw a dis-

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<sup>9</sup> There seems to be an increasing awareness of the crucial role played by central banks in Western States, but it is still too early to assess whether the increased importance of central banks makes these institutions relevant actors in processes of constitutional change. Nonetheless, it is quite telling that in the main comparative constitutional law handbooks there is no dedicated chapter to central banks. One exception (a sign of the rising awareness of the importance of these institutions) is Jeff King and Richard Bellamy (eds), *Cambridge Handbook of Constitutional Theory* (Cambridge University Press 2023, forthcoming), which contains a chapter on central banks by Jens van't Klooster.

<sup>10</sup> It should be added that the role of the military has often been overlooked by comparative constitutional scholars. Even in the otherwise rather exhaustive handbook on Latin American Constitutionalism, there is no dedicated chapter to the military as a force of constitution-making: see Roberto Gargarella et al. (eds), *Oxford Handbook of Latin American Constitutionalism* (Oxford University Press 2022). It should also be noted that Ackerman has addressed the central importance of the US army as a matter of constitutional maintenance in *The Decline and Fall of the American Republic* (Yale University Press 2010) ch. 2. For an analysis of the role of the military in a classic case study, i.e. Turkey, see Tarik Olcay, 'The Military in the Turkish Constitution', in Marco Goldoni and Michael Wilkinson (eds), *Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023) ch 23.



inction between constitutional politics and ordinary politics. Be that as it may, the references to the three pathways seem to imply that the genesis moment leaves its imprinting onto the following history of a constitutional order.<sup>11</sup> The moment of formation (and consolidation, at least for the case of revolutionary constitutions) shapes the nature of constitution-making in a specific jurisdiction. While there are elements of process in Ackerman's conception, they seem to be fairly limited and the original imprinting ultimately gets the upper hand and (over)determines the evolutionary trajectory of the constitutional order. According to this reconstruction, if a democratic constitutional order is introduced in piecemeal fashion by establishmentarian means, then this will inform the following developments.

As already remarked, the study of the different European experiences seems to suggest a more complicated picture. First, while the focus on revolutionary politics might allow for a relatively uncontroversial identification of the origins of the constitutional order, it is less certain that a clear-cut criterion can be adopted for establishmentarian and for the elite-based constitution-making experiences.<sup>12</sup> The emphasis on the origin should be toned down at least when it comes to the establishmentarian pathway as the moment of rise of a new constitutional order is, by definition, not the outcome of a clear break with the past. But here we encounter two deeper issues concerning the correct identification of the notion of constitutional origin.

First, some of the chapters, especially those on France and the UK, show quite clearly that periodisation is highly exposed to the risk of arbitrariness: shall the analysis of constitution-making go back to the formation of the unitary state? Or would it be sufficient to start the observation of constitution-making from the moment of the rise of the European concert? Or, are the pathways applicable only to (partially) democratic constitutional orders?<sup>13</sup> All those are certainly not trivial questions, as a proper understanding of the types of constitution-making and their rationale cannot be disentangled from a historical analysis (as Ackerman himself has taught to comparative constitutional lawyers).

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<sup>11</sup> Once again, there is more Arendt than Weber in the emphasis put on the origin of the constitutional order: see Hannah Arendt, *On Revolution* (Viking Press 1990) ch 4. Cf Jason Frank, *Constituent Moments* (Duke University Press 2009) ch 1.

<sup>12</sup> In the cases of Spain and Germany, for example, it seems plausible to identify the beginning of an elite-driven constitution-making process as the previous political regimes collapsed.

<sup>13</sup> This question is elicited by the way Ackerman treats authoritarian regimes, for example, Fascist Italy and Communist Poland. These historical experiences do not seem to be classifiable according to the three pathways.

