

# The Social Lives of Constitutions

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In the course of disciplinary division in the mid-nineteenth century, constitutionalism as an academic subject embedded itself in the fields of political science, history and law. The new field of sociology largely abandoned its claims to the topic. Therefore, while the study of constitutions and constitutionalism has proceeded apace, its entry into the field of sociology is relatively new.

The recovery of constitutional sociology requires addressing what sociology as a discipline brings to a table already groaning with the weight of insights from other fields. My colleagues in this volume have already made substantial contributions to a sociology of constitutions. In this chapter, I will add to sociology's distinctive contribution to constitutionalism by focusing on constitutional processes for which a knowledge of sociology and a sociology of knowledge are necessary.

Constitutions – or at least successful constitutions<sup>1</sup> – manage to create their own social life. They do so by naturalising, channelling and/or legitimating power. Successful constitutions extend the idea of constitutionalism beyond any constitutional text and beyond the directly regulated political classes into a broader social world in which constitutional ideas shape social expectations and understandings, and come to be taken for granted. Constitutions, in short, rely for their maintenance on a general understanding of constitutionalism both in the political elite and in a broader public. How constitutions come to create social expectations, and what difference it makes that they do, are squarely in sociology's wheelhouse.

<sup>1</sup> What is a 'successful' constitution? This is also a matter for sociological investigation. A successful constitution is one whose ideas have spread beyond the boundaries of the text and into fields of social practice. Even if a constitution is eventually nullified formally as a legal matter, as was the May 5th constitution in Poland (1791), or even if it never goes into effect, like the Frankfurt Constitution (1848), a constitution can still be successful if its ideas live on to found another government or to organise social life beyond the boundaries of the text.

Sociologists might consider a constitution to be first and foremost a field of knowledge. A constitution can be seen as a web of *ideas* about the organisation of political power (including, among other things, working understandings of both ‘political’ and ‘power’). When these ideas become taken for granted as part of the lived experience of a particular people in a particular place and time, they create a sense of their own reality. When they become real in this way, constitutions become capable of separating the rules of the game from the game, the first requirement of any functioning constitutional system. To get at how constitutions do this, we need a theory of the creation, distribution and entrenchment of knowledge.

Rather than trace this inquiry solely to the work of the person usually considered the father of sociological constitutionalism, Max Weber, I will show how an understanding of the social life of constitutions can grow differently from the work of Weber’s contemporaries and colleagues: Wilhelm Dilthey, Georg Simmel, Edmund Husserl and (somewhat later) Alfred Schutz. These writers elaborated the view that social worlds were built from subjective understanding and not just from objective material circumstances, state structures or power relations. Following their lead, an account of lived experience as understood by phenomenological theorists shows us how constitutions can come to have a social life.

### In Defense of ‘Understanding’

Across the budding social sciences in the late nineteenth and early twentieth century, deep questions were being asked about the nature of knowledge of human affairs. While some early social scientists adopted the model of the natural sciences and looked for positive laws of social life,<sup>2</sup> others could see that studying social phenomena was a different sort of enterprise. For the new humanists, the ‘human sciences’ – what we would today call the humanities and social sciences – were different from the natural sciences because in the human sciences, people studied

<sup>2</sup> For example, the French school of social inquiry founded by Comte (1853 [1830–1842]) was anti-subjectivist. As developed by Quetelet and including most prominently Émile Durkheim, statistical phenomena like rates and averages were thought to have a social reality of their own and could be studied as such. Durkheim’s account of ‘social facts’ was especially eager to avoid anything that might have been interpreted as psychology or subjective understandings of social phenomena. For an account of the rise of social facts and their grounding in statistics, see Hacking (1990).

people. Therefore, those who analysed human action were both ‘inside’ and ‘outside’ the phenomena they studied. This fundamental difference in the type of knowledge that social analysts would bring to the table required new methods. Among other things, being able to see something from both inside and outside called into question the aspiration to universal knowledge in the human sciences, given that social understanding was clearly situated in time and place. How could social analysts rise above purely local perspectives to aspire to more general knowledge?

First, these new humanists thought, one needed to understand precisely how knowledge served to orient social actors in the world. Development of this insight travelled under the heading of *Verstehen* – understanding the social world through the lived experience of social actors. Adding *Verstehen* to the methodological mix of early sociology enabled the study of social *action*, framing social conduct as internally meaningful and motivated rather than as the mechanical result of observable external forces. *Verstehen* focused analysts’ attention on the concepts, categories and taken-for-granted assumptions of the social actors they studied.

Concentrating on the subjective side of social action might have easily led to psychologising social inquiry. And some of the earliest writers who took this route started to do just that. But this reductionism was tempered as philosophers like Dilthey, Simmel, Husserl and Schutz transferred their attention from the internal operations of the mind to the insights one could draw about society and history by starting with the idea of lived experience. In this new sociological analysis, taking *Verstehen* seriously did not mean reducing all historical events to the subjective viewpoints of the particular actors who participated in those events. Instead, focusing on the lived experience of the social actors revealed that people often came to have similar ideas in particular times and places, ideas that constituted the knowledge of the day through intersubjective processes that resulted from and in the sedimentation of knowledge.

Max Weber is credited with bringing the concept of *Verstehen* into sociology, but the idea did not originate with him. Instead, the idea was already in the air before he wrote his famous methodological essays (Weber 1975 [1904]; Weber 1949 [1904]).<sup>3</sup> Weber’s use of *Verstehen* attempted to lift it out of the context of developing phenomenological

<sup>3</sup> Different Weber scholars track different routes through which the idea entered his work, though the path leading from Heinrich Rickert seems the most obvious (Heidelberger 2010; Suber 2010).

philosophy and to reconcile it with its conceptual opposite, *Erklären* or 'explanation' in the sense of accounting for a phenomenon through causal laws. In trying to have the best of both worlds, Weber, particularly the later Weber, failed to see how one could make sociology of knowledge a central feature of the new discipline. Weber had an immense influence on the sociology of law but, by leaving the deeper understanding of *Verstehen* aside, he promoted an external perspective on law through which sociologists of law have attempted to understand legal institutions ever since. In this chapter, I will recover the development of *Verstehen*-inflected thinking by tracking its other history.

### The Rise of Phenomenological Sociology (PS)

Sociology and philosophy were fellow travellers at the dawn of the social sciences. Georg Simmel and Alfred Schutz, familiar names to sociology, trafficked in both, along with Wilhelm Dilthey and Edmund Husserl, names more familiar to philosophers than to sociologists.<sup>4</sup> In those days – roughly from the 1880s through the 1930s – it was hard to know what was sociology and what was philosophy. During this time, the concept of *Verstehen* was associated with the experiential understanding through which people came to take features of their world for granted. How this was possible, and how other forms of knowledge could emerge from lived experience, was a major preoccupation of the phenomenological school in both philosophy and sociology.

