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The Sociology of Constitutions

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Abstract

This article sets out an account of the historical development and the contemporary elaboration of sociological approaches to constitutional law. It argues that recent years have seen a broad sociological turn in constitutional theory, such that sociological constitutionalism now forms a distinct field of legal research. This is due to the general increase in the importance of constitutionalism in different national societies across the globe. This is also due to the emergence of new patterns of constitutional formation, both within and beyond national societies, resulting from the interaction between national and domestic constitutional law. The article separates different constitutional-sociological approaches into two categories: those with a primarily national, and those with a primarily transnational focus. Overall, however, it claims that sociological constitutionalism is driven primarily by engagement with transnational law, and the main insights in this field relate, in different ways, to global processes of transnational norm formation.

INTRODUCTION

Recent years have seen a rapidly growing number of publications that address constitutional questions from a sociological perspective. Indeed, it is reasonable to claim they have witnessed both a constitutional turn in sociological theory and a sociological turn in constitutional theory. Constitutions have therefore become prominent objects of sociological inquiry, and constitutional inquiry now widely avails itself of sociological methods.[1] Across disciplinary boundaries, it is now possible to identify a distinct subfield of legal-sociological and constitutional inquiry, which can be classified as the sociology of constitutions, sociological constitutionalism, or constitutional sociology.

This double turn in constitutional research is itself, in some respects, sociologically explicable. First, it can be attributed partly to the fact that since the 1980s constitutional government has been consolidated, in most national societies, as a preferred system of sociopolitical organization. As a result of this broad objective process, the range of methods used to explain the legitimacy of constitutional norms has necessarily expanded. Second, certain elements in the design of contemporary constitutions have also triggered sociological reactions, usually focused on the institutional dimensions of constitutional organization. Notably, the increasing universalization of national constitutionalism has had the result that national constitutions are often defined by similar characteristics. In particular, recent national constitutions have tended to establish strongly entrenched catalogs of rights, subject to protection by powerful, often very activist, superior courts. Indeed, constitutional courts, whose jurisprudence often links national courts to international norm setters, have become a generalized feature of constitutional government in recent decades. Accordingly, one line of constitutional sociology is now centrally concerned with the sociology of courts, especially of constitutional courts. Third, this new research focus is attributable to the fact that, in parallel to the increasing generality of national constitutionalism, the classical domain of constitutional normativity has been extended. Legal norms with constitutional implications are now produced at many levels and locations in society, both within and outside the boundaries of nation states. This process has been discussed most extensively in a growing body of more formal international legal literature engaged with questions of global constitutionalism.[2] However, this process of global constitutional norm formation has found a distinct reflection in sociological analysis, and many researchers have attempted to account for the growing force of inter- or transnational norms from a more socially embedded, less strictly formalistic perspective. Indeed, the separation of constitutional norm construction from classical state-based institutions often forms a thematic thread that connects contemporary constitutional analysis with earlier legal-sociological traditions.[3]

This article sets out a reconstruction of recent research engaged in the sociological analysis of constitutional norms.[4] In addressing this research, it proposes a distinctive definition of the sociology of constitutions. Of course, the sociological construction of a constitution cannot be treated from a perspective of categorical purism, and much of the more canonical analysis of constitutions contains some sociological elements. Indeed, some of the earliest attempts to propose a theory of constitutional legitimacy, set out, for example, by Montesquieu, Rousseau, and Adam

[1] One observer claims that the last decades have seen a "renaissance" in sociological research on constitutions (Schmidt 2012, p. 254).

[2] See discussion in Milewicz (2008), Peters (2014), and Schwöbel (2011).

[3] See the link between recent sociological constitutionalism and earlier sociological accounts of legal pluralism in Teubner (1997).

[4] See other recent general discussions in Chernilo (2014), Goldoni (2016), Morlok (2014), Priban (2012), and Thompson (2015).

Smith, might now be seen as pertaining to the early canon of sociological theory.[5] For the sake of clarity, however, the sociological analysis of constitutions is defined here as an approach to constitutional laws, which can be quite securely differentiated from other modes of constitutional inquiry, and which has several central characteristics.

First, the sociological analysis of constitutions is defined by the fact that it perceives constitutions as core components of the legitimational structure of society, and it insists that vital processes of societal formation, integration, and political self-legislation are conducted and enacted through constitutional norms. In this respect, the sociology of constitutions is distinct from many other lines of sociological research, as it claims that there are deep structural reasons why societies rely on general constitutional norms, and why they tend to articulate their legal-normative foundations in constitutional form. The sociology of constitutions thus stands against certain established positions in legal sociology, notably of a Marxist or Foucauldian orientation, which dismiss the belief that constitutional norms can stabilize socially meaningful legitimational claims, separate from dominant material power interests.[6]

Second, the sociological analysis of constitutions is defined by the fact that it perceives constitutions not solely as aggregates of norms reflecting rational or collective decisions about the overall organization of a governance system but also as the products of deeply embedded societal processes. To this degree, it opposes more literal theories, which observe constitutions as formal agreements about the general "objects of public good" (Tomkins 2003, p. 5). Consequently, the sociological approach to constitutions is marked by a rejection of the principle that constitutional law is conclusively elevated above, or differentiated from, other social processes, and it argues that the constitutional norms, in which society's legitimational ideas are condensed, are produced by dynamics that do not occur solely in the dimension of rational deliberation. Although expressing normatively formative principles for a society, therefore, constitutions appear to a sociological perspective as responses to expectations of legitimacy that have multiple social foundations, which reflect multiple social pressures, and which are not simply articulated as rationally adjudicable claims.

In sum, the sociology of constitutions turns on the seeming paradox that constitutions are embedded in deep-lying legitimational processes within society, and their normative content is structurally vital for modern society, forming a domain of norm construction upon which society's integrity and cohesion depend. However, the normative-legitimational functions of a constitution cannot be limited to rational principles or agreements. In sociological theory, notably, the legitimational role of a constitution is widely linked to its contribution, not to rational political justification, but to multilevel patterns of societal integration. In this perspective, constitutional norms are not merely textual obligations for government bodies but are deeply articulated with social agency and social motivations. Constitutional law retains its classical sense as a set of higher-order legal norms, but its obligatory force is formed in practices that are located outside the law, and it cannot be established through merely legal analysis.