This leads, second, to another important issue, namely what does qualify as a constitutional origin? Here it is helpful to resort to a classification of different types of constitutional change. It is an acquisition of recent comparative constitutional literature that constitutional transformation comes in different forms, and it is more accurate to keep these separated. Thus, constitution-making is diverse from constituent power (at least under certain conceptions of the latter) and from simple constitutional amendments as well.<sup>14</sup> The same applies to other forms of constitutional developments such as constitutional maintenance and constitutional mutations prompted by fundamental changes of the economic or social context in which constitutional orders are situated.<sup>15</sup> Given the description of the pathways provided by Ackerman, it seems that constitution-making is actually understood as an umbrella-term. Breaking it down or distinguishing it from other constitutional phenomena could provide a more accurate picture of concrete processes of constitutional transformation. We suggest, tentatively, that constitution-making, major constitutional amendments and constitutional mutations affect the constitutional identity and the distinctive traits of a regime, while more circumscribed constitutional amendments impact specific non-fundamental aspects of the constitutional order.

### 3.3 Original Imprinting v. Regime

But how can we establish when constitution-making invests core features of political and social organisation? This is indeed far from easy to address, but it gives us the possibility of engaging with a further important issue that emerges from reading the chapters of this volume. Common to many post-WWII constitutional orders is the attempt at constitutionalising socio-economic issues, both in the forms of a catalogue of social rights and through the insertion of principles of organisation of economic production and distribution. As illustrated by the chapters on the Democratic and Social State, and on the materialist conception of the revolution (as well as by the case studies on Portugal, Italy and the Scandinavian countries), addressing the social question under its many manifestations has become a crucial feature of European constitutions in the second half of the 20th century. This has represented a fundamental change

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<sup>14</sup> See, in a burgeoning literature, Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2017); Xenofon Contiades and Alkmenis Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2021).

<sup>15</sup> See Alessandro Mangia, 'Moti della Costituzione o mutamento costituzionale?' (2020) 1 *Diritto costituzionale*, 75.

in the constitutional structure of many European states.<sup>16</sup> It has not happened under the same form in all places: in Northern countries, a living constitution characterised by dominant leftist and social-democratic parties, as well as by strong trade unionism, made it possible to achieve a social democratic state in ordinary politics without resorting to formal constitutional change; the constitutional path followed by other European states (Portugal, Spain, Italy, France, Greece, and Germany, to name a few) has been to entrench certain social rights and principles of activist government. There is an important lesson to be learned by observing these forms of constitutionalisation of the social question as this has shaped constitution-making in many European experiences post-WWII.

Grasping the main traits of European states' constitution-making requires a focus on the political economy of the time and on the normative choices made within a state over socio-economic issues. The variety of these approaches has played no lesser role than the variety of constitutional traditions in preventing a unitary constitution-making process at the European level. Moreover, these two explanatory aspects cannot be severed: the latter's form and content are not independent from the choices concerning the economic structure.

In this sense, it is striking to note how nowadays even Ackerman refers mostly to cultures and traditions of constitution-making rather than to the political-economic structures.<sup>17</sup> Paradoxically, in this respect Ackerman's work seems to both follow and challenge a rather prominent stream of scholarship concerned with the legitimacy of European constitutional orders. Indeed, similarly to Ackerman a number of authors have in the last decades coped with the legitimacy issue by focussing essentially on the law and politics axis – an approach that has led them *en masse* to underestimate the political and democratic qualities of post-WWII European constitutionalism and emphasise its legal and constraining capacity.<sup>18</sup> Also this book bears witness to this line of scholarship. As evidenced by the chapter of Justin Collings, the

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<sup>16</sup> This is not only a European story. For an overview of developments in Latin America see Roberto Gargarella, *Latin American Constitutionalism 1810-2010* (Oxford University Press 2013).

<sup>17</sup> For a comparative analysis of different cultures or traditions of constitution-making see David Landau and Hanna Lerner (eds), *Comparative Constitution Making* (Edward Elgar 2019). Ackerman's own work on the constitutional regime was influenced by the American School of Political Development: see Stephen Skowronek and Karen Orren, *The Search for American Political Development* (Cambridge University Press 2004).