#### *Dilthey*

Wilhelm Dilthey's work<sup>5</sup> distinguished the 'I think' of conceptual cognition, in which analysts bring concepts external to the subject matter of the

<sup>4</sup> In this section, I will take authors in the order in which their primary publications appeared. Each of the authors I will address in this section – Dilthey, Simmel, Husserl and Schutz – worked and reworked their ideas over the course of a lifetime and, in all but Simmel's case, most of their major works appeared in print long after they wrote them. Many publications were based on edited fragments left behind after they died. The social and intellectual connections among Dilthey, Simmel and Husserl are clear; however, they read each other's drafts, heard each other's lectures and borrowed many ideas from one another. It is difficult to date particular ideas and who got a particular idea first, however, given the way they all worked. Perhaps this is the ultimate irony of phenomenological sociology – that the ideas giving rise to the field are so hard to place in their authors' lived experience.

<sup>5</sup> His work on this theme, starting with *Introduction to the Human Sciences* (1989 [1883]) and continually revised and changed through *The Formation of the Historical World in the*

inquiry to bear in ordering and explaining what they see in the natural world, from the 'I know' of lived experience, in which both subjects and social analysts can call upon a reflexive self-awareness (*Innewerden*) of their own lived experience prior to its conceptualisation (Makkreel 2012; Dilthey 1989: 253–255). Lived experience is directly apprehended and can therefore be interpreted in multiple ways; it is open to be conceptualised and re-conceptualised as different facets of experience are called to attention and problematised. The social analyst has access to a stream of thought when studying people; the natural analyst of the non-human world does not.

Lived experience was not purely a mental or solipsistic construct for Dilthey. Instead, Dilthey showed how lived experience responds to changes in external conditions, and so it therefore inevitably has temporal, spatial and social dimensions. Knowledge derived from lived experience is shared by people in a specific time and place because it is forged by a reciprocal common orientation in an external world in which others are also orienting themselves. The generation of common knowledge occurs when others share one's own sense of the external world and thus validate it. Or, as Dilthey explained it, '[T]he historical world is known objectively through a sequence of operations rooted in lived experience and understanding' (Dilthey 2002: 110).

For Dilthey, society was organised into a variety of 'purposive systems . . . always realised as actions that are bound by rules' (Dilthey 2002: 25). Sometimes individuals contribute to the stream of knowledge on their own,<sup>6</sup> and other times they work with others in institutional sites. Unlike Durkheim, however, Dilthey did not take institutions to be transpersonal subjects with their own ideas and values; instead, Dilthey described institutions as productive systems in which individuals act and produce knowledge in common – so that institutions are interactive sites that are 'constituted by their enduring products' (Dilthey 2002: 174–175). These 'products' include social structures, values, purposes and knowledge. Because of the social activity that goes on within them, institutions can

*Social Sciences* (2002 [1910]), sets out the dualist argument that the human sciences need a different sort of foundation than the natural sciences, precisely because the source of knowledge that analysts have in the two cases is different.

<sup>6</sup> This phenomenological literature is full of references to streams, flows and other metaphors that emphasise the fact that lived experience appears to the person experiencing a life as a continual and uninterrupted sequence of events that, while being experienced, has no obvious beginning, end or periodisation. The division of experience into episodes, stories or histories occurs only when the individual steps back from the stream of experience and creates these organised units of experience by an act of reflection.

generate knowledge not reducible to the individuals who inhabit them. As he explained:

In every lasting relation among individuals, values, rules and purposes are developed, brought to consciousness, and consolidated by reflection. This creative activity, which occurs in individuals, communities, cultural systems and nations under natural conditions that constantly provide material and stimulation for it, attains reflective awareness of itself in the human sciences

(Dilthey 2002: 176).

As this account makes clear, Dilthey believed that individuals are not completely subsumed in specific social sites; they live at the intersection of many different such social formations and so participate in the creation of many of them. The fact that individuals exist in many different subsystems of knowledge gives each individual access to a distinctive mix of ideas and inspirations.<sup>7</sup> As agents of and participants in institutional cultures, individuals take up the conceptual frames made possible by these productive systems – which then come to be filled with and modified by their own lived experience. Dilthey saw society as a system for the social production of knowledge generated through lived experience of individuals in particular social sites, made intersubjectively real in social interaction and reproduced by institutions. This was how, in his view, meaning-making individuals could stand at the centre of a story that still had room both for the development of social institutions and for historical change.

Not surprisingly, jurisprudence gained Dilthey's attention as a specific productive system of knowledge, given that law is contained in institutions and associated with specific cultures and communities. He proposed that the study of law 'must press forward from particular positive legal maxims to the universal legal rules and legal concepts that are implicitly contained in them' (Dilthey 2002: 25). In short, one could not just take the law as a variable predicting the behaviour of people or as the activity of a particular set of institutions; one had to understand that law was also a conceptual field within which people act. Rather than seeing law as a brute fact about the world, then, Dilthey saw law as a meaning-laden field that grew from lived experience, was refined through social action and then became consolidated in institutions from which it was then passed on through the lived experience of those inhabiting the institutions. He understood law as a field of knowledge with constituting effects – itself a human

<sup>7</sup> Readers may recognise that Georg Simmel (1955 [1922]) made a very similar argument in 'The Web of Group-Affiliations'.

product that works to shape lived experience even as it remains constantly in flux, responding to new historical developments:

The apparatus of law books, judges, plaintiffs and defendants, as manifested in a specific time and place, is first of all the expression of a purposive system of legal rules and norms in terms of which this apparatus functions. This purposive system is directed toward the external obligation of wills in a univocal estimation that brings about the coercively realizable conditions for the perfection of the relationships of life and delimits the spheres of power of individuals in their relation to one another, to things and to the common will. The form of law must therefore be one of the imperatives behind which the power of the community stands to enforce them. Thus the historical understanding of the laws existing within such a community at a determinate time consists in a regress from that outer apparatus to the system of legal imperatives that has its outer existence in that apparatus, and that was produced by the common will

(Dilthey 2002: 106).

This sounds very far from the lived experience of a single individual, but it illustrates how conceptual frames derived from the intersections of lived experience with the particular historical time/place can become sedimented in institutions and thus appear to subsequent generations of individuals as an external constraint. Dilthey's 'common will' in this passage is not the mysterious apparition of Rousseau and Sièyes; instead this common will is dynamically produced through social interaction, developed through the creation of common knowledge and then passed on (and also enforced through) through social institutions. As such, law can appear as a hard constraint, but it too is a subject of history.

Dilthey's philosophy of history, then, brought lived experience to the centre of inquiry and linked it to theories of social interaction situated in particular times and places. In turn, Dilthey created a general theory of knowledge in which the ability of social actors to convert lived experience to institutional forms was crucial for understanding how history developed. Law can be seen as a particularly crucial example of this process.

### *Simmel*

While Georg Simmel is known primarily as an advocate of 'formal sociology'<sup>8</sup> and therefore his appearance in this narrative may be surprising,

<sup>8</sup> Formal sociology focuses on the structural properties of interaction and groups, such as the number in the group (drawing on Simmel's essay 'The Dyad and the Triad'), the relationship of members of a group to secrets that the group generates ('The Secret and the

Simmel started his career as a student of both philosophy and history. His early work, under the (partial) direction of Dilthey, critiqued and reformulated Kant's ideas.<sup>9</sup> Simmel argued, against the consensus of his day, that Kant's distinction between *a priori* and *a posteriori* knowledge was unstable because both required experience-based knowledge for their content. This was a revolution in Kant scholarship, which had begun from Kant's sharp distinction between *a priori* knowledge as independent of all experience and *a posteriori* knowledge as dependent on empirical evidence.

