

The Concept of Constituent Power

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Power vests ultimately in ‘the people’. This is the persistent theme of modern constitutional thought that runs from the late-18th century American and French Revolutions to the upheavals of the ‘Arab spring’ in 2011. But each term of this phrase needs unpacking. How, in particular, is this democratic conviction expressed in constitutional thought? The answer is found in the concept of constituent power.

German scholars who label constituent power a *Grenzbegriff* - a boundary or limit concept - have identified its critical role.¹ Located on the boundaries of legal knowledge, the concept helps us specify the nature of the constitutional form assumed by a political regime. But since the political domain is a contested space it is not surprising that that concept is itself contested. Constituent power is not only a *Grenzbegriff* but also a *Kampfbegriff* whose meaning is rooted within deeper disputes over the nature of legal, political and constitutional ordering. It is difficult, then, to explain its nature without getting entangled in disputes of an ideological as well as a conceptual nature.

I try to minimize these inherent difficulties by sketching an account of origins and then examining the main perspectives on the concept. These are emanations of three types of legal thought: normativism, decisionism and relationalism. Normativism, the prevailing mode of legal thought today, fashions itself on the autonomy of legal ordering and in this mode constituent power becomes a redundant category. The second type, decisionism, is founded in law as will. Although one strand exists in American legal realism and its various instrumentalist offshoots, the most prominent exponent within constitutional thought is Carl Schmitt. Schmitt claims that modern constitutions are unable to guarantee the terms of their own existence and must be underwritten by a sovereign will: the constituent power. The third type of legal thought, relationalism, rejects both the normativist assumption that constituent power is redundant and the decisionist contention that it is the will of a constituent subject. For relationalists, the concept expresses a relationship of right: it is the

manifestation of political right (*droit politique* or *jus politicum*), expressing the open, provisional, and dynamic dimensions to constitutional ordering. In this paper, I argue that the relational method is the key to understanding the significance of the concept in contemporary constitutional thought.

ORIGINS

Constituent power is a modern concept. Its origins lie in medieval thought, but it emerges in distinct form only with the establishment of the modern institution of the state. Its primary function is to specify in constitutional language the ultimate source of authority in the state. In his analysis of the means by which authority is acquired, Max Weber suggested that there are three main sources of legitimacy: *charismatic*, involving devotion to the exemplary or sacred character of a leader; *traditional*, concerning acceptance of the authority of immemorial custom; and *rational*, entailing belief in the rightful nature of a ruler's authority to make law.² In the history of governmental forms, these follow a sequential pattern and suggest an ascending order of clarity, from opaque to transparent. Constituent power derives from the emergence of the third source of legitimacy: the rational. It presents itself as a modern, rational concept that does not easily fit with claims to the traditional or sacred authority of the sovereign.

The concept emerges from the secularizing and rationalizing movement of 18th century European thought known as the Enlightenment and rests on two conditions: recognition that the ultimate source of political authority derives from an entity known as 'the people' and acceptance of the idea of a constitution as something that created. The concept comes into its own only when the constitution is understood as a juridical instrument deriving its authority from a principle of self-determination: specifically, that the constitution is an expression of the constituent power of the people to make and re-make the institutional arrangements through which they are governed.

The origins of this modern concept lie in Calvinist reinterpretations of Bodinian sovereignty. They claimed a 'double sovereignty', with personal sovereignty (*majestas personalis*) being held by the ruler and real sovereignty (*majestas realis*) vesting in the people. This argument was used by radicals in the various conflicts in European regimes over competing claims of 'divine right' and 'popular sovereignty'. Though the details of these

historic struggles are local and particular, the trajectory of this line of thought ended in a critical distinction between the ‘constituted power’ (the power vested in the prince to exercise rule) and the ‘constituent power’ (the power through which the prince’s power to rule was authorized).