<sup>18</sup> See Jed Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 NYULRev 1993-2000, Christoph Möllers, "'We Are (Afraid) of the People": Constituent Power in German Constitutionalism', in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007) 87-105; Jan Werner Müller, *Contesting Democracy: Political Ideas in*

law and politics perspective may easily lead to highlight the elitist qualities of national constitutional systems. But if this characterisation is widely accepted in relation to the German constitutional order, the claim seems amenable to be stretched so as to include the French and Italian constitutional experiences. This is, for example, the assessment by Michael Wilkinson, whose chapter depicts the constitutional culture of the founding Member States of the European Union as *counter-revolutionary* from the outset. In his reconstruction, European constitution-making has been (at least in the 20th century) inherently anti-democratic and has been driven by one precise objective: containing, and if possible reducing, popular power. The originality of the claim made by Wilkinson's analysis is that it was not only European integration that constrained the political power of the masses, but the domestic party-systems themselves. Ackerman brings to this debate an alternative perspective: as said, although he remains firmly wedded to the law and politics coordinates, his contribution questions a purely constraining and depoliticised account for post-war European constitutionalism and illuminates a variety of political dynamics inherent in French and Italian constitution-making which seem as good as the most celebrated manifestations of democratic constituent power.<sup>19</sup> By contrast, it may be argued that the 1974 carnation revolution in Portugal led the country into a revolutionary pathway, which was however rapidly truncated. At first, as Teresa Violante shows, this was the result of political instability and the IMF acting as an external constraint on democratic politics. Later, European integration favoured a radical scaling down of the socio-economic ambitions of the Constitution, with the latter being successively amended. Yet, the legacy of the revolutionary origins of the Constitution materialised in a strong catalogue of social rights; and this catalogue became, in the aftermath of the 2008 crises, the lever on which the Portuguese Constitutional Court pressed to contain and partially undo political decisions which had made the weaker in society bear the burden of adjustment.

Of course, differences in emphasis and in appreciation of the nature of constitutional orders may simply reflect differences in theoretical preferences or analytic benchmarks. But there may be more to that and elements of artificial construction may be at work. Indeed, while it is fair to assume that each con-

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*Twentieth-Century Europe* (Oxford University Press 2013) and Alexander Somek, *The Cosmopolitan Constitution* (Yale University Press 2014).

<sup>19</sup> This is the case, perhaps, because Ackerman rejects the notion of constituent power as attempt at a total revolution. On other descriptions of constituent power, the difference with Ackerman's notion of constitutional transformation seems less relevant. For an extended analysis of multiple conceptions of constituent power cf Joel Colon-Rios, *Constituent Power and Law* (Oxford University Press 2020).

stitutional culture develops an imagination<sup>20</sup> that often refers (mythically) to its own origins in order to provide for its legitimacy, the historical analysis of these European case studies show that this same imagination is not monolithic.<sup>21</sup> As noted above, a constitutional culture has to maintain a lively relation with socio-economic development, that is, it might help in guiding them, but ultimately it cannot control fully social production and reproduction. If this is the case, then there is always space for a dialectic of challenge and preservation within each culture of constitution-making. Hence, a contest over the hegemony of that culture (as reminded by Di Martino's chapter on Gramsci and revolutionary constitutionalism) is part and parcel of a conflict over the social issues that animate various constitutional and political actors. The attempt to reconnect constitution-making with social and economic processes inspires the chapter of Marco Dani. This contribution does not question the possibility and even the necessity to distinguish the different political origins of European constitutional orders. Yet, it finds that an exclusive focus on the law and politics axis is likely to obscure normative commonalities existing between the constitutions such as the predominant commitment, in the post-WWII European constitutional experience, to mass democracy, constitutional rights, activist government and multilateralism.

#### 4. THE IMPLICATIONS FOR/OFF EUROPEAN INTEGRATION

This call for a broader conceptualisation of constitutional orders including also their substantive dimension seem particularly pertinent in dealing with a theme that lies at the heart of this collection: the implications of the legitimacy pathways theory on the process of European integration.