To illustrate, Kant would argue that one could say that a king who ruled for four years also ruled for three years, since three was necessarily included within the concept of four. The truth of such a proposition was given in the idea of three and four, a matter of *a priori* knowledge unaffected by experience. By contrast, knowing a specific king ruled from 1431–1435 required empirical evidence and therefore was *a posteriori* knowledge. Simmel took on this distinction by arguing that Kant's *a priori* knowledge could have no content unless it also referred to lived experience. So, for Simmel, the ideas of 'three' and 'four' were themselves derived from empirical knowledge (the experience of 'more' and 'less'). Therefore, they did not exist as purely formal entities. Once turned into concepts that removed all traces of specific history, however, they could be carried forward as forms able to organise future experience. For any particular individual, the historically informed conceptual world that she received as given would appear to consist of pre-empirical *a priori* concepts because they were pre-empirical relative to her experience. But situating *a priori* concepts in history showed that they had to be derived from both 'intellect and sensibility' (Staiti 2014: 57). Simmel's post-Kantian revolution argued that one could not avoid lived experience at the basis of a theory of knowledge.

Simmel's views on Kant were so radical that he had difficulty getting his work accepted. His academic career was rescued by Dilthey,<sup>10</sup> who

Secret Society') or the stock figures of a modern society ('The Stranger'). This impression of Simmel as a formalist uninterested in the subjective life of those whom he studied (Wolff 1955) accompanied the English translations of parts of his giant work, *Sociology*, as *The Sociology of Georg Simmel*. As we will see, however, Simmel's formalism derives from his lifelong engagement with the work of Kant and his struggle with the meaning of *a priori* knowledge.

<sup>9</sup> Simmel's work on Kant eventually resulted in his famous lectures in 1904 in Berlin (published as Simmel 1905 and Simmel 1906), but both his doctoral dissertation and habilitation had been in informal circulation for at least a decade before this.

<sup>10</sup> Dilthey was the dissertation advisor of record for Simmel's habilitation (second doctorate) on Kant's theory of time and space. The dissertation had earlier been rejected by



saw in Simmel someone of very much the same mind as he. Simmel's views on Kant informed Dilthey's own work in the philosophy of history, and they also made a major impression on Edmund Husserl, who would later use Simmel's work as the basis of a seminar with his graduate students, the only contemporary work that Husserl ever used in his seminar (Staiti 2014: 170–173). Thus Simmel, contrary to his current reputation in sociology, is very much part of this narrative on the development of *Verstehen*-inflected phenomenological philosophy.

Simmel's work in the philosophy of history started from the observation that knowledge begins from lived experience and therefore that an understanding of history required an understanding of how the world appeared to those who were living through it:

If history is not a mere puppet show, then it must be the history of mental processes. So the observable events that history describes are merely bridges that link impulses and volitional acts, on the one hand, and the emotional reactions that these external events produce, on the other

(Simmel 1977 [1892]: 39).

At first, Simmel thought that understanding subjectivity required a psychology of cognition, which then raised the question of how any one person could understand the mind of another. But Simmel – like his phenomenological contemporaries – eventually saw that a social rather than a psychological account of knowledge would enable minds to meet, as it were. This is why he found Kant's account of the *a priori* useful – though in a different way than Kant had proposed. Our experiences, processed as knowledge, are comprehensible to others precisely because our accounts of them use categories, concepts and narrative forms pre-given (*a priori*) relative to any particular experience of ours. The *a priori* therefore acts as a pre-empirical (to us) organiser of our experience even as it also reflects the sedimented prior experience of other people:

The *a priori* plays a dynamic role in our thought. It is a real function which is precipitated or crystalized in its final, objective results: knowledge . . . [T]he significance of the *a priori* is determined by its efficacy of producing a world of our knowledge. In this sense of *a priori*, the following is an *a priori* proposition. The personality of every other person is an entity for us. In other words, it is an intelligible nexus of processes. We acquire *knowledge* of another person by means of this structure, or insofar as he is

a committee headed by William Wundt, but Dilthey intervened to support the work. Simmel was therefore given the rare opportunity to defend the same work a second time (Helle 2013: 173–177).

constituted by this structure. The function which corresponds to this concept complements or supplements the mental facts which lie behind the observable facts

(Simmel 1977: 46).

Simmel's example of the understanding of other persons shows how this theory of knowledge works. *A priori*, we believe other people to be just like us, as meaning-making entities in a stream of lived experience. That tells us that any specific person must be understood in light of her own motivations, concepts and categories. As we do in similar circumstances, she makes sense of what is happening around her and acts in light of that sense. We therefore interpret what she says and does in light of the same *a priori* concepts that we share with her. But, and this is where Simmel departs from Kant, an *a priori* concept is itself grounded in experience that pre-existed the experience it now describes. *A priori* knowledge is itself a historical product that condenses prior life experiences into abstract forms.

From this account, then, we can see how law would function for Simmel. To the person who is subject to it, law appears to be a norm that admits of no exception. In a democratic society in which the law is created by those who are accountable under democratic mandates, the law itself is constituted by delegated consent. Thus the democratic subject faces the law as both the indirect creator of the law and the direct object of law's commands:

In its purity, the term 'law' implies a submission which does not involve any spontaneity or counter-effect on the part of the person subordinate to law. And the fact that the subordinate has actually cooperated in making it – and more that *he* has given himself the law which binds him – is irrelevant. For in doing so, he has merely decomposed himself into the subject and the object of lawmaking; and the law which the subject applies to the object does not change its significance only by the fact that both subject and object are accidentally lodged in the same physical person (Simmel 1950 [1908]: 188).

In this account, law appears as a social form into which the content of a specific lawmaking process is poured. But once constituted as law, any specific legal enactment then takes on a life of its own, a life whose force is removed from the lived experience that gave rise to it. The person who is ordered by law to obey sees law as having appeared prior to the experience now being shaped by law even if she participated in creating the law. The subordinate – the person under the law – receives law as a command.

At that time, the person who is the law's author loses control over the law as soon as the law is finalised and goes out into the world as a command. Through this process, we can see law as an outgrowth of lived experience in time 1 which comes back at time 2 as if it were an *a priori* constraint on the lived experience at time 2, when it subjects all, including the law-maker, to the empirical and normative visions in the law. But then, given the flow of history, there will be a time 3 when the law at time 1 comes to be modified – whether by formal enactment or as the result of being filled with an ever-changing flow of content. Even though the concepts and categories that count as the *a priori* starting points of knowledge are themselves formed in history, they do not remain static.

### Husserl<sup>11</sup>

Edmund Husserl joined Dilthey and Simmel in developing a theory of lived experience as the source of knowledge.<sup>12</sup> Like them, Husserl began from the view that much of knowledge was created through what he called the first-person perspective. Like them, Husserl began his early inquiries by assuming that this first-person perspective could be understood through an account of psychology – tracking how specific individuals see the world. And, like them, Husserl eventually realised that the phenomena he wanted to study went well beyond what was going on in particular minds to the creation of knowledge as such. Husserl, like Dilthey and Simmel before him, therefore jettisoned psychologism. But Husserl developed an account of the development of knowledge that allowed the analyst to transcend the first-person perspective first by showing this perspective to be a captive of its own particular taken-for-granted assumptions and then by transcending the limits of the

<sup>11</sup> The path that Husserl followed to the development of transcendental phenomenology in the last decades of his life was long and winding. In this brief treatment, I will focus only on the later work without showing how his ideas emerged out of his earlier views on mathematics, logic and general philosophy. For an account that shows how Husserl's thoughts emerged over time, see Moran (2005). Moran's account was made possible only by the late publication of much of Husserl's *Nachlass* (or unpublished fragments), some of which are available through the Husserl website here: [http://www.husserlpage.com/hus\\_nach.html](http://www.husserlpage.com/hus_nach.html).