HISTORICAL FOUNDATIONS

As mentioned, sociological approaches to constitutional law are not entirely new. Notably, in fact, the immediate theoretical reactions to the first constitutional-democratic experiments in

[5]For similar views, see Durkheim (1966).

[6]In the age of classical Marxism, notably, Lassalle (1892, p. 19) described the constitution as reflecting the "factual power relations" in society. For a Foucault-inspired view, see Dean (1999, p. 122).

revolutionary America and France in the eighteenth century were marked by the deployment of proto-sociological methods of constitutional inquiry. Indeed, methods that we would now recognize as possessing a sociological character had central importance in many more skeptical assessments of early democratic initiatives, especially after the ostensibly unsuccessful termination of the revolution in France, and a body of literature on constitutional law emerged in Europe that perfectly described the underlying paradoxical axis of constitutional-sociological reflection. On one hand, this line of research endorsed the essential principle of the French Revolution—namely, that the governmental system of society needs to be framed by formal constitutional norms. Yet, on the other hand, this line of research claimed that the rationalist constitutionalism of the French Revolution had been incapable of designing laws able to generate robust resources of legitimacy for the state. Naturally, various positions in this corpus of research differed greatly. Generally, however, prominent outlooks in this environment converged around the claim that genuinely legitimate constitutions cannot be produced by acts of purely rational design, and they cannot arise from single revolutionary acts. Instead, these outlooks indicated that constitutions able to establish legitimacy for a political system must be correlated with structurally ingrained social processes and experiences, and the obligatory, legitimational force of a constitution relies on already existing, historically ingrained patterns of legal recognition and motivation.

This sociological reaction to the constitutional doctrines of the revolutionary era was initially reflected, with variations, in the thought of theorists located between early historicism and early positivism, such as Edmund Burke, Friedrich Carl von Savigny, Gustav Hugo, and Georg Friedrich Puchta.[7] However, the seminal position in the development of early constitutional-sociological theory was elaborated in Hegel's [1969 (1821)] *Philosophy of Right*.[8] In this work, Hegel endorsed the primary claims of earlier, rationalist theories of constitutional order, arguing that a legitimate state must possess a rational will, and it must exercise its power within a rational body of public law. However, Hegel claimed that the constitution of the legitimate state cannot be dictated by acts of formal or generalized rationality, and it must be founded in legal norms, produced through long processes of socio-historical evolution, which gain acceptance because of their correlation with objectively given understandings of freedom and legitimacy. In particular, Hegel denounced the classical constitutionalist construction of subjective rights as institutions that bring legitimacy to government by imposing formal-rational constraints on governmental institutions, and he argued that formal subjective rights always presuppose the existence of historically formed state institutions. Most notable in Hegel's constitutional thought is that he observed the rise of the constitutional state as an essential sociological consequence of the differentiation of society caused by the decline of feudalism and the emergence of a relatively autonomous market economy. In fact, he indicated that, as individual agents in society are released from their time-honored local/sectoral obligations, their dependence on the "reality of the substantial will" of a constitutionally ordered state, able rationally to define the highest norms for society, increases, consonant with the need for integration experienced by individual social actors [see Hegel 1969 (1821), p. 399]. Although it was not generated by the dictates of single rational minds, therefore, Hegel saw constitutional law, in part, as the necessary result of social demands for rational government triggered by the purposive structuring of modern society. Accordingly, he implied, the legitimacy of the modern political system presupposes the existence of a constitution, and the legitimacy of the constitution depends, both normatively and functionally, on its role in securing the integration of otherwise atomized or antagonistic social groups, agents, and constituencies.

[7] See, importantly, Puchta's (1828, p. 141) sociological account of legal obligations.

[8] For other accounts of Hegel as an early sociologist of law, see Fine & Vázquez (2006) and Thornhill (2013).

Durkheim (1950, p. 93) later expanded the sociological approach to constitutional law, viewing the emergence of the rights-based constitutional state as an evolutionary process caused by the increasing differentiation of society and the transition from mechanical to organic solidarity. At much the same time, Weber also proposed a sociological account of the constitution that stressed its importance for the integration of social agents in mass-democratic society, yet that rejected the idea that constitutional law could acquire legitimacy on simply generalized rational grounds. As an alternative to classical constitutional theories, Weber argued that a constitution can demonstrate legitimacy and perform functions of integration for society only if it is able to stabilize political motivations for persons at different positions in the societal community: if it is able to generate trans-sectoral compliance for laws.[9] For Weber, this typically occurs through a constitution that guarantees principles of rational organization for the state, but that is also able to motivate citizens in the symbolic or affectual dimensions of their experience. Accordingly, for Weber, a constitution always presupposes validity grounds that are not founded solely in simple rational principles, and only if a constitution addresses people through laws that are not of an exclusively formal-rational nature can it integrate the diverse, often materially antagonistic social factions that modern society contains. For this reason, in his own practical writings on German constitutionalism, Weber (1988, p. 469) viewed a constitutional order combining formal legality and plebiscitary democracy, retaining an element of affective integration within the otherwise formally structured polity, as the most robustly motivational, and therefore most legitimate, basis for national government.

In each of these examples, early sociological analysis of constitutions called into question more typical normative explanations of the legitimacy of constitutional law. Central to this line of analysis was the claim that the reasons why members of society might show compliance with constitutional norms need to be interpreted not as the result of rational norm generalization but as the outcome of social processes that may have a trans-personal, subliminal, even non-rational character. In each instance, however, the abstraction of constitutional norms was perceived as a question of vital structural importance for the overall integration of modern society.

THE CONTEMPORARY CONSTITUTIONAL QUESTION

In the interwar period, sociological theories of constitutionalism remained widespread, especially among jurists (see, for example, Schmitt 1928). After 1945, however, such approaches initially lost influence; leading sociologists of the postwar era showed only relatively marginal interest in constitutions, and theorists of constitutionalism rarely used sociological methodologies.