European integration makes its appearance in the chapters of this book first of all as a process influencing national traditions of constitution-making. Although in the case of European integration a distinction between accession to the European Union and developments internal to the process of European integration should be always kept in mind (as these two processes generate

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<sup>20</sup> The notion of constitutional imagination has gained traction in the current debate. See the project run by Jan Komárek and its first editorial outcome: Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023). The article that triggered the discussion on constitutional imagination is Martin Loughlin, 'Constitutional Imagination' (2016) MLR 1.

<sup>21</sup> If we are to follow Paul Kahn, this is true also of US constitutionalism. According to Kahn, an imagination of order as project was overcome, during the 19th century, by an imagination of system and spontaneous development: *Origins of Order* (Yale University Press 2019).

different demands on Member States), it is undeniable that the impact on constitution-making has been felt across many Member States, if not all. As documented in the chapters on Scandinavian countries, Italy and Portugal (especially starting from the ratification of the Maastricht Treaty), a process of constitutional transformation has unfolded in these countries. Quite interestingly, it seems that in all those cases, the process of transformation was undertaken through a path that is discontinuous with the one leading to the establishment of the constitutional order. Perhaps, this phenomenon brings about a question concerning the characteristics of constitution-making and whether a separation line can be drawn between the latter and constitutional amendment or transformation. Furthermore, the changes produced by EU membership have often been achieved by stealth or, at least, without signalling an explicit constitutional intention of transforming key substantive and institutional aspects of national constitutional orders. Rather, they have been introduced as more innocuous versions of constitutional or even ordinary adaptation to the pressure exerted by the goals of European integration, presented as entirely aligned with the commitments inspiring national constitutional orders. A further question that deserves to be investigated, with the aid of a political sociology of EU elites and bureaucracy, concerns the role of transnational networks and non-political actors (mostly sending signals through markets) as triggers of domestic processes of constitutional transformation. At the same time, this study ought to be integrated by an investigation on the instrumental use of European integration and European institutions by national elites. One can think at the use of strategic litigation, mechanisms like the “European Semester” or the newly established *Next Generation European Union* as attempts at bringing about substantive material constitutional change in one’s own Member State.<sup>22</sup>

But the relationship between the legitimacy pathways theory and European integration is not confined only to the repercussion of the latter on the identity of national constitutional orders. As Ackerman himself acknowledges, the legitimacy pathways are also pertinent at the moment of assessing the chances for the European Union to evolve into a fully-fledged constitutional order. Indeed, the difficulties experienced in the last decade and a half by the EU

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<sup>22</sup> While the force of strategic litigation depends on the (essentially negative) primacy of EU law, the material transformative effect of the European Semester or of EU Next Generation results from different forms of conditionality. In both instances, European law is turned into an “external constraint” through which certain political alternatives become no longer possible, even conceivable. It is revealing in itself that the academic literature on European strategic litigation tends to focus instead on instances in which EU law is used to expand the protection of rights, such as asylum law, gender discrimination or climate policy.

could be traced back to the plurality of constitutional paths followed by the “leading nations” of Europe, something which would render impossible for the EU itself to follow a coherent constitutional path. In a nutshell, the diversity of constitutional pathways of its Member States would render the founding of a pan-European constitutional democracy almost impossible.

The two final chapters of this book take issue with this claim. According to Sacha Garben, the diversity of legitimacy pathways does not really stand in the way of a fully-fledged constitutionalisation of Europe. Making a creative use of Ackermanian categories, she presents the constitutionalisation of European integration driven by the European Court of Justice as a single protracted constitutional moment towards the establishment of an EU Constitution with full political and democratic credentials. In her reconstruction, after the signalling and proposal phases constituted by the ECJ landmark rulings on the authority of EU law, we would be experiencing a rather turbulent phase of popular mobilisation in favour and against the European project that could possibly culminate into a phase in which the judicial claim for final authority of EU law could find validation or rejection by a genuine exercise of popular sovereignty.