<sup>12</sup> He started far from history and sociology by working first on a theory of mathematics, wondering how mathematicians could understand numbers that existed in no concrete observable form. Even so, Husserl was much influenced by Dilthey, who in fact helped Husserl gain his first regular professorship in Göttingen (Beyer 2015), as well as by Simmel, whose work he greatly admired (Staiti 2014: 62).

first-person perspective through the conception of the phenomenological reduction (Husserl 1931).

Husserl launched his phenomenologically grounded philosophy from the ‘natural attitude’ – a state in which an individual simply accepts the world as given and in which the individual’s experience of the world is the horizon of her knowledge (Husserl 1982 [1913]). But, as Husserl argued, the individual could break with this natural attitude by putting it into suspension, by ‘bracketing’ it,<sup>13</sup> and seeing herself and her natural attitude as if from the outside.

This suspension of the sense of taken-for-grantedness of the natural attitude required a double move. It required a self-conscious break with the natural attitude – an ‘*Epochē*’ for Husserl – combined at the same time with stripping away the empirically grounded self as such – or a ‘reduction’ in Husserl’s terminology.<sup>14</sup> Through the phenomenological reduction, the individual literally imagines herself out of herself, so to speak. She takes up a critical attitude toward herself and her knowledge by freeing herself from capture by the world as she experienced it. She does so by denaturalising this world. Her new critical attitude enables her to arrive at knowledge that is not limited by the natural attitude. Husserl argued that, through this mechanism, people can observe themselves knowing, as it were, and they can make use of this reflexive awareness to check and reassess their own natural attitude.

Husserl’s phenomenological reduction allowed the thinking subject to put the obvious under question, so that what was taken in the natural attitude as self-evident could become an object for examination without automatically validating the presuppositions that the natural attitude relies on for validity. The thing-in-the-world, seen in the natural attitude, becomes the thing-in-one’s-mind under the phenomenological reduction.<sup>15</sup> As the thing-in-one’s-mind, it appears to consist only of abstract properties. The individual can then ask what difference it makes to contextualise these properties in different ways. Moving from the

<sup>13</sup> As Moran (2005) shows, the concept of ‘bracketing’ came from Husserl’s early work in the philosophy of mathematics.

<sup>14</sup> A particularly helpful account of the phenomenological reduction can be found in Cogan (n.d.).

<sup>15</sup> One can see in this move why Husserl was so fascinated with Simmel’s reading of Kant. Simmel set the stage for this leap as soon as he noticed that Kant’s *a priori* knowledge necessarily embedded knowledge derived from experience. Husserl added a mechanism producing this result. To generate general substantive knowledge, one had to start from lived experience and then abstract away its specific content to arrive at these ideas, which would then appear as *a priori* knowledge, its contents having been abstracted into form.

natural attitude to this attitude of critical self-reflection has the effect of doubling the field of vision. One can toggle between the natural attitude in which lived experience is self-evidently real and the phenomenological reduction in which the self-evident is problematised and abstracted.

What sort of knowledge is made available once one makes the phenomenological reduction and questions the self-evident reality of the natural attitude? At this point, Husserl might have easily fallen into solipsism to say that one's own subjectivity can be all one knows. But Husserl, like Dilthey and Simmel, eventually went social instead.<sup>16</sup> He argued that individuals in the phenomenological reduction can distinguish between themselves and others so that they can check their ideas against those of others. Intersubjective agreement then produces objectivity:

Here in the ego's<sup>17</sup> transcendental realm of knowing, a fundamental and essential distinction shows up between what is personally one's own, so to speak, and what is other than oneself. It is from out of myself as the one constituting the meaning of being within the content of my own private ego that I attain the transcendental other as someone just like me; and in this way I attain the open and endless whole of *transcendental intersubjectivity*, precisely as that which, within its communalized transcendental life, first constitutes the world as an *objective world*, as a *world that is identical for everyone*

(Husserl 1931: 11; emphasis in original).

In this passage, the recognition that one is not alone – or, perhaps the recognition that one is like all others – creates the possibility of intersubjectivity. Individuals in the phenomenological reduction can generate an intersubjective space in which they arrive at an agreement on the *objective* nature of this world. The objective world is populated not only by intersubjectively agreed upon descriptions of the world, but also by the subjective knowledge of oneself and one's fellow humans. In this realm, then, mathematics becomes just as real as the description of objects in the natural world because both appear in the transcendental attitude as

<sup>16</sup> This simplifies a lot. As Moran (2005) makes clear by tracking the development of Husserl's thought, Husserl tried out virtually every other option before arriving finally at a social account of intersubjectivity.

<sup>17</sup> The translators, faced with a difficult task given Husserl's specialised vocabulary in German, identified this meaning of 'ego' as the 'psychic-physical individual who experiences the natural world as such', while the Ego (capitalised) represented the individual in the transcendent state, shorn of identification with the natural attitude (Husserl 1931, translators' note 2).

abstracted ideas. Intersubjectivity allows individuals, in parallel, to take a '*theoretical attitude*: the attitude of the detached, disinterested, uninvolved spectator' (Moran 2005, emphasis in original).

### *Schutz*

While Husserl was crucially interested in epistemology (the study of how one knows about the world), Alfred Schutz adapted Husserl's ideas to create an overtly phenomenological sociology (the study of how people act in the world, based on the knowledge they have).<sup>18</sup> Schutz, like his phenomenological predecessors, understood the individual to be living in a flow of experience, a 'stream of consciousness'. Dilthey, Simmel and Husserl had all emphasised that the ongoing sense of experience-in-time was preconceptual and that one had to step outside of the flow of experience in order to be able to conceptualise and make sense of it. Schutz brought to this framework Henri Bergson's idea of *attention*. While the flow of experience makes it impossible to comprehend that flow conceptually while one is in the immediate 'now' of the moment, one can direct one's attention to particular aspects of that experience. One can then clip particular bits out of the flow of experience through paying *attention* to them and therefore turn these bits into entities for reflection. What was once lived becomes *remembered*, as attention severs the 'past' from the 'now' in manageable segments that are comprehended *as something*. Experience is meaningful only in reflection, only when it is past:

Meaning does not lie in experience. Rather those experiences are meaningful when grasped reflectively. The meaning is the *way* in which the Ego regards its experience. The meaning lies in the attitude of the Ego toward that part of its stream of consciousness which has already flowed by toward its 'elapsed duration'

(Schutz 1967 [1932]: 69–70).