This postwar shift away from sociological methods among constitutionalists, we might reasonably speculate, was likely partly the result of the authoritarian catastrophes of the interwar period, which meant that more skeptical, relativizing reflections on democratic legality fell out of favor. Indeed, post-1945 inquiry in public law was dominated by rational or even ius-natural theoretical models more typical of the European Enlightenment. Equally, however, this turn away from sociological research in constitutionalism appears to have been caused by the fact that, unlike classical national democracy, the institutional model of democracy that emerged after 1945 was widely shaped by international legal transfers. In particular, most new democracies created after 1945 were galvanized around institutional designs that were marked by a high commitment to judicial power and, above all, by a high commitment to the entrenchment of human rights norms. These designs were strongly promoted by international norm providers and deeply influenced by the

[9]On social compliance as the basis of legitimacy in Weber's sociology, see Weber (1921, p. 123).

post-1945 rise of international human rights law. This meant that, in the first instance, the specifically social foundations of democratic constitutional law lost visibility, and sociologists struggled to construct a paradigm for examining new lines of constitutional-democratic formation. The classical sociological insistence on the correlation of constitutional law with deep-lying sociopolitical motivations became rather implausible after 1945, when democracy was solidified around normative institutions that did not even originate in national processes of legal construction. Tellingly, many major works of legal sociology in the nineteenth and earlier twentieth centuries had reserved particularly intense contempt for international law, which they often simply dismissed as an object for legal-sociological study or even refused to recognize as an authentic part of legal order.[10] As a result, after 1945, sociological inquiry into constitutional law was forced to reconfigure its basic methodological outlooks to capture the emerging realities of constitutional organization. In fact, it took several decades for sociological researchers to fully identify and comprehend the patterns of constitutionalism, partly based in international law, that came into being after 1945.

This slow process of methodological adaption is strikingly reflected in the most important sociological writings on constitutionalism in the first two decades after 1945, that is, in the earlier works of Habermas [1990 (1962)], in the political writings of Parsons (1965), and in the political-sociological publications of Luhmann (1965). Notable in these cases is that all these authors preserved certain basic argumentational threads from earlier legal sociology, and each author saw the constitution as performing core integrational functions for society. However, all these authors also effected an important paradigm shift from earlier sociological constructions of constitutional norms. Above all, all of these authors accorded a distinctly elevated position to human or civil rights as sources of constitutional integration and wider social cohesion, and all clearly reflected the growing salience of the rights dimension in post-1945 constitutional law. At the same time, however, these authors analyzed constitutional rights in an exclusively national context, without any express awareness of their linkage to the rapidly expanding system of international law. Initially, in fact, the deepening interpenetration between national constitutional law and international human rights law, which underpinned the gradual consolidation of postwar democracy, was a striking blind spot for the most important sociological theorists in the longer wake of 1945. This is especially visible in the case of Parsons, who tellingly, in 1965, elaborated a profoundly insightful theory of the role of constitutional rights in processes of societal inclusion in the United States, focused on the integration of minority population groups in the age of the civil rights movement. This theory, however, was marked by a puzzling silence about the interaction between the domestic process of rights consolidation and international norm providers, which was an important subcurrent in the legal success of the civil rights movement (see Layton 2000). This reluctance to address the international dimension of constitutional rights is also visible in the works of Luhmann. Luhmann was also working in a society in which international norms had played a vital role in the stabilization of democracy, yet his account of the constitutional function of rights makes no mention of the international legal background.

Overall, the emergent conditions of constitutional democracy after 1945 initially evaded sociological explanation. Eventually, however, sociological analyses of constitutions began to gain ground once again. In some cases, sociological analysis of constitutions reappeared in neoclassical form, placing primary emphasis on the normative and integrational apparatus of national states. In most cases, however, the reemergence of sociological constitutionalism is marked by a particular attentiveness to the ways in which domestic constitutional law has been reconfigured by its interaction with the system of international law.

[10] Weber (1921, p. 18) refused to accept international law as law. See also Ehrlich [1989 (1913), p. 9].

Neoclassical Analyses: National Constitutions

The reorientation toward sociological interpretation of national constitutions began to take shape in the 1980s. At this time, Münch (1984, p. 311) notably developed an analysis of the integrative foundations of modern democracies, which identified "constitutional culture" as a core prerequisite of democratic society. Slightly later, Sciulli devised a socio-theoretical model for understanding the constitutional bases of nonauthoritarian societies. On one hand, Sciulli adapted Fuller's common-law concept of proceduralism or procedural legality as a framework for examining constitutional legitimacy. Sciulli (1986) claimed that Fuller's account of the determinants of law's morality could be applied as a general benchmark for measuring the legitimacy of governance regimes, and for defending nonauthoritarian modes of sociopolitical organization. On the other hand, he argued that in a constitutional democracy respect for the standard of procedural integrity in law is not solely institutionalized at a governance level but also established in other spheres of social interaction outside the political system. He explained that a high-quality democracy is a governance system that "extends rule of law as procedural legality from state agencies, and thus public governance structures, to major intermediary associations in civil society, and thus private governance structures" (Sciulli 2010, p. 102). Sciulli thus argued that, when defining constitutional norms, constitutional analysis should look beyond the positive law of constitutional texts, and he claimed that less politically structured social domains, such as professions and corporate bodies, contain and enact procedures that define the wider constitutional form of society (p. 105).[11] Accordingly, Sciulli proposed the thesis that national societies possess multiple sources of constitutionally formative procedure, and de facto constitutional force can be attributed to normative orders that are formed in a variety of ways. That is to say, different centers of agency create norms that both have constitutional impact on their own constituencies and build up counter-power to the authority of the state. In diverse fashion, the approaches of Münch and Sciulli testify to Parsons's enduring importance to constitutional analysis. Münch adopted from Parsons an account of the importance of embedded cultural values in securing democracy. By contrast, close to the spirit of Parsons's institutionalized individualism, Sciulli emphasized professional organizations and professional ethics as foci of democratic norm-producing authority.

More recently, the increased sociological interest in national constitutional law has been reflected in a widening range of approaches. In particular, sociological analysis has been attracted by the waves of constitutional-democratic transition that have occurred in many national societies since the 1980s. As mentioned, the globalization of constitutional democracy is a key motive for the increasing sociological engagement with constitutions. Consequently, much sociological research has a keen interest in both the constitutional terms in which authoritarian regimes are contested and the grounds for the constitutional stabilization, or otherwise, of postauthoritarian constitutional orders.