This shaped late-18th century revolutionary thought. Locke’s influence over the American colonists is made manifest in the words of the Declaration of Independence: ‘whenever any form of government becomes destructive of these ends, it is the *right of the people* to alter or to abolish it, and to institute new government’.³ The constituent power of the people is also used to establish the authority of the Federal Constitution notwithstanding an unlawful break with the Articles of Confederation.⁴ But it was explicitly deployed in French revolutionary discourse. The Abbé Sieyès emphasized the point that ‘the people’ – in his words ‘the nation’ – possesses the constituent power of political establishment. Government, Sieyès explained, is an office of delegated authority, a form of constituted power. But it is the government, not the nation, that is constituted: ‘Not only is the nation not subject to a constitution, but it *cannot* be and *must not* be’.⁵

It has become an orthodox tenet of modern legal thought that constitutional law is fundamental law. Sieyès highlights the point that while the law of the constitution may take effect as fundamental law with respect to the institutions of government, no type of delegated power can alter the conditions of its own delegation. Constituent power remains. The nation is prior in time and prior in authority: ‘It is the source of everything. Its will is always legal; indeed, it is the law itself’.⁶ By expressing in legal language the idea that ‘the nation’ is the ultimate source of political authority, Sieyès produced a concise and abiding statement of the concept of constituent power.

This formulation has since become a staple of modern constitutional discourse, as constitutions have come to be drafted in the name of ‘the people’. But it still had its ambiguities and Joseph de Maistre immediately pounced on one difficulty. Over whom, he asked, are the people sovereign? He supplied his own answer: ‘over themselves, apparently’, meaning that the sovereign people are also subject. Maistre not surprisingly felt that there is ‘something equivocal if not erroneous here, for the people which *command* are not the people which *obey*’.⁷

Sieyès had already acknowledged this point when arguing that political power originates in representation. He accepted that the people exercise sovereign authority only

through the medium of their representatives. But this suggests that the constituent power can only be exercised only through the constituted (ie, representative) authorities. Or, as Maistre put it more caustically, ‘the people are the sovereign which cannot exercise their sovereignty’.⁸ Some have finessed this problem by contending that ‘the people’ is not sovereign as such but is merely the source of sovereign authority of the established regime.⁹ That hardly provides an unambiguous solution.

A further problem with Sieyes’ formulation is his use of legal terminology. He believed that without an instituted order of government the nation exists in a state of nature, governed only by the law of nature. But if constituent power is a modern concept brought into being with the establishment of the state as an expression of self-actualization, the idea of natural law does not offer an adequate explanation of its source: the world of classical natural law is precisely what is being left behind.¹⁰ Sieyes uses this terminology because once he moves beyond the relationship between sovereign and subject as an expression of positive law he can only conceive of natural law. But need this be so? Rousseau had already shown that the establishment of the constitution of government is regulated not by natural law but by *principes du droit politique*. He showed how, by virtue of the political pact, a new entity comes into existence: this ‘public person’, formed ‘by the union of all’ is called a *Republic* or *body politic*; or ‘*State* when passive, *Sovereign* when active, and *Power* when compared with others like itself’. And ‘those who are associated in it take collectively the name of *people*, and severally are called *citizens*’.¹¹ Prior to this constitution there exists the political life of the nation and this modern idea of constitution acquires its meaning within the broader frame of the political life of the nation. But rather than conceiving the ‘life of the nation’ as a type of natural law, it should be understood through the concept of *droit politique*.

The origins of constituent power, it is suggested, lie in the concept of real sovereignty (*majestas realis*) that early-modern writers vested in ‘the people’, and *majestas realis* is a political rather than a natural category. Sieyes, the leading architect of the concept, specifies the hierarchical relationship between the legislative power, constitutional authority, and the constituent power of the nation. But constituent power is not the expression of the nation operating in accordance with some law of nature; it is a modern concept expressing the evolving precepts of political conduct which breathe life into the constitution. This claim is amplified by examining how the concept is situated within the main categories of legal thought.

NORMATIVISM

Constituent power is a modern constitutional concept with political and legal dimensions. Broadly conceived, public law divides into three main strands: the law concerning the acquisition and generation of political power, the law concerning the institutionalization of political power, and the law concerning the exercise of political power. The latter two address aspects of ‘constituted power’, conventionally of constitutional and administrative law respectively, but constituent power relates only to the first strand, the way in which political power is generated.

This treatment of public law is rejected by many contemporary jurists, most noticeably within the philosophy of legal positivism, which presents itself as a science of positive law that abstains from all forms of value judgment. In early formulations, such as that of John Austin, law is defined entirely in non-normative terms and even positive constitutional law is merely a type of political morality, not strictly law at all.¹² This approach reaches its apogee in Hans Kelsen’s ‘pure theory of law’. Kelsen’s theory presents law as a science that is on the one hand ‘purified of all political ideology’ and, on the other, of ‘every element of the natural sciences’.¹³ His solution is to show that law is a scheme of interpretation whose reality rests in the sphere of meaning (RR, 10). Law is, in short, a system of norms (RR, 55-58).