The accumulation of these acts of attention and reflection over the course of a lifetime creates a 'stock of knowledge' (Schutz 1973: 99–118) that in turn allows one to create an understanding of 'situations', to attribute

<sup>18</sup> Husserl tried to take on the young Alfred Schutz as his assistant, recognising in him a kindred spirit. However, due to rising anti-Semitism in 1930s Germany that eventually also cost Husserl his job, Schutz turned down the position in order to be able to leave Germany, traveling first to Paris and then to New York (Luckmann 1973: xvii).

causes (one did *x because of y*), to move toward goals (one does *x in order to accomplish y*), and to develop the ideas of regularity and recurrence. The stock of knowledge is organised by *relevance* (Schutz 1973: 182–229; see also Schutz 1970) and *typicality* (Schutz 1973: 230–241) which allow us to orient ourselves in the world without drowning in the sum of our past experiences. By showing how an individual's focused attention on lived experience generates knowledge, Schutz converted Husserl's extraordinary act of phenomenological reduction into common experience.

Husserl had already developed the idea of intersubjectivity, positing that intersubjective understanding was possible only during the transcendental reduction after one had abstracted particular aspects of worldly phenomena from concrete contexts and from one's own self-immersion. But Schutz brought intersubjectivity back into everyday experience as a practical accomplishment of social interaction. Both when we watch someone else engaged in action, and perhaps even more when we interact personally with the other, we enter into her lived experience as she does into ours. The question for the phenomenologist then is: How does this mutual experience generate intersubjective understanding?

Schutz began from the model of face-to-face interaction. In face-to-face interaction, we observe others' bodily movements, and we know from our own experience that, behind these movements, is an intentional subject whose actions are organised around meaningful ideas. Using our own experience as a guide, we can attribute organising principles of our own action to the actions of others. We cannot experience another's experience, but we can make informed guesses about another's lived experience by reflecting on our own. We take the interpretive schemes we have developed for our own experience and test them by interacting with others. As others react (because they, too, are using their lived experience to understand us), we encounter other schema. Face-to-face interaction permits a certain mutual adjustment that will eventually produce mutual inference about each other's experiences through a common scheme. These orienting schema, once successful in producing a sense of common understanding, can then be taken-for-granted as knowledge of the social world.

For subjective knowledge to enter the social stock of knowledge that we share with others, however, it must be 'objectivated' (Schutz and Luckmann 1973: 286). 'Objectivation' can occur through face-to-face interaction without symbolic intermediation, as one person's experience is directly observed by another so that the experience of the first person

becomes a lesson for the second. For example, suppose Emily touches a pan on the stove, recoils and grimaces. From this, Jack learns not to do the same thing because he infers that the pan is too hot, even though he did not experience that heat directly. Emily's lived experience was objectified in the world and so could become a lesson guiding the conduct of Jack.

Alternatively, lived experience can be sedimented in language and in other signs and symbols. In this case also, particular symbols are associated with particular meanings in particular contexts through lived experience. Language acquisition must work this way because if there are no common points of reference between the pre-existing social stock of knowledge and our own lived experience, we cannot take it in, so to speak. Consider the phenomenon of the 'mondegreen' (Konnikova 2014), in which a new idea is converted into something different that the recipient is already familiar with but that bears no relationship to the context in which the idea was generated. For example, take a Christian church service that goes over a child's head, who hears 'Gladly, the cross-eyed bear' (for 'Gladly, the cross I'd bear'). Without some relevant lived experience that would come from learning about the Christian symbol system and origin stories, the child cannot access the social stock of knowledge that precedes her own experience. For language to work, meanings need to be revised and stabilised in the company of others. The intersubjective meanings of symbols are built up through common social experience. Objectivation occurs when lived experience leaves a trace in the world that others can then experience as their own knowledge.

Phenomenological theories take lived experiences to be the primary building blocks of the social world. Schutz, channelled by Thomas Luckmann,<sup>19</sup> showed how any particular subjective stock of knowledge built out from a personal history of experience can contribute to the development of a *social stock of knowledge* (Schutz and Luckman 1973: 243–304). Intersubjectivity works the magic. Much of what we know about the world is not in fact derived from our firsthand experience, but instead through learning from others and interpreting traces left behind.

<sup>19</sup> While *The Structures of the Lifeworld* (1973 [1932–1971]) is primarily the work of Alfred Schutz, Thomas Luckmann, his former student and colleague, undertook to finish this work, which Schutz had begun in 1932 and continued to work on through his death in 1959. Luckmann worked from outlines, partial drafts and some more polished pieces, but rearranged the work to make sense to him. Therefore, they are really joint authors even as Luckmann purported to be simply bringing Schutz's ideas to light.



We have firsthand experience with these others and with the traces, but they pass on knowledge that we know only *through* them. Through others, we learn ‘the social structure behind the earliest we-relations’ (Schutz and Luckmann 1973: 243–251) – that is, the historical preconditions of our entering into social relations with others and sharing with them a common social world. This knowledge-in-common constitutes the social stock of knowledge.

These four authors – Dilthey, Simmel, Husserl and Schutz – together create a compelling vision for how sociology can be done by making the production and constitution of knowledge central to the creation of social life.

### Toward a Sociology of Constitutional Knowledge

Phenomenological sociology (PS) allows us to build a much more sophisticated theoretical platform for the analysis of legal constitutions than the unusual shortcut that goes by the name of the ‘social construction of reality’.<sup>20</sup> In particular, this more philosophically complicated framework allows us to see constitutionalism as a lived experience and a form of knowledge in the world. In general, constitutional studies have taken the view of a constitution as a text or as a set of visible and functioning institutions. PS focuses our attention on the way that people experience constitutional life. It also examines the way that constitutional knowledge comes to be developed, shared and passed on as the result of social interaction, through institutions, across history and as sedimented fact that becomes part of the taken-for-granted world. A PS perspective on constitutionalism focuses on the ways that constitutional ideas are generated and naturalised. It offers us a way to link the ideas of the law with the social action carried out within those ideas.

As it turns out, the word ‘constitute’ is a term of art in PS. While the authors we have examined did not generally create a constitutional

<sup>20</sup> The book by this name by Peter Berger and Thomas Luckmann (1966) brought the insights of Alfred Schutz into modern sociology while omitting the philosophical origins of Schutz’s ideas and the parallel ideas of Dilthey, Simmel and Husserl. Leaving out the more philosophical aspects of this theory may have made it more popular, but it also made it easier to caricature. One person who of course knew better was Thomas Luckmann himself, since in many ways he created the modern persona of Schutz. Luckmann discovered many of Schutz’s manuscripts and finished them so that they could be published; therefore, much of what we know as Schutz is in fact Luckmann’s imaginative reconstruction of him.

sociology in our sense – focusing on legal constitutions – they developed an account of knowledge processes through which individuals ‘constitute’ particular things, events and episodes by lifting excerpts from the stream of experience, reflecting on these excerpts and converting that reflection into a conceptualised account that could be offered as knowledge to share. The overlap between ‘constitution’ as a PS concept and ‘constitution’ as a legal entity amenable to sociological study is precisely why PS offers so much to this field. The PS concept of ‘constituting’ sets out how we might think about building a new form of legal-constitutional sociology.