In this thematic domain, several theorists have promoted sociological approaches to the processes of constitutional transformation that followed the collapse of the communist regimes in Eastern Europe after 1989. Salient in this body of research is the work of Scheppele, who initially used an ethnographic method to analyze modes of constitutional formation in the new democracies in Eastern Europe, focusing in particular on the social functions of constitutional courts, and especially the Constitutional Court of Hungary. This analysis is designed to account for the democracy-enhancing potential of constitutional courts by examining multiple points of articulation between courts and other actors in society, focusing on the interactions between judicial

[11] See, for a fuller account, Sciulli (1991).

players, "other institutions of state," and "international practices and institutions of the transnational human rights community" (Scheppele 2004, p. 397; see also Scheppele 2003, p. 234). More recently, although still concerned with Eastern Europe, Scheppele (2017) has supplemented her earlier approach with a phenomenological sociological method, based on the principle that constitutions are objectivated accretions of knowledge and obtain acceptance on that basis. Important in this account is that emphasis is placed on sociological ownership of constitutional norms, insisting on cognitive embeddedness as a basis for legitimacy. As a result, Scheppele also presents a phenomenological theory of constitutional legitimacy, implying that many new constitutions in Eastern Europe suffer from depleted legitimacy because of the external, strategic processes through which they were initially imposed. Also noteworthy in this field are the works of Blokker, who adopts a primarily conflict-theoretical approach to analysis of constitutions.[12] Blokker (2017) argues that constitutions need to be understood primarily as objects of eminently political contestation, in which rival concepts of legitimacy are projected and tested. He insists that multiple actors are engaged in the production of constitutional norms, such that the constitution necessarily possesses a reality that extends beyond the formal text and beyond the domain of judicial action and interpretation. Constitutional law can be observed sociologically, therefore, only if it is construed as the unstable outcome of conflicting justificatory claims, which make up the political dimension of society. More recently, sociological analysis of constitutionalism in Eastern Europe has been extended to Russia. Notably, some Russian sociologists have questioned whether constitutional-sociological perspectives can be employed to examine patterns of public-legal formation under Putin (see Levakin 2016, p. 17). Smirnova & Thornhill (2016, p. 751) have advanced a distinctive methodology for interpreting the social foundations of Russian constitutional law, stressing how the rise of litigation in recent Russian history testifies to increasing integration of society in processes of constitutional norm construction. In all these accounts, constitutional norms are formed and legitimated by multiple constitutional practices. The construct of a constitutional norm is extended beyond a simple legal-textual principle, and it is interpreted as the result of socially constitutive practices, resulting from the embedded engagement of social actors.

In other geographical contexts, processes of postauthoritarian or postconflict constitution making have also elicited complex sociological reactions. For example, Klug's (2000) research is devoted to analyzing the constitutional processes that shaped the establishment of democracy in South Africa, and he uses both a historical-sociological and a global-sociological method to elucidate the historical factors that ultimately sustained the new constitutional order. Very important in this regard is the work of El-Ghobashy, which addresses the sociolegal background to the processes of constitutional transformation in North Africa. El-Ghobashy (2008, p. 1603) adopts a conflict-sociological approach to examine the constitutional situation in Egypt prior to 2011, arguing that pressures giving rise to constitutional transformation had been created, to a large degree, by judicial politics, and by the promotion of a discourse of legal contention by actors in the legal system. In this respect, El-Ghobashy widens the concept of constitution-making power in a very significant fashion, and she incorporates contentious administrative litigation within the category of social forces capable of stimulating constitutional change. Similar lines of analysis are visible in research on the processes of regime transition and legal-constitutional pacification, which occurred in Colombia in the longer wake of the creation of the new constitution in 1991. Key researchers in Colombia have also accentuated the importance of litigation as a constitutional process. Some, notably Rodríguez Garavito & Rodríguez Franco (2010), have made these claims from a perspective that observes the importance of authoritative courts as institutions that stabilize

[12] See the development of this approach in Blokker (2013).

articulations between constitutional norms and agents at different locations across society. Some, notably Lemaitre Ropoll & Sandvik (2015), have made these claims from a legal mobilization perspective.

In parallel to such regionally focused lines of constitutional-sociological theory, an important avenue of more generalized sociological inquiry into national constitutionalism has developed within the terrain of cultural sociology. This research is less centrally engaged with transitional legal/political environments, and it looks back to more classical historicist lines of inquiry, tending to stress deep-lying sociocultural continuities, rather than conflictual ruptures, as the foundation for integrative constitutional normativity. This research is exemplified, first, by the work of Vorländer, which is located at the juncture between sociology, political science, and cultural hermeneutics. Close to Häberle's (1975) earlier account of the constitution as a pluralistic interpretive process, Vorländer's (2002, p. 23) analysis of constitutionalism centers on the claim that a constitution is lastly a symbolic order, whose validity results from the fact that it gives symbolic expression to the range of normative political conceptions that reside in a "political community" at a given time. The legitimacy of a constitutional norm is thus never statically attached to the literal meaning of a constitution, but it emerges, often in counter-position to the originally projected constitutional norms, through expansive processes of normative social construction and interpretation. This process of interpretation itself gives effect to the legitimational, integrative function of the constitution (Vorländer 1999, p. 82). On this basis, Vorländer (2017) also attaches great importance to variations between different constitutional cultures, formed through distinct patterns of constitutional interpretation and realization. In this lineage, Schmidt has also provided a wide-angled historical-sociological reconstruction of constitutional cultures. Distinctive in Schmidt's (2012) approach is the fact that it undertakes penetrating historical research on different constitutional lineages, and he places current sociological inquiry on a continuum with earlier theoretical traditions.

Alongside conflict- and cultural-sociological approaches, some of the recent research on national constitutional traditions has also developed within the horizon of evolutionary or functionalist sociology, which can be traced back to the ideas of Durkheim, Parsons, and Luhmann. Notably, between the early 1970s and early 1990s, Luhmann himself wrote a series of rather occasional, but still highly influential, articles on constitutionalism. The basic claim in these writings is that a constitution is an evolutionary legal form that serves to secure political legitimacy in society because it helps a society to describe and objectivize the points of linkage (structural couplings) between law and politics. That is to say, for Luhmann (1990, p. 186), constitutions are legal arrangements formed at the intersection between the legal and political systems of society; they allow the terms of articulation between these systems to be consolidated and simplified; and they enable both systems to borrow from each other descriptions of their functions through which they can respond to, positively organize, and societally legitimize their inner communications. Through the advent of constitutions in society, Luhmann (1990, p. 202) claims, law acquires the capacity to explain (and positivize) itself and its decisions as politically enforced, and power acquires the capacity to explain (and positivize) itself and its decisions as legally determined. A constitution thus contributes to the legitimacy of a political system because it constructs the systemic transmission of political power as a procedure subject to legal sanction, and in so doing, it increases the probability that power might meet with compliance across society.