Following Hume’s injunction against deriving an ‘ought’ from an ‘is’, Kelsen argues that a norm acquires its meaning and status as law only from another norm, a higher norm that authorizes its enactment. If law is a hierarchy of norms, eventually the chain of authorization runs out and we are left with a *Grundnorm* (founding norm) at the apex that authorizes the lower norms but is not itself authorized by a higher norm. This *Grundnorm* is the original constitution of the legal order. Who authorizes the original constitution? Kelsen answers that in legal science this question – the question of constituent power - cannot be addressed: the *Grundnorm* can only be presupposed (RR, 57). Constituent power – the will that makes the constitution - is for Kelsen a political and not a legal issue.

In positivist legal science, the concept of constituent power belongs either to the world of myth – a political myth that grounds the authority of the basic norm – or is an expression of raw power. It is a political, metaphysical or theological concept with no juristic significance. Legal science is limited to a question of validity: is this or is this not a valid

norm of an extant legal order? The theory acquires a scientific status only by eliminating all questions concerning the relationship between legality and legitimacy. The first strand of public law, which concerns establishment and maintenance of authority, is not the subject of legal cognition.

This stance is not confined to legal positivism: it is now being implicitly promoted by a broad range of contemporary normative legal theory founded on the autonomy – or intrinsic morality – of law. The argument has been most explicitly presented by David Dyzenhaus who contends that the concept of constituent power is superfluous for the legal theories of scholars such as Fuller, Dworkin, Alexy and their followers. What unites this group is their commitment ‘to showing how legal order and law itself are best understood from the inside, from a participant perspective that argues that legal order has intrinsic qualities that help to sustain an attractive and viable conception of political community’.¹⁴ Law acquires its authority from these intrinsic qualities; without these, there is neither law nor authority. And once this essential point is acknowledged the concept of constituent power (ie ‘the people’ as authorizing agent) is redundant.

Dyzenhaus’s argument is founded on the claim that legality is basic in a way that ‘constitution’, let alone constituent power, is not. This claim to legality – to ‘the rule of law’ – is to a ‘higher law behind the law’. Adopting a reconstructive methodology that promotes the integrity of legal ordering, it rejects the concept of constituent power on the ground that it remains tied to the status of an enacted constitution whose author is an entity known as ‘the people’. Theorists of constituent power, the argument runs, must hypothesize an event – a decision by ‘the people’ – that takes effect as the ultimate authority of a legal-constitutional order. This is a distorted image of the authority of ‘government under law’.

This theme runs through contemporary normative legal theory. Even Kelsen contends that ‘positive law is justified less by appeal to a higher law, different from positive law, than by appeal to the concept of law itself’ (RR, 37). Anti-positivists make a similar argument, adjusting only to incorporate their claim to the intrinsic morality of law. Either way, public law and private law is undifferentiated. In legal positivism, these are merely conventional categories – subsets – of positive legal norms and, since law can only be understood in terms of positive law, the ‘law’ that establishes the authority of government does not exist (RR, 92-6). In the anti-positivist normativist reformulation of this argument, legality is not a system of legal norms a moral practice of subjecting official conduct to the

governance of principles and values that make up an ideal (liberal?) vision of law. Public law and private law remain undifferentiated, but in this case because law is conceived as an overarching structure of principles governing all types of human conduct. To the extent that this version accepts the first strand of public law (the acquisition and generation of political power: ie, authority), this is regarded as intrinsically moral rather than political. In both strands of normativism – which together embrace a very broad swathe of Anglo-American jurisprudence - the notion of a constituent power simply does not register.

DECISIONISM

However sophisticated it may be as legal theory, normativism is a peculiarly inadequate expression of constitutional thought. In its positivist variant it either assumes the existence of a sovereign or else a concept of law as a system of norms authorized by some founding norm whose authority is pre-supposed. In its anti-positivist variant, this type of legal thought focuses on the moral evolution of legality as a social practice but avoids saying anything about the political conditions under which constitutional authority is established. In place of a founding norm, the anti-positivist variant postulates a morality of law which promotes certain (intrinsically good) legal values. Such inquiries avoid reference to the institution of the state (ie, the state as the political unity of a people) or to the concept of sovereignty.