Dilthey introduced the idea of ‘constitution’ by specifying the relationship between ‘consciousness’ of something (its being-given) and ‘reality’ (its constitution):

A feeling exists insofar as it is felt, and it exists just as it is felt: The consciousness of it and its constitution, its being-given and its reality, are not different from one another. ‘Being-there-for-us’, ‘being-given-to-us’, or ‘fact-of-consciousness’ are only different expressions for the same state of affairs, in which apprehension and the fact given in it are one instead of some object standing over against it

(Dilthey 2002 [1910]: 48).

As this passage indicates, the reality of something to each of us comes from our consciousness of and then reflection on that thing. Reflection and its subsequent conceptualisation *constitutes* a particular aspect of lived experience as real. This PS meaning of constitution is something easily understood from within legal-constitutional theory more generally, as where we describe a legal constitution as having failed when it exists only on paper with no corresponding lived reality in the world (see, for example, Harris 2010).

Simmel explains how the process of constitution works through the creation of useful forms that abstract and synthesise lived experience. He rejected the idea that only observable entities could be studied by social science and instead explained how intangible ideas could also come to have a discernible social reality:

Color molecules, letters, particles of water indeed ‘exist’ but the painting, the book, the river are syntheses: they are units that do not exist in objective reality but only in the consciousness which constitutes them . . . It is, therefore, not true that reality can be attributed only to properly ultimate units [like physical entities or individual persons], and

not to phenomena in which these units find their forms. Any form (and a form always is a synthesis) is something added by a synthesizing subject

(Simmel 1950 [1908]: 7).

Simmel's formal sociology demonstrates how the process of constituting works. So, for example, the concept of the 'dyad' (1950: 118–135) is constituted from the lived experience of those who interact with one other person. This experience is different than the lived experience of the 'triad' (Simmel 1950: 145–180).<sup>21</sup> The concepts of dyad and triad thus single out particular features of lived experience. By abstracting this particular facet of lived experience, the property of interactional quantity comes to exist as a form that can be filled in with different content in different contexts, generalising experience across different social settings. *Constituting* the dyad or the triad allows these forms to appear as real, so that they can be recognised in future social settings and acted upon as if they had a tangible existence.

Husserl expanded the idea of constitution to the context of intersubjectivity, in which multiple people together understand what is 'real' precisely because each person's account of her lived experience reinforces the other accounts:

We see how far we must take [phenomenological analysis] when we realize that, while we are dealing with the total intentional accomplishment, having many levels, of the subjectivity in question, it is not that of the isolated subject . . . All the levels and strata through which the syntheses, intentionally overlapping as they are from subject to subject, are interwoven from a universal unity of synthesis; through it the objective universe comes to be – the world which is and *as* it is concretely and vividly given . . . In this regard, we speak of the 'intersubjective constitution' of the world, meaning by this the total system of manners of givenness, however hidden, and also modes of validity for egos; through this constitution, if we systematically uncover it, the world as it is for us becomes understandable as a structure of meaning formed out of elementary intentionalities. The being of these intentionalities themselves is nothing but one

<sup>21</sup> Note here the difference between Simmel's forms and Weber's ideal types. For Weber, the ideal type represented an abstracted entity that no one would ever experience in pure form. The rational-level bureaucracy was an ideal, not a lived reality. As Weber himself said, any actually existing bureaucracy was composed of elements from all of his ideal types. For Simmel, however, the dyad or the triad *were* in fact forms that were experienced, and the difference between the two was defined completely in terms of the way that the addition of a third person affected the lived stream of interaction for all participants. Simmel's forms were meant to identify properties of particular social settings that in fact altered the nature of the lived experience in those settings.

meaning-formation operating together with another, ‘constituting’  
new meaning through synthesis

(Husserl 1970 [1934–7]: 167–168).

This passage, while dense with Husserl’s own specialised vocabulary, explains how an ‘elementary intentionality’ – that is, a conceptualised reflection on one’s own lived experience – can come to be reinforced in the presence of other people who are doing the same thing. If everyone acts as if the same external reality is taken-for-granted and these acts reinforce the conclusion that it is the same external reality, then it becomes intersubjectively real to all. This is the process of constitution, through which the world appears as an entity outside oneself, constituted out of the cumulative subjective experiences (intentionalities) of individual persons.

Schutz was perhaps more direct in describing how the process of constituting works at the level of the individual:

Let us try to unravel the complicated structural contexts that are involved in the constitution of an external object. The object is constituted out of appearances as we encounter them in our stream of consciousness. Such appearances hang together in a context of meaning. As they follow one another in regular sequence, our experience of the object is built up. We can by means of a monothetic glance look upon the whole sequence as a unity in itself—the object of outer experience, the thing of the external world. The fact that the individual lived experiences of the individual appearances are linked together in the experience of the object is itself experienced (*erfahren*). We thus experience within the living present the actual constitution of objects

(Schutz 1967 [1932]: 78–79 ).

For the individual, then, lived experience of an external object is converted to an appearance of that object in our own subjective awareness, which in turn is given meaning through the location of that object in a conceptual field that precedes our encounter with that particular object. The meaning-filled representation of that object in our minds is then compared back with the external object itself, which it now *constitutes* as real.

As we can see through this analysis of the phenomenological conception of ‘constitution’, the social processes that make abstractions real in the world are precisely what we can use to understand legal constitutions, to which we now turn.

## The Social Constitution of Legal Constitutions

The dominant approaches to the study of legal constitutions tend to treat constitutions as purely objective phenomena that generate causal force in the world or as purely subjective ‘interpretations’ made by legal experts. Phenomenological sociology pushes us to see the links between the objective, taken-as-real aspect of constitutions and the subjective, meaning-making aspect, both among legal experts and among all of those whose lives are touched by law. The dominant approach in political science, for example, treats constitutions *as if* they are natural phenomena without a distinctively subjective presence. For example, political scientists measure constitutions’ external features (like persistence, Ginsburg et al. 2009), or examine the formal correlation between words in texts and actions in the world (seeing whether rights listed in constitutions are enforced or not, Law and Versteeg 2013). Or they track the relationship between constitutional forms and external associated phenomena (for example, studying the relationship between electoral competition and forms of judicial review, Ginsburg and Versteeg 2014). These approaches treat constitutions the way that natural scientists treat physical objects, as knowable only from the outside. By contrast, legal academics often reveal a commitment to the inverse fallacy. They often take a subjectivist perspective by focusing on the interpretation and historical development of texts alone, as if it were enough for law to exist in the minds of scholars, judges and lawyers without any corresponding reality in the world.<sup>22</sup> The phenomenological approach links interpretive activity to lived experience in the world, and thus it creates the possibility of understanding ‘the social life of constitutions’.

In a phenomenological spirit, we might consider a constitution to be a web of ideas that separates the rules of the game from the game. In order to make this separation, one first needs an idea of a game. A game can be thought of as a bounded social space in which particular rules apply; to ‘play the game’ means to follow the rules in a certain spirit toward predefined ends. The game defines the players, the legitimate moves, the way outcomes are understood and the ways to resolve disputes over the rules. When it manages to do this, it exists as a conceptual reality for its players; it is registered in their lived experience as something real. This

<sup>22</sup> A powerful critique of this position was made by Robert Cover, who tried to snap his colleagues out of it: ‘Legal interpretation takes place in a field of pain and death’ (Cover 1986: 1601). But one does not have to attribute a causal force to law in the world in order for it to nonetheless constitute that world.

recalls Dilthey's account of phenomenological analysis as starting from the '*conceptual cognition of reality*' which includes '*the positing of values ... the determination of purposes and the establishment of rules*' (Dilthey 2002: 25, emphasis in the original).