Luhmann's reflections on these questions ultimately provided a platform for a substantial, and in itself quite varied, body of research. In this context, Corsi (2016, p. 19) remains closest to Luhmann's own ideas, explaining the constitution as "a benchmark structure" for the systems of law and politics, which allows both systems to operate in functional autonomy and to develop "decision-making potentials compatible with the condition of their reciprocal operative closure"

(p. 22). Also in this milieu, Neves (1992) has set out a reconstruction of Luhmann's theories of functional differentiation and legal positivization in the context of Latin American legal history, or in the history of peripheral modernity. In this inquiry, Neves concludes that (supposedly) Western patterns of legal formation cannot be projected onto Latin America, and that, in particular, Luhmann-inspired accounts of the interdependence between law and politics are essentially Eurocentric. As a result, he claims that classical modes of constitutional balance, in which the political system is constrained by public law, are not consolidated in Latin America, and the constitutions of Latin American states have typically functioned either as mere formal texts or as symbolic adjuncts to authoritarian rule (Neves 1992, pp. 145, 191; 1998, p. 138). As an alternative to Luhmann's theory, Neves (2017) eventually developed a theory of transconstitutionalism, which is designed to promote a system of constitutional meta-norms, able to incorporate the multiple, often conflicting normative sites that he identifies in different Latin American societies.

Subsequently, the functionalist approach to constitutions has assumed a central position in the works of Thornhill, which are also partly concerned with national processes of legal formation. Thornhill argues against purely conflict-theoretical accounts of constitutionalism, which often stress deep caesuras between different constitutional époques. He asserts instead that constitutional norms emerge through long-standing processes of systemic transformation and functional differentiation, providing a structure of abstraction to support the differentiated political system of modern society, and they cannot be attributed to simple causes, actions, or conflicts in society (Thornhill 2011, pp. 1–19). In particular, he claims, basic constitutional norms, such as popular sovereignty and human rights, are articulated through submerged processes of functional differentiation, and they act materially to objectivize and secure the institutional realities on which these processes depend (Thornhill 2012a). Also using an evolutionary perspective, Brunkhorst (2002, pp. 113–39) has set out a theory of national constitutionalism that interprets constitutional norms both as the results of a deeply lying process of social adaptation and as documents that contain revolutionary normative validity claims, which have binding force for the construction of governmental legitimacy. Almeida (2014) recently expanded Brunkhorst's evolutionary approach, arguing that constitutionalism is a key part of the socio-cognitive learning processes that make social coexistence in pluralistic societies possible.

First, therefore, recent years have witnessed the emergence of a diffuse body of research, drawing on different methodologies, which seeks to explain why national societies increasingly presuppose constitutions for the legitimation of laws, and to interpret the functions that constitutions perform for modern societies. Especially notable in this body of literature is the fact that, although concerned primarily with national patterns of constitutional construction, much of this inquiry refracts, either directly or obliquely, the correlation between the factual generalization of constitutional democracy in recent decades and the increasing reinforcement of international law as a free-standing system of norms. In particular, much of the literature considered above examines how the legitimational structure of national constitutions depends on the social protection of human rights, either directly or indirectly internalized, in part, from the international domain. This is clear, for instance, in the work of El-Ghobashy, who argues that the contentious discourse in pre-2011 Egypt was partly created by interaction between national litigators and international human rights advocates. This is clear in the work of Klug, who observes the domestic penetration of international human rights law as a key constitutional factor in stabilizing democracy in South Africa. Similarly, Thornhill claims that the legal circulation of rights is the basic functional foundation of the modern political system. Brunkhorst argues that, in their evolutionary foundations, the rights established by national constitutions are inseparable from the construction of human rights law at an international level. In consequence, across the variations in this research, national constitutions are conceived in a perspective in which the national domain of legal formation is not

restricted to the narrow horizons of national law, but in which national and international legal norms are deeply interlinked.

International Constitutionalism and the Sociology of Courts

The growing sociological interest in the impact of international norms in national constitutional law has also led to the emergence of a separate body of sociological inquiry, which takes the position and function of international norm providers—that is, international courts, tribunals, and other judicial or semijudicial bodies—as its primary object of analysis. Notably, this research focuses on the growing interaction between national and international judicial bodies, and it addresses the consequences of such interaction for national constitutional practices. This literature can be classified, broadly, as a contribution to the sociology of judicialization;[13] that is, it examines sociological reasons why classical political processes are increasingly influenced by judicial bodies and why particular constitutional designs have become globally prevalent, especially those making strong judicial provision for judicial authority and human rights protection. This literature stands slightly apart from the main body of nationally focused constitutional sociology, and it shares common ground with positions in a distinct sphere of legal sociology, which has also gained greatly increased importance in recent years—namely, the sociology of international law.[14] However, this literature also belongs, albeit rather marginally, to the sociology of constitutions.

At the most critical end of the spectrum of this research, Hirschl (2004) has elaborated an influential analysis of the global rise of judicial institutions and the penetration of international norms into domestic constitutional law. Hirschl argues that the increasing formation of national constitutions on the pattern of judicial constitutionalism is driven, to some degree at least, by the preferences of hegemonic players in the international arena. On this account, the model of new constitutionalism, oriented toward entrenchment of judicial authority and strong protection for subjective rights, is imposed externally on national democracies to preserve transnational elite economic interests, and it inevitably undermines the scope of provisions for national-democratic deliberation. Schneiderman (2008) has intensified this approach, attributing the rise of transnational judicial power to quasi-imperialistic economic forces in global society, leading to a decline in the quality of national democracy. Although in itself intuitive and broadly influential, this narrative has been challenged because it operates within a residually dualist account of the relation between national and transnational law, and it is only marginally attentive to the dynamics of interpenetration between them. Some sociologists have proposed the counterargument that, in most cases, national democracy was actually formed only because of the deep interpenetration between national law and international jurisprudence (Thornhill 2012b).