In place of the state normativists substitute an autonomous concept of constitution. The stance of scholars such as Dyzenhaus, who argue that too much attention is paid to the idea of the constitution and that the concept of legality is more basic, is not far removed. What unites these strands is the abstract and ideal character of the directing idea, whether the ideal constitution or some overarching principle of legality. In either case, the constitution is posited as idealized representation of legal ordering. This is constitutional thought in blinkers. Constitutional legality is not self-generating: the practice of legality rests on political conditions it cannot itself guarantee.¹⁵ For scholars who inquire into these factors – and indeed also for lawyers and judges¹⁶ - the constituent decisions of sovereign actors must remain part of the analysis.

Consideration of the origins of constitutional ordering invariably brings the concept of constituent power into play. Constituent power is sometimes invoked as a formal concept, postulated to make sense of the authority of an agent to alter the terms of the

constitution.¹⁷ In this context, it is merely a pre-supposition. But once we inquire into the conditions that sustain constitutionality, the question of how legal authority is generated within the political domain becomes critical. This is the inquiry Carl Schmitt undertakes. For Schmitt, the modern written constitution is the circumstantial product of particular historical conditions. It is the result of a specific political decision which is given jural form as the constituent power.

Schmitt's argument is derived from his theory of state and constitution. The state is the political unity of a people. Given competing interests within any association, unity is maintained only if some means of overcoming conflict can be devised. This is achieved by a sovereign power imposing its will in response to a threat to political unity. In normal times, the existence of a sovereign will is often masked; under relatively peaceful conditions, formal constitutional mechanisms will be sufficient to resolve disputes. But since the issues that threaten unity cannot be determined in advance, sovereign will cannot be given up. The sovereign is the agent that identifies the exceptional situation in which unity is threatened and acts to resolve that threat. In this situation, the law may recede but the state remains (PT, 12).

The state as the political unity of a people is not simply a hypothesis. The state comes into existence through a historical process. Unity does not rest on some abstract idea; it is the expression in practice of the relative homogeneity of a people. Just as the concept of the state presupposes the concept of the political,¹⁸ so too does the concept of the constitution presuppose the state. Contrary to those jurists who treat the constitution as a contract, Schmitt argues that at base it is a decision, a decision of the sovereign will. It involves, in other words, an exercise of constituent power. Normativist jurists try in various ways to eliminate all reference to the existence of this sovereign act of will from the sphere of legal thought. Decisionists claim that, by severing the norms of legal ordering from the facts of political existence, normativism skews understanding of the nature of constitutional arrangements.

Schmitt offers a clear answer to the question: what is constituent power? Constituent power 'is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence'. It is 'concrete political being'.¹⁹ It determines the nature of the institutional arrangement of political unity.

It establishes the constitution. And its continuing existence (as sovereign will) bolsters the authority of the constitution.

Schmitt's concept of constitution, it should be emphasized, does not correlate with the modern legal conception: 'A concept of the constitution is only possible when one distinguishes constitution and constitutional law' (CT, 75). The latter, the set of provisions laid down in a text called 'the constitution', is a 'relative concept' which is adopted because of the tendency, under the influence of normativist thinking, to conflate the constitution of a state with a document drafted at a particular moment in time and containing a set of constitutional laws. Relativization means that 'the concept of *the* constitution is lost in the concept of individual constitutional *law*' (CT, 71). Many provisions in written constitutions relate to matters that do not concern the fundamentals of a state's constitution. These provisions may be fundamental in the perspective of normativism, but this is purely the perspective of positive law. The foundational claim made by normativists is a formal condition, whereas for Schmitt the constitution is a substantive concept.

Since the norms included in modern constitutions do not always regulate fundamental political matters, constitutional laws should not be confused with fundamental decisions made by the exercise of constituent power (CT, 76-7). For Schmitt, the constitution in its true meaning is valid only 'because it derives from a constitution-making capacity (power or authority) and is established by the will of this constitution-making power' (CT, 64). Whatever unity one finds in the constitution arises from 'a pre-established, unified will' which is not found in norms but only in 'the political existence of the state' (CT, 65).

Schmitt's concepts of state and constitution now fall into alignment. The state is 'the concrete, collective condition of political unity' and in this sense the state 'does not *have* a constitution'; rather, 'the state *is* constitution'. The state/constitution is 'an actually present condition, a *status* of unity and order' (CT, 60). The constitution equates to the form that the state takes. This is not an expression of legal principle: it is an existential condition.