In the chapter by Agustín Menéndez, the engagement with Ackerman’s claims leads towards an entirely different scenario. Like Garben, Menéndez does not seem persuaded by the notion that national constitutional diversity is an obstacle for the building of a pan-European constitutional democracy. Indeed, Menéndez observes that, notwithstanding their different classification in the light of the legitimacy pathways theory, most if not all EU Member States share the commitment to the regulatory idea of the Democratic and Social State. However, rather than building on this commonality, European states seem to have employed European institutions first to enable it and then to transform it in a neoliberal direction. Indeed, Menéndez shows how until the mid-1970s European institutions operated mainly to facilitate the fulfilment of national constitutional commitments. Afterwards, the process of European integration has been increasingly characterised in a neo-ordo-liberal direction which was bound to put the EU into a collision course with the national constitutional commitment to activist government. The explosion of such tensions was postponed up to the 2008, when the financial crisis triggered a “polycrisis” in which EU law revealed itself as a vehicle of policies antithetic to the normative requirements of the Democratic and Social State and, perhaps even more decisively, of social stability.

We conclude the volume with a grand finale, a rejoinder by Bruce Ackerman, which in its wide scope defies any categorisation. The reader can watch there the next volumes of world constitutionalism in the making. In the end, this volume confirms, but also complicates, Ackerman’s scheme of legitimacy pathways in European history. The use of three ideal types provides a valuable starting point, but as many chapters of this collection have aimed to prove, the

pathways are more mixed than the model suggests. The volume suggests that it is certainly not possible to speak of a “regional” culture – and not even of a tripartite model – of constitution-making. Moreover, there seems to be no clear and coherent teleology behind the development of constitution-making in European states.<sup>23</sup> European integration has impacted European cultures of constitution-making but it has not been able to impress a unitary trajectory to all Member States. At the same time, a variety of trajectories have been followed in order to adapt, but also influence, the construction of political and economic unity at the European level. As for the latter, if we stick to Ackerman’s frame, it will have to be concluded that constitution-making has been dominated by a mix of elitist and establishmentarian pathways.

## 5. CONCLUSION

We have tried in earnest to push the discussion forwards with *The Legitimacy of the European Constitutional Orders*. But this is, in at least two different ways, only a first step.

First, it was beyond the reach of the project to be as exhaustive and thorough as is required. We would like to have had more case studies, including several postcommunist states, whose *longue durée* constitutional history has tended to be neglected. As Marina Bán’s chapter clearly reveals, digging deep in the historical record clearly pays out. Some countries which have been researched frequently still require a fresh look, such as Spain. And we are still missing an equivalent of Signe Larsen’s study focusing in one of the last countries in Europe where there are no hints of constitutional review emerging, the Netherlands. We hope the book elicits the interest of others, and results in further comparative studies completing the European map.

Second, if the idea that constitutional history had come to an end in 1989 was ever entertained by anybody, that has been clearly discarded by now. The constitutional history of European states, and of the European Union, is still on the march. The polycrisis is not only still with us, but new shocks have resulted in new transformations, which will require further analysis and reconstruction. Whatever the judgment one may pass on the merits of the decisions taken by the European Union to contain and overcome the COVID-19 syndemic, the way in which burdens have been allocated is different from what was the case

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<sup>23</sup> For a similar conclusion, see Christopher Thornhill, ‘Constitution Making and Constitutionalism in Europe’, in Landau, Lerner (eds), *Comparative Constitution Making*, above, fn 17, 445 (‘we need to speak about different waves of constitution making, in which very different patterns of public order were projected, and which configured very different relations between governmental institutions and the popular will’).



in the Eurozone fiscal crisis. The picture gets blurred in many regards, not least if we consider the extent to which some of the means employed had avoided the worst while further fuelling financialisation and the growth of inequalities. But the opportunity of a change of direction seems real, and the jury is still out on what course the EU and its Member States will follow.