Alongside this, important legal sociologists, notably Madsen and Vauchez, have proposed an alternative account of the rise of transnational judicial bodies, and of the impact of these bodies on national constitutional processes. Central to the work of Madsen and Vauchez is a highly innovative deployment of insights extracted from the sociology of professions and from the Bourdieusian sociology of elites to examine the emergence of transnational judicial institutions (see, for instance, Madsen 2014). Notably, Madsen and Vauchez observe these institutions as central parts of an emergent transnational judicial field, or even of a transnational human rights field. On this account, this field is not solely constructed as a formal or free-standing legal arena. Instead, it is underpinned by conflicts between legal professionals over resources and cultural status, and its normative force

[13] For a more programmatic account, see Commaille & Dumoulin (2009).

[14] See Hirsch's (2015) introduction to this field.

is not separable from the singular life trajectories of the persons who contribute to the emergence of international human rights protection (see Madsen 2010, Vauchez 2014). Most importantly, Madsen and Vauchez argue that the increasing importance of transnational judicial bodies can usually be ascribed to changing professional opportunities for lawyers and advocates, and they claim that the transnational legal domain has assumed importance, especially in Europe, because international human rights activism opened new careers for progressive elites, whose horizons were restricted at a national level. The construction of the transnational human rights field then has secondary repercussions for national legal systems, as professionals who have established an international profile linked to human rights are inclined to promote related causes in their national activities. The constitutional bridge between the national and the international domain is thus explained through microsociological reconstruction of particular prominent legal players and their opportunity structures. Dezalay's collaborative works (see Dezalay & Garth 2002), which have focused extensively on the importance of professional elite formation in the creation of legal norms in Latin America, have deeply influenced this research.[15]

Second, therefore, the recent growth of constitutional sociology has been strongly shaped by sociological analysis of the position and function of international courts. This literature is not focused centrally on the foundations of domestic constitutional norms. However, it provides a sociological reconstruction of the dominant patterns of contemporary constitutionalism, especially the growing authority of judiciaries and the salience of human rights norms. Moreover, it identifies courts as de facto constituent agents, able to create legal norms with binding force both at an international level and, through the actions of national judges and advocates, in national legal systems. As a result, this literature provides a core contribution to the primary themes of the sociology of constitutions.

Transnational Constitutional Law

Sociological research on constitutions is defined quite fundamentally by the fact that it introduces new accounts of normative validity and norm formation into legal analysis, and it typically revises standard categories to reflect emergent, often still only half-visible, social and legal realities. As a result, one central impulse of sociological constitutionalism is that it reflects the fact that in contemporary society, to an increasing extent, norms with binding force can be generated in many ways and by a plurality of actors, such that the constitution of society is no longer attributable to simple constituent acts. As mentioned, in the outlooks discussed above that still retain a neoclassical focus on identifiably national legal domains, the separation between national and international law is never sharply defined. In addition, however, much of the most innovative research on constitutional sociology has abandoned the (even residual) attempt to distinguish between national and international law, and it adopts a transnational perspective to account for society's constitutional form. Much current sociological research on constitutional norms claims that societies now obtain a constitutional structure in multicentric fashion, and the porosity of national societies to extranational norms has allowed patterns of constitutional norm construction to evolve that do not even remotely match inherited categories of public law. In such cases, the constitutional force of a norm depends, not solely on its obligatory rank for state organs, but also on its binding effect for agents at different points in global society.

As a result, much research now addresses transnational constitutional law as the most vital sphere of constitutional analysis. In fact, the analysis of transnational constitutional norms is

[15] For background, see Dezalay & Madsen (2012).

now, in key respects, seen as the eminent domain of sociological constitutionalism, in which legal analysis is challenged to refine its sociological sensibilities to capture highly emergent and contingent modes of legal abstraction (see Teubner 2012, chapter 1). Notably, the programmatic call for a sociology of transnational law occurred at an early point in the recent development of sociological constitutionalism (Friedman 1996). At the same time, however, as transnational law has moved to the center of sociological-constitutional research, different authors have begun to approach the transnational legal domain in different ways, and numerous perceptions and definitions of transnational constitutional law have emerged. Indeed, the basic configuration of the transnational, and its relation to the national, is now contested.

Transnational constitutional law 1: the European Union. Sociological accounts of transnational constitutional law have often focused on the legal structure of the European Union (EU).

On one hand, the EU has a distinctive constitutional order, which is formed primarily by complex transnational patterns of interjudicial interaction (see Stein 1981, Stone Sweet 2004, Weiler 1991). As a result, the EU has attracted researchers who emphasize judicial sociology as a perspective to understand new constitutional forms, and there have been several attempts to identify the social foundations of the judicially constructed constitutional system of the EU. Salient among this research is Vauchez's (2008) attempt to unearth the concrete professional strategies and opportunities underlying the rise of judicial power in the EU. Also important is Münch's (2008) research on this question, which, in neo-Durkheimian fashion, examines judicial constitutionalization in the EU as a mode of social inclusion adapted to an individualized social order.

On the other hand, a very important body of sociological literature has developed that applies a theory of constitutional pluralism to the legal order of the EU. This research, which is represented, with important variations, by Tuori and Frerichs, is also partly influenced by Luhmann's legal-sociological writings.[16] The point of departure in this approach is that in the EU different policy domains have assumed a distinctive constitutional structure, which is formed through the coupling of the legal system with the normative exigencies of a particular regulatory sphere. On this basis, for example, Tuori (2015, p. 23) argues that the EU possesses a series of separate sectoral constitutions; that is, it possesses distinctive political and juridical constitutions, which overarch or frame other constitutions, and it also possesses, at varying degrees of consolidation, an economic, a social, and a security constitution. Each constitution in this system results from a distinctive "*constitutional relation* between *constitutional law* and its object of regulation: that is, a *constitutional object*" (Tuori 2015, p. 9, emphasis in original).

Frerichs follows some of Tuori's claims. She views transnational society as a whole as marked by the constitutionalization of different functional spheres of global exchange. As a result, global society increasingly evolves an economic, a political, a social, and a security constitution. In this light, Frerichs (2010) interprets the European legal order as a distinct normative structure, in which these four systemic/functional constitutional dimensions are organized in a manner adapted to the European territorial affiliation. Notably, however, Frerichs places a distinctive emphasis on the economic constitution of the EU, which she sees as produced through a distinct coupling of the legal system and market imperatives. Using insights derived from Polanyi, Frerichs (2017, p. 259) claims that the economic constitution of the EU, which she describes as embodying a "new, transnational drift of the law of market society," is the most highly evolved component of the EU constitution as a whole. In particular, she claims that the EU is paradigmatic for the

[16]See Tuori (2015, p. 22) for analysis of this point.

quintessential global trajectory of economic constitutionalism and distills the wider transformation of economic law from nineteenth-century universalism, to twentieth-century "national closure," to twenty-first-century "transnational openings" (Frerichs 2016, p. 173).