The key to understanding the significance of constituent power lies in the fact that the state is not a static entity. It continues to evolve, expressing 'the principle of the *dynamic emergence* of political unity, of the process of constantly renewed *formation* and *emergence* of this *unity* from a fundamental or ultimately effective *power* and *energy*' (CT, 61). Constituent power

is therefore not entirely encapsulated in the term ‘sovereign will’; it also expresses the formative process by which that sovereign will exhibits itself through time (CT, 62).

But who exercises constituent power? In *Political Theology* (1922), Schmitt addresses this question by asking: ‘who is entitled to decide those actions for which the constitution makes no provision?’ (PT, 64). Although in the early-modern period that power was held by the prince, Schmitt recognizes that since the 18th century the decisionist and personalist elements of sovereign will have become submerged in the concept of ‘the people’ as an organic unity (PT, 99-102). Following Donoso Cortés, he accepts that 1848 marks the end of the epoch of kingship.²⁰ But does he also follow Donoso Cortés in arguing that the only solution to this gap in authority is that of dictatorship? In *Constitutional Theory* (1928), Schmitt recognizes that the bearer of constituent power varies over time. There are, he suggests, two main types of legitimacy - the dynastic (blending the charismatic and traditional Weberian categories) and the democratic (an expression of the rational) – and these correspond to the two main bearers of constituent power: the prince and the people. In this later work, Schmitt accepts the notion that ‘the people’, or at least some powerful group acting in their name, could qualify as bearers of constituent power.²¹

With respect to Weimar Germany, Schmitt recognizes that the sovereign people have defined their mode of political existence by adopting a modern constitution allocating governmental powers to various offices. But he follows Maistre in maintaining that the concept of ‘the people’ in this constitution takes an essentially representative form (CT, 272-3). The people as such cannot deliberate or advise, govern or execute and are able to act only in plebiscitary mode and in response to a precise question.²² Political action is therefore undertaken primarily by those who claim to act in the name of the people. The constituent power of the people is, for the most part, delegated to their elected representatives.

For Schmitt, then, the democratic character of the Weimar Constitution remains ambivalent. This is because he follows Aristotle and Rousseau in maintaining that the basic criterion of democracy is not representation but the identity of rulers and ruled (CT, 264-7). This leads him to re-assess the relative roles of Parliament and President. As a deliberative or opinion-forming assembly, Parliament expresses a liberal rather than democratic principle. And with the emergence of disciplined political parties, it becomes an unsuitable vehicle for decision-making since the essential decisions are in reality taken elsewhere. Contrary to normativists who claim a strict political neutrality for the role, Schmitt argues that the

President, being directly elected by the people, has become ‘the republican version of the monarch’ (CT, 316). The President is the true bearer of constituent power. Schmitt explains this claim with reference to legal analysis, especially regarding the breadth of the emergency power vested in the President under Article 48 of the Constitution.²³ But his formal legal argument is underpinned by the decisionist claim that the bearer of constituent power exists ‘alongside and above the constitution’ (CT, 126). That is, the President is not merely a creature of the legal constitution; he also possesses the constituent power to maintain the unity of political will. The President’s power exists to safeguard the ‘substance’ of the constitution.

The significance of Schmitt’s claim that sovereign is he ‘who decides on the exception’ can now be grasped (PT, 5). The constituent power of the President authorizes him to undertake a sovereign act, an act that demonstrates the primacy of the existential over the merely normative (CT, 154). But what type of sovereign power does the President possess? Writing *Die Diktatur* in 1921, in the shadow of the Bolshevik Revolution, Schmitt was conscious of the emergence of a new type of constituent power: sovereign dictatorship, a power not merely to suspend normal legal procedures to preserve the state but one that could be used to overturn the old regime and replace it with a new state founded on social revolution (DD, ch.4). The emergence of this new manifestation of constituent power overshadows his analysis in *Constitutional Theory*. Is the constituent power that underpins the Weimar Constitution, which is of social-democratic form but of uncertain authority, of a commissarial or sovereign nature? The power is to be exercised in the name of the people and it exists to safeguard their political unity. But what type of unity does the Weimar Republic express? Under the Constitution, this existential question, of necessity, falls to the President to determine.