If a game is constituted by its rules, values and purposes, and is recognised as such by those who play it, then a fundamental challenge to any of those elements will destabilise the reality of the game-space. Games can and do fall apart under such circumstances so that the rules fail to any longer constitute the game. Games can also respond to challenges by adapting the rules, as those who are part of the game adjust in light of each other's adjustments to save the game.

If a game is not 'just a game', but is generalised to a society-wide practice anchored by political institutions over a longer haul, then we can see what is at stake. A constitutional order, like the rules, values and purposes of a game, defines how players are supposed to interact, who gets to move when, what limits exist on what the actors can do and what the point is of common activity. Like the simple two-person, time-limited game, a constitutional order is most effective at shaping social order when it is naturalised and taken-for-granted. When a constitution is functioning, it goes without saying. But when it is fundamentally challenged, its reality becomes questionable and those who play the game have to adapt in an intersubjective space to rescue its normality. If they fail – or if they fail to try – constitutions can crumble.

Why go through this complex phenomenological re-description of something that might be taken as obvious without this much hard work? The phenomenological framework is the only one that links interpretation to practice and that shows how constitutions constitute. It makes sense of historical moments when new constitutions are enacted and take hold as real. And it makes sense of more tragic moments when the obvious cracks, when taken-for-granted knowledge comes under radical challenge and its naturalisation fails. Understanding constitutional crises requires being able to see how constitutions were constituted in the first place so that we can understand how and why they fall apart.

How would one begin to study constitutions empirically with this theoretical framing? First, one would have to be able to study the creation and spread of ideas alongside their effects in the world, which counsels ethnographic work. Only when one gets close enough to one's subjects to understand how they think can one connect thinking to acting, and therefore show how ideas produce social reality. Constitutional

ethnography (Schepple 2004b) can be done in a variety of ways, through fieldwork, archival work and the study of 'traces'.

In traditional fieldwork, the researcher moves into and lives in a particular space, watching her own immersion into a field of new ideas as part of her research plan. Fieldwork puts the researcher into the lived experience of her subjects as she creates a parallel lived experience of her own. I did this in Hungary while working at the Constitutional Court for four years in the 1990s, watching how constitutional judges and their counselors developed constitutional ideas and then later took the very ideas that they had created as real constraints in later cases. I was also able to see how some ideas quickly spread to 'constitute' political life (for example, the entrenchment of social rights, Schepple 2004a) while other ideas were dead on arrival (for example, judicial review of administrative decisions, Kovács and Schepple, forthcoming). Fieldwork requires that the fieldworker watches her own process of learning so that she can see how obviousness is created in a particular social setting before something becomes obvious to her too. Then, once the fieldworker learns to take for granted the very same things that her research subjects do, she returns to her original social site to explain to those who were not similarly immersed in the conceptual field of her subjects how these ideas work to constitute the world. If we are lucky enough to have been born into a functioning constitutional system, is often easier to denaturalise the obvious if we do comparative or historical research instead of trying to understand our own taken-for-granted constitutional culture.

In addition to fieldwork for understanding the present, one can also use ethnography to do immersion-style archival work about the past. In immersive archival work, one embeds oneself in archives to the point where these collected materials become the horizons of one's own lived experience. The problem of history motivated both Dilthey and Simmel, who wanted to see history from the inside, as it were. They wanted to understand how their historical subjects saw the world and were motivated by their senses of what was real, possible or invisible. Dilthey and Simmel both saw history as a sequence of motivated actions. Archival immersion allows a researcher to begin to think as someone from her target society might have thought. Archival immersion does with texts what fieldwork immersion does with daily life – allow repeated encounters with those in particular sites to the point where one can imagine oneself into their space and its associated ideas. Dilthey's and Simmel's accounts of how one has to relive the experiences of one's research

subjects by immersing oneself in the ideas of their times provide a good guide to how one might do this.

Archival immersion is not new to the field of constitutional ethnography. For example, Pamela Brandwein first studied how the American historical period of Reconstruction after the Civil War was imagined by the justices of the US Supreme Court when they interpreted the 'Reconstruction amendments' of the US Constitution (1999). She later went on to study how Supreme Court justices constituted the idea of 'state action' as feature of the legal world (2011). In both cases, she used the historical record to get at the way that these judges understood the conceptual fields within which they were working, and she tracked how and why they developed the ideas that they did. She then went on to show how these ideas became naturalised and taken for granted down to the present day.<sup>23</sup> Inge Markovits immersed herself in a court archive from East Germany and discovered how the judges and lawyers imagined socialist law and its role in constituting social life (2011). She, too, explored the taken-for-granted ideas that would have prevailed among her East German judges and how those ideas shaped people's fates.

Ethnography of either the past or the present can also be carried out by examining traces. By traces, I mean cultural phenomena living in the world rather than in an archive. An archive is curated according to principles that must also be taken into account as one immerses oneself in it while traces are cultural phenomena in the wild, as it were. Of course, the 'wild' has its own canons of preservation which one must understand to see why and how traces have come to survive and to generate meanings. Traces include things like popular cultural products (for example, pop music and fiction, cat videos and opera scores, fashion and social media), affective objects that are associated with special meaning (for example, children's toys, religious icons, war memorials and things present at special sites like objects from the World Trade Center on 9/11 or from the moon), adaptations of languages to fit new times (for example, the creation of slang or professional vocabulary). While these traces sometimes result from the deliberate investment with specific meaning on the part of their creators (for example, as I just defined the term 'traces' in this paragraph), traces often come to carry meanings not intended or available to those who originally constituted them (for

<sup>23</sup> I might note that even though Brandwein currently teaches in a political science department, her PhD is in sociology. She was my student as an undergraduate before she went off to work with my own dissertation advisor, Arthur Stinchcombe.



example, the Magna Carta has come to stand for the right to a fair trial, which, since this demand was originally numbered 39 in the list of specific provisions, did not seem to be the central point of the text for those who wrote it).

The power of traces is quite visible in the constitutional world, as we can see with the Magna Carta. In the US, both Supreme Court justices and members of the Tea Party movement often wave pamphlet copies of the American Constitution in the air as a way of demonstrating that they affirm the 'the constitution' as authoritative – even though the meanings that these two groups attribute to the text differ. Some constitutional traditions associate particular constitutional ideas with particular places and their associated symbolic meanings – as in Germany where the Frankfurt Constitution (1849) is contrasted with the Weimar Constitution (1919) with the Bonn Constitution (1949). Some traces are constituted by the texts of constitutions themselves, which often specify the details of national flags, anthems, cultural relics and nationally important symbols that sometimes then have a life of their own. In some cases, people come to believe that a physical object just *is* the constitution of a country, as I have found with the defenders of the Holy Crown of St Stephen of Hungary (Scheppelle forthcoming).

Phenomenological analysis rests on the ability of analysts to denaturalise the natural attitude of her research subjects long enough to see it clearly, to engage as an analyst in the phenomenological reduction that allows the taken-for-granted to lose its grip. But such activity is not just the province of analysts; it happens in daily life when apparently solid knowledge is destabilised and no longer holds experience together as an organising frame in the lives of people who once took that frame for granted. The collapse of a system of knowledge can be gradual, partial and reparable. Or it can be sudden and catastrophic.