In these instances, the legal order of the EU is treated as a legal-constitutional order sui generis. However, it is also viewed as paradigmatic for emergent patterns of transitional norm production and constitutionalization.

Transnational constitutional law 2: hybrid law. The most expansive field of research concerned with transnational constitutional law is centered around the works of Teubner, and his highly ambitious theory has a key position in this area. Over several decades, Teubner has elaborated the argument that the constitutional form of contemporary global society is not defined primarily by states and that constitutional norm construction does not occur solely, or even primarily, at the level of public law. Moreover, society's constitutional order can no longer be construed as a unity, or as a formal hierarchy, and it possesses a deeply fragmentary, pluralistic character. As a result, Teubner claims, the construction of constitutional law must be directed away from more classical ideas of formal legal certainty, and it should be observed as the result of the highly contingent legal interactions that define global society as it spreads beyond the jurisdictional force of classical statist institutions (see Fischer-Lescano & Teubner 2006). Accordingly, Teubner accounts for his sociological vision as a highly pluralistic theory of transnational societal constitutionalism. On this account, transnational law is, primarily at least, law that crosses the boundaries between national societies through exchanges between (classically defined) private actors.

On one hand, Teubner argues that the globalization of society has given rise to a legal order in which each functional domain of society is capable of generating norms with constitutional standing for a given aggregate of social practices. In global society, he claims, all spheres of interaction (communication systems) become detached from national steering institutions, and they are compelled to establish a self-regulating, internally reflexive normative order, reaching across the boundaries between historically distinct political or constitutional regions (Teubner 2007, pp. 138–40). To this degree, Teubner ascribes a distinctive constitutional apparatus to all communication systems, such as media, economics, sports, and medicine, each of which he sees as endowed with particular problem-solving procedures and as capable of generating constitutional principles in a spontaneously ius-generative manner. This process of auto-constitutionalization imprints a distinctively acentric constitutional structure on society as a whole. First, for example, this process means that demands for discretionary interventions of the political system in other communication systems are reduced, and even implausible (Teubner 2011, p. 91). Second, this means that different communication systems can formalize reflexive normative limits for their own functions, thus obstructing their own excessive expansion into other social domains (Teubner 2011, pp. 60, 62).

On the other hand, Teubner claims that the sectoral constitutions of contemporary global society are created through a spontaneous hybridization of elements of public and private law. The main implication of this is that constitutional norms are not created through identifiably public or conventionally political acts, but that transnational accretions of private law are able to assume quasi-public, quasi-political status as they produce structurally framing norms for different societal domains. Even specialized functional institutions, such as central banks, universities and other scientific organizations, constitutional courts, or self-regulating professions, possess their own sources of political agency and processes of self-constitutionalization. Teubner's vision of societal constitutionalization thus countenances many sites of politicality and many expressions of constitutional practice in society, in which political-constitutional agency cannot be seen as identical to formal processes of political institutionalization. Notably, this theory relies on a

reconstruction of the classical theory of the horizontal effect of basic rights, which acquired great importance in West German constitutional jurisprudence in the 1950s and 1960s. On Teubner's account, in global society basic rights are partly freed from their classical restrictive position in the vertical relation between citizen and state, and they assume a distinctive role as relatively spontaneous sources of functionally specific norm production, providing a constitutional core for the legal ordering of private domains. The constitutionality of modern society in fact produces itself in part through reference to rights, or to "regime-specific basic rights standards" as they are spontaneously articulated and prescribed in the functional localities of law's formation (i.e., tribunals, courts, panels, councils) (Teubner 2007, p. 140). In these aspects of his theory, Teubner is clearly influenced by Luhmann's theory of structural coupling, as he views a reflexive coupling between law and different function systems as the key to societal constitutionalization. Additionally, he is influenced by Sciulli's theory of norm-based societal procedures as sources of constitutional norm formation. To some degree, he is also influenced by the less well-known societal-constitutional method of Scholz (1971, p. 294; 1978, p. 219), who, albeit in a still classical liberal sense, interpreted the impact of the basic rights provisions of the West German constitution as giving rise to a series of distinct constitutions in society, especially a communication, a labor, and an economic constitution. Very distinctively, however, Teubner (2017, p. 329) also implies that, through their own internal reflexivity, different sectoral constitutions may have the capacity to adapt to the expectations of other sectoral constitutions, so that some broad compatibility between different functional domains might be possible.

Teubner is not alone among theorists of transnational law in ascribing a distinct constitutional dimension to some elements of transnational private law. Notably, Zumbansen (2010, p. 184) has claimed that transnational private law might be viewed as possessing constitutional dimensions because it contains a set of "process-oriented principles" able to provide normative structure for global society, where substantive concepts of justice and institutional models derived from the nation state are increasingly without purchase (Zumbansen 2002, p. 432). Both Zumbansen (2006, p. 747) and Fischer-Lescano (2003, p. 735) have argued that transnational law embraces human rights norms as a structural principle of normative order and that the coalescence of private and public law forms a vital instrument for enforcement of human rights. Kjaer has intensified the constitutionalist claims in Teubner's variant on systems theory, arguing that, as modern society is marked by an increasing degree of functional differentiation, the constitutionalization of social interactions, both public and private, in the form of formal organizations becomes a strong functional imperative. For Kjaer (2014, p. 113), global society presupposes the formation of "multiple constitutions," which are required both to construct internal order within the functional arenas to which they are linked and to establish the "possibility of stabilised linkages with other fields." On this account, all formal organizations, including those that operate in the transnational sphere, can be the object of a constitution (Kjaer 2014, p. 143).

All these positions are shaped by a perception of transnational legal order that argues that modern law is defined by a suspension of classical hierarchies and fixed normative structures. Nonetheless, all these outlooks perceive transnational law as producing legal forms with a status close to that of classical constitutions, albeit formed in highly contingent, systemically internalistic and rapidly adaptive fashion (see Zumbansen 2012, p. 50). Moreover, all these outlooks contain the claim that contemporary society, even in its globally fragmented form, remains marked by a deep reliance on constitutional norms.