Schmitt’s analysis in *Die Diktatur* reflected the ambivalent political situation in 1921. He then concluded that it was unclear whether, under the Constitution, these powers were of a commissarial or sovereign character.²⁴ In the supplement to the second edition in 1928, however, he changed his view. Explaining that the two types of power are incompatible, he argued that since the regime of the Republic had now consolidated its authority, the President’s emergency powers under Art.48 take the form of commissarial rather than sovereign powers.²⁵ Schmitt had undoubtedly been concerned about the radical implications of the rise of mass democracy and his analysis of the constituent power vested in the

President served the purpose of safeguarding the authority of the social-democratic form of governmental ordering under the Weimar Constitution. The extensive decision-making powers needed to protect this order are vested in the President,²⁶ and they are of a commissarial nature.

RELATIONALISM

The decisionist account has evident advantages over normativism, especially in acknowledging that a constitution-founding power is a political undertaking which, of necessity, has an existential dimension. Constitutions are not purely normative constructions: they are bound up with the historical processes of state-building. Modern constitutions, drafted at particular moments in time, establish their authority only through a political process in which allegiance is forged. Achieving this while simultaneously generating political will is not straightforward. For the purpose of building political unity and overcoming conflict the imposition of will – whether through use of emergency powers or the promotion of a cult of strong (charismatic) leadership – is often required. Even in mature constitutional democracies, jurists often overlook the extra-constitutional work carried on through political party mechanisms to enable government to function effectively.

Valuable though Schmitt's account is, it appears now to contain limitations or ambiguities. But rather than rejecting his analysis, it might be more productive to rework it. This is what the relational method seeks to do. Relationalism accepts many of Schmitt's contentions about constitutional ordering. It recognizes the necessity of relating the normative to the existential: constitutional claims must always be interpreted in the light of material and cultural conditions. It recognizes the political as a domain of indeterminacy and therefore one that cannot be organized in accordance with some grand theory. It recognizes that the constitution is a way of political being and, as a consequence, that there will always be a gulf between the norm (the written constitution) and the actuality (the way of being). And it recognizes that that gulf must be filled by the activity of governing. Since conflicts in this domain are inevitable, it also accepts that the activity of governing is a sphere of domination in which decisions must be taken. There is, one might say, an intrinsic tension between sovereignty (the representation of the autonomy of the political domain) and the sovereign (the constituent power which makes decisions about the nature of the political

formation). Acknowledging the appeal to universal values, it recognizes that we are never in an ideal situation.

But relationalism diverges in significant respects from Schmitt's decisionism. The pivotal issue is representation. Sieyes founded his analysis of constituent power on the principle of representation, but this was conceived as a necessary response to the continuing division of labour in modern society. Schmitt, by contrast, argues that representation 'contradicts the democratic principle of self-identity of the people present as a political unity' and, perhaps because of the serious threats to political stability the Weimar regime faced, places great reliance on the presence of a sovereign (CT, 289). Neither gets to the core of the issue, which is that once representation is invoked for the purpose of generating political power, 'the people' must itself be regarded as a representation. Political power is generated only when 'the people' is differentiated from the existential reality of a mass of particular people (the multitude).

Schmitt seems to recognize this point only implicitly, and he finds a solution in decisionism, that is, in a leader charged either with acting as the authentic will of the multitude (sovereign dictatorship) or as the effective will able to protect the unity of the established order (commissarial dictatorship). But this is not the only way to conceptualize the issue or posit a solution. The transfer of authority from prince to people in modernity also brings about a profound change in the order of symbolic representation. The transcendent belief in divine authority might be effaced but that space remains.²⁷ The transcendent figure of the sovereign is lost, but the space of sovereignty is retained. This is the space of the political, an autonomous domain which, despite its uncertainties, expresses a distinctive way of being that is revealed in its logic of action and singular conception of power.

This space of the political is what normativism – whether in its positivist or anti-positivist variation – seeks to remove from constitutional discourse. The former does this by equating state and legal order and designating sovereignty as metaphysical mumbo-jumbo masking naked force. The latter conceives constitutional discourse as a type of moral philosophy, a conviction that rests on 'superficial ideas about morality, the nature of the state, and the state's relation to the moral point of view'.²⁸ Schmitt accepts the autonomy of the political but cannot conceive the maintenance of the political domain without the constant presence a determinate sovereign. He seeks closure by way of a sovereign that maintains unity through identity. But this attempt at closure through a materialization of 'the people-as-one' can

lead only to totalitarianism, in which any form of opposition is to be regarded as ‘the enemy’.²⁹ If the democratic potential of this modern shift in the source of authority is to be retained, then the political space must be recognized as incorporating an unresolved dialectic of determinacy and indeterminacy, of closure and openness. This is the basis of the relational approach.

A relational analysis begins with the problem of the foundational moment. Rousseau was the first to highlight its paradoxical character: how can a multitude of strangers meet, deliberate and rationally agree a constitution for the common good? For this to happen, he explains, ‘the effect would have to become the cause’ in that humans would have to be beforehand that which they can only become as a consequence of the foundational pact (SC, 71). How, in other words, can ‘the people’ act as the constituent power to establish the form of the political union if they can be identified as such only by virtue of the pact? Normativism resolves this by treating the foundation as a pure act of representation. Constituent power is entirely absorbed into the constituted power: it is merely a pre-supposition of legal thought. Decisionism resolves it by pre-supposing some mysterious prior substantive equality of the people. Is it possible to move beyond such an opposition between representation and presence?

The paradox of constituent power can be overcome only by adopting a relational approach. The notion of ‘self-constitution’ is understood by reference to reflexive identity. Building on Paul Ricoeur’s distinction between *idem*-identity (sameness) and *ipse*-identity (selfhood, implying ability to initiate),³⁰ Hans Lindahl illuminates the ambiguous nature of foundational moment. He argues that ‘although Schmitt is right to assert that foundational acts elicit a presence that interrupts representational practices, this rupture does not – and cannot – reveal a people immediately present to itself as a collective subject’.³¹ This is because constituent power not only involves the exercise of power by a people: it simultaneously constitutes a people. Constituent power expresses the fact that unity is created from disunity, inclusion from exclusion. Constitutional ordering is dynamic, never static. So instead of treating the constituent power of the people as an existential unity preceding the formation of the constitution, this power expresses a dialectical relation between ‘the nation’ posited for the purpose of self-constitution and the constitutional form through which it can speak authoritatively.

Schmitt had argued that for the decisionist ‘the sovereign decision is the absolute beginning’ which ‘springs from the normative nothing and a concrete disorder’.³² From a

relational perspective, this situation can never arise. Action always entails reaction; constituent power always refers back to constituted power. In this sense, the foundation in its ideals (that is, with respect to its normative form) can only be understood virtually. Yet this virtual event founds actual association. The actuality is always messy. The break often takes place through an act of violence (war, conquest, revolution, etc) and the territorial dimension of the emerging idea of state is invariably arbitrary, in the sense that no ‘natural’ community inhabits this political space. These factors explain the necessity for government. The space of the political can be seen as a space of freedom (‘the absolute beginning’), but if it is to be maintained institutionalization of rule is required. This institutionalization, needed for power-generation, implies domination. This leads to a dialectical engagement between what Ricoeur calls conviction and critique, institutionalization and its irritation.³³ It forms a dynamic of constitutional development without end.

From a relational perspective, constituent power vests in the people, but this does not mean that political authority is located in the people (*qua* the multitude) as adherents to the principle of popular sovereignty maintain.³⁴ Constituent power expresses a virtual equality of citizens. This is generated *inter homines* (establishing the principle of unity) but it founds an actual association divided into rulers and ruled in a relation of domination (establishing the principle of hierarchy).³⁵ It founds constitutional rationality (normativity), but the association evolves through action (decision). This tension between sovereignty (the general will) and the sovereign (the agent with authority to enforce a decision in the name of the general will) ensures that the constituent power is not to be understood merely as power (in the sense of force). It involves a dialectic of right – of political right (*droit politique*) – that seeks constantly to irritate the institutionalized form of constituted authority.

Once set in a relational frame and conceived as an elaboration of right, the paradoxical aspects of constituent power can be viewed more constructively. Does the foundational moment begin with ‘the constitution *of* a political unity through a legal order’ or as ‘the constitution of a legal order *by* a political unity’. Lindahl recognizes that ‘someone must seize the initiative to determine what interests are shared by the collective and who belongs to it’ and notes that, notwithstanding Schmitt’s explicit denial, ‘political unity first arises through the “enactment of a constitution”’.³⁶ But many of these difficulties are removed when it is recognized that ‘the constitution of a legal order by a political unity’ involves an exercise in positive law-making, whereas ‘the constitution of a political unity

through a legal order' refers not to the positing of a legal order (in a strict sense) but to the constitution of political unity through *droit politique*. Once constituent power is conceived to be an expression of *droit politique* it does not seem correct to say that political unity arises through the 'enactment' of a constitution, since this suggests an exercise in positive law-making to establish a formal constitution. Political unity is formed through the way in which *droit politique* operates to frame the constitution of the state.

Conceived in this way, Schmitt's argument may not be so far removed from a relational perspective as has so far been presented. Schmitt builds his analysis on a distinction between the constitution and positive constitutional law and he recognizes that the state is constantly in the process of formation. Most significantly, it should be noted that, in response to criticisms of his decisionism, from the late-1920s Schmitt modified his position and adopted an institutionalist method similar to that of the early 20th century French public lawyer, Maurice Hauriou.³⁷ In *On the Three Types of Juristic Thought* (1934), Schmitt again criticizes normativism, but he also argues against decisionism and in favour of what he calls 'concrete-order' thinking.³⁸ Concrete order thinking is his attempt to finesse the distinction between normativity and facticity. It brings his legal thought much closer to Hegel's legal and political philosophy, in which 'the state is a "form (*Gestalt*), which is the complete realization of the spirit in being (*Dasein*)"; an "individual totality", a *Reich* of objective reason and morality' (ibid. 78).

Although Schmitt here comes close to adopting a relational method, his concept of concrete order thought remained under-developed. A clearer illustration of relationalism is found in the work of his contemporary, Herman Heller. Heller follows Hegel in arguing that a concept of law depends on the Idea of law and this, he argues, can be formulated only by 'the relativization of positive law by supra-positive, logical and ethical (*sittliche*) basic principles of law'.³⁹ These basic principles – *Rechtsgrundsätze* – come from existing practices and their explication requires the deployment of a dialectical method. 'Every theory that begins with the alternatives, law or power, norm or will, objectivity or subjectivity', Heller contends, 'fails to recognize the dialectical construction of the reality of the state and it goes wrong in its very starting point'.⁴⁰ Normativism and decisionism, he is suggesting, are erroneous legal methodologies. Once the 'power-forming quality of law' has been grasped, it is impossible to understand the constitution 'as the decision of a norm-less power' (S, 1214). Since power and law are mutually constitutive and reciprocally dependent, we can never

embrace the ‘normative nothingness’ of decisionism. And by ‘law’ here Heller is referring not to positive law but to *droit politique*, ‘the fundamental principles of law which are foundational of positive law’ (S, 1157). Heller’s relationalism points in the right direction, though it leaves us with a highly abstract account of constituent power.

CONSTITUENT POWER IN CONSTITUTIONAL THOUGHT

Schmitt’s concrete order thought and Heller’s dialectical analysis each mark advances, but the former remains under-developed and the latter is both incomplete and abstract. It remains, then, to examine how the relational method provides an account of constituent power able to enrich our understanding of constitutional ordering.

The key is found in the concept of political power. Political power derives its character from the paradoxical nature of the foundation. It exists by virtue of humans coming together as a group. Power is created through a symbolic act in which a multitude of people recognize themselves as forming a unity, a collective singular: *we the people*. That act cannot exist only in the realm of belief; it must also take effect in reality, and this will often involve the use of force. It follows that, however powerful this transcendent act of symbolic representation, conflict and tension within the group are not eliminated. After all, what some celebrate as liberation others experience as defeat. Political power is maintained and augmented only through institutionalization. And because political conflict can arise in all aspects of group life, a constitutional framework is needed. The people consequently *do ordain and establish a system of government*.

This constitution vests authority in the constituted authorities to legislate, adjudicate and govern in the interests of the group. By limiting, channeling and formalizing these competences, the constitution itself becomes an instrument of power-generation. This follows from a nostrum bequeathed to us by Bodin and repeated many times since: ‘the less the power of the sovereignty is (the true marks of majesty thereunto still reserved), the more it is assured’.⁴¹ But through whatever form the constitution institutionalizes power, the constituted authorities inevitably retain an extensive, discretionary authority to determine the best interests of the group. That is, there is always a gulf between the constitutionally-prescribed arrangement (an expression of sovereignty) and the decisional capacity of the governing authorities (an expression of sovereign authority). Political power is generated

through symbolic representation of foundation and constitution and is then applied through the action of government. Power thus resides neither in ‘the people’ nor in the constituted authorities; it exists in the relation established between constitutional imagination and governmental action.

We can now specify the meaning of constituent power in constitutional thought: constituent power expresses the generative aspect of the political power relationship. Contrary to