A phenomenological approach can help us to see the process of constitution and de-constitution in action. Take Hungary, which surprised many people by reverting suddenly to an autocratic form of government after the 2010 election brought Viktor Orbán and his Fidesz party to power. Some immediately assumed that the fall of liberal constitutionalism in Hungary meant that it had never existed in the first place, on the theory that people who had lived through communism were incapable of managing a real democracy when push came to shove. But those who lived through the 1990s in Hungary know that liberal constitutionalism was no sham: it was supported by every political party, by public opinion, by the thousands of people who acted as if it were real, by the strong

resolve of Hungarians across the political spectrum to join the European Union and by the celebration of human rights from 1989 through nearly two decades. It quickly became taken-for-granted.

So what happened? Part of the answer is that support for liberal constitutionalism's premises had been evaporating for years before the 1989 constitution itself finally failed in 2010.<sup>24</sup> Surveys are not substitutes for immersion in lived experience, but they can provide a hint that not all is well. For example, a Pew survey in 2009 showed that

In Hungary, there is clear frustration with the current state of democracy, despite the public's acceptance of the shift to a multiparty system. More than three-quarters of Hungarians (77%) are dissatisfied with the way democracy is working in their country. This may be due in part to an overwhelmingly dismal national mood: About nine-in-ten think the country is on the wrong track (91%) and that the economy is in bad shape (94%). Disenchantment with political elites is especially strong in Hungary, where only 38% believe voting gives them a say in politics. And even more than other publics included in the survey, Hungarians are frustrated by the gap between what they want from democracy – such as a free press, free speech and competitive elections – and what they believe they currently have

(Pew 2009: 3).

Discontent with politics in Hungary translated into discontent with a constitution that seemed to legitimate this dreadful state of affairs. The constitution that was supposed to create democracy, end corruption, bring economic prosperity and create better lives had failed, because its goals had not been achieved. Analysts have attempted to explain what has happened in Hungary over the last half-dozen years by pointing to a collapsing economy, public corruption on a grand scale and many other woes. But phenomenological analysis shows how the lived experience of 'getting worse' became affiliated with the rise of counter-constitutional ideas. The combined effect translated into a conclusion that the 1989 constitution was no longer real enough to withstand attacks.

A bad economy and government ineffectiveness would not usually be enough to shatter constitutional reality. Internal democratic renewal within the boundaries of an existing constitutional form can shore up

<sup>24</sup> Note that Alexis de Tocqueville makes a similar argument for the French Revolution. As he documents, the attractive force of the prior constitutional ordering of France had been hollowed out long before the Revolution, which then merely had to tip over the empty shell (de Tocqueville 2011 [1856]).

faith in the constitutional system when the public has the opportunity to ‘throw the bums out’ at the next election. The United States went through massive disillusionment in politics in the 1970s after the misbehaviour of President Richard Nixon was brought to light. But, as Michael Schudson has shown in his cultural analysis of Watergate memory, the overwhelming public narrative constructed once Nixon left office was ‘The system worked!’ (Schudson 1992). Though public outrage rather than anything obvious about the US Constitution drove Nixon from office, cultural memory attributed the restoration of constitutional normalcy to a constitution that worked itself pure. The opposite happened in Hungary, where the steady decline in optimism that accompanied a rapid fall in living standards produced what I have called counter-constitutions instead.

Counter-constitutions are alternative visions of constitutional order, grounded in different understandings of what a constitution is and should be, understandings that reject the taken-for-granted constitutional vision already in place. In Hungary, counter-constitutionalists were able to present Hungary’s liberal 1989 constitution as an import from abroad rather than as the next step in Hungary’s long constitutional history. Hungary’s counter-constitutionalists created traces: they wrote books about 1,000 years of Hungarian constitutional history, erected statues, created museums and even generated music videos, bumper stickers and more. They colonised every national holiday with their own celebrations, created parallel political organisations and developed a specialised vocabulary of national constitutionalism. Perhaps most visibly, Hungary’s counter-constitutionalists argued that the Holy Crown of St Stephen – an old and venerated object – was Hungary’s ‘true constitution’ instead.

Because this alternative constitutional vision had been developed and had saturated the public culture in the countryside long before the financial crisis of the late 2000s turned the electoral results in the counter-constitutionalists’ favour, the 1989 liberal constitution was denaturalised by ideational competition even before the economy collapsed. Had the counter-constitutional ideas not been around to provide a ready-to-hand alternative conceptual frame, the 1989 constitution might have been harder to topple. But once an alternative constitutional conception came to be seen as legitimate by segments of the Hungarian population, it became impossible for the 1989 constitution to naturalise the political space any longer. The dominant constitutionalism ceased to hold, and the post-1989 constitutional order became easy to destroy because it was no longer accepted as real.

Documenting the rise and fall of constitutionalism through phenomenological sociology requires getting deeper into the weeds than this account has done. In a longer treatment of the subject, I show how the Crown constitutionalists were able to dominate both popular culture and public education so that their understandings of history simply came to be seen as real. In the meantime, the elites, who refused to immerse themselves in popular culture, failed to notice. Hungary, like many countries that went from a peasant culture through socialism into a liberal constitutionalist present, had long had a persistent gulf between the daily life, cultural consumption and formal education of the masses and those of the elites. When liberal constitutionalism came to Hungary as part of the post-socialist transition, it was an elite project, supported by the masses as long as it delivered hope and the promise of prosperity and as long as it was associated with the restoration of national sovereignty. But when hope began to fade and the promises did not materialise, counter-constitutionalists who understood the ideational frames of the public that was left behind in transition were able to build on these ideas to generate an alternative constitutional vision. Not only that, but the elites whose constitutional conceptions were being hollowed out from beneath them never noticed because their daily lives were completely buffered from these ideational challenges. The immense gap in lived experience between the masses and the elites in Hungary allowed political groups who understood these differences to create a counter-constitution in plain sight of the masses that was nonetheless invisible to the elites. This is a story that is impossible to tell without seeing constitutions as fields of naturalised ideas that can become denaturalised and without understanding any society as a set of complex streams of lived experience that can only sustain a national constitutional vision when they have at least some elements in common.

Our tour through the development of phenomenological sociology has shown how one can build constitutional sociology by focusing on the way lived experience produces ideas that in turn can be naturalised as real. Sometimes one can also see how those naturalised views come to be denaturalised by competing ideas before they eventually fall apart. But without seeing constitutions as lived experience, it becomes hard to see how legal ideas – legal doctrines – ever have anything to do with life.

Constitutions, in short, have social lives. To constitute, they must be felt as real in the lives of those governed by them as taken-for-granted features of the social world. They must develop not just ideological followers but, even more crucially, ideational believers. People have to

believe that the ideas contained in constitutions constitute an existing landscape that all can take as real. Reality is a delicate business, and intersubjective knowledge can be displaced by new experiences that challenge prior taken-for-granted assumptions. To fully understand how constitutions work, sociologically speaking, one has to see constitutions as webs of knowledge supported by intersubjective agreement. In short, constitutional theory needs phenomenological sociologists to show how constitutions work.

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