Transnational constitutional law 3: interaction of national and international law. A third sociological theory of transnational constitutional law can be identified, albeit more diffusely, in a body of research focused on the constitutional interactions between national and international

law. In this research, the claim has become widespread that national and international processes of constitutional norm construction are inextricably intertwined, and even that national and international legal norms are created through the same (transnational) constitutional process.

To some degree, this claim is visible in the works of de Sousa Santos (2002), who, while criticizing formal international law, argues that international law acquires great importance in promoting democratic constitutional cultures. He sees the "*political mobilization of international human rights*" as a core mode of inner-societal constitutional agency (p. 488, emphasis in original). A related understanding of transnational constitutional norms is also evident in Brunkhorst's recent work, which centers around the essential interconnectedness of global normativity and national constitutional formation. Brunkhorst's (2014) later work comprises an attempt to fuse an evolutionary theory of social formation with a Habermasian doctrine of discursive norm construction. On this premise, he argues that contemporary democracy has evolved through a long prehistory of democratic institution building, the constitutional origins of which can be traced to the High Middle Ages. Accordingly, he claims that democracy has been formed by a sequence of revolutions, from the papal revolution of the twelfth century, to the Reformation, to the constitutionalist revolutions of the Enlightenment in the eighteenth century, each of which articulated a normative learning process for society as a whole, and each of which has instilled in society a set of hard, materialized constitutional norms. Once historically formulated, he explains, these norms act as constraints within society that drive the formation of democratic government, in each case giving more robust legal protection to the essential liberties required for human self-determination. Ultimately, Brunkhorst argues, this normative-evolutionary trajectory culminated, after 1945, in the revolutionary construction of a system of international norms, especially relating to human rights law, which simultaneously formulated norms of self-legislation for all members of global society and conferred intensified security on democratic norms within the national domain. Against this background, Brunkhorst views the stabilization of democratic law within national societies as a process that is integrally linked to the articulation of democratic norms at an international level; only through the correlation between both the national and the international dimensions of the global legal system can democracy emerge as a relatively stable mode of socio-political organization.

From a more functionalist perspective, Thornhill has recently advanced overlapping legal-sociological claims. In his later work, he theorized that, from the moment of their establishment, the political institutions of national democratic societies were defined at a deep structural level by the fact that they released pressures for legal inclusion, linked to constitutional guarantees over different sets of rights, which they were not independently, using exclusively national legal resources, in a position to manage adequately. In particular, he claims that from the outset, national democracies have been expected to confront conflicts between social groups positioned at different points on the class spectrum, which their institutions struggle to incorporate, or even to withstand (Thornhill 2016, chapter 4). On this basis, he argues that over long periods of time, national political institutions have been forced by deep-lying functional imperatives to lock themselves into international normative systems, largely based in human rights law. As a result, national states have increasingly been constructed as components of a broader transnational constitution. The benefit states obtained through this process is that they acquire the capacity to legitimize their basic functions, and especially acts of legislation, without the inclusion of insoluble societal antagonisms, and in consequence, they heighten their resilience in the face of unsettling inclusionary pressures embedded in the structure of national societies. On this account, the evolution of international human rights law is the result of a long process of transnational constitutional formation, largely driven by functional overspill from pressures within national societies. The eventual concretion of a layer of international human rights, situated above the rights created exclusively

within national constitutions, helps to stabilize democracy at a national level, and the constitutional linkage between national and international norms evolves as a material precondition for the stabilization of constitutional order as a whole. Thornhill concludes that national democracy relies deeply on a transnational legal substructure, and typically, national democracy in fact comes into being only as part of a transnational constitutional system. On this account, in contrast to the claims in Teubner's analysis, translational constitutional law is still observed as a normative order that is formed at the level of public law, and in fact it evolves, albeit dialectically, as an internal component of national constitutional normativity. A major difference between Brunkhorst and Thornhill is that Brunkhorst places greater emphasis on the performative, contested realization of constitutional laws, so that a residually Marxist theory of *praxis* is essential to the constitution of legitimate power. By contrast, Thornhill observes the formation of constitutional law as the result of functional pressures, both international and domestic, on state institutions. Some analogies to these ideas can be found in the theories of world culture and world polity set out by Meyer, Boli, Ramirez, and others. These theories are focused mainly on education, but they also stress the importance of global legal structures in reinforcing national democracy, national constitutional rights, and national citizenship practices (see, for example, Meyer et al. 1997, p. 159).

Third, therefore, transnational constitutional law has become the primary focus of much sociological constitutionalism. Outlooks in this line of research still converge around the claim that constitutional law, even if produced at a high level of pluralistic contingency, remains a core integrational domain for society as a whole. These outlooks still perceive constitutional law as primary law that sets parameters for subsidiary processes of norm formation. Increasingly, however, these inquiries are divided by rival accounts of transnational law, some of which see such law as evolving outside classical national states and some of which see a formative linkage between national and inter- or transnational law. Indeed, some theorists of transnational constitutional law have questioned the general presumption that national law in some way preexisted transnational law. Instead, they have argued that the two domains actually emerged simultaneously (see Kjaer 2014, pp. 31–35; Thornhill 2016, pp. 22–30).

CONCLUSION

The contours of a new field of sociolegal research, centered around the sociology of constitutional normativity, have been established in a very short period of time. In certain respects, the contemporary sociology of constitutions clearly displays direct parallels with the nineteenth-century sociological writings on constitutionalism. Both bodies of literature developed as reactions to the general spread of constitutional rule, and both sought to explain this phenomenon by examining its broad societal foundations. Indeed, there remain remarkable continuities between classical and contemporary sociological constitutionalism. At the same time, however, contemporary constitutional-sociological research is marked by a profound break with more classical approaches. As discussed, in recent years sociological analysis of constitutions has begun to address legal questions of global society, especially concerning the social foundations of transnational norms, which the classical-sociological field of vision was not prepared to admit as meaningfully social. Indeed, arguably, contemporary constitutional sociology has developed, in its entirety, as an attempt to understand the linkage between the national and international dimensions of the constitutional order of modern society. For this reason, some of most innovative constitutional sociology has now approached global sociology. Such research has begun to separate global questions of normative or constitutional validity from more situated, agency-centered perspectives. Encompassing, macrosociological concepts of sectoral autonomy, transnational normative contingency, functional overspill, and the coevolution of national and transnational norms have come

to rival more classical ideas of legal-normative authorship, contestation, and recognition as the central paradigm of constitutional sociology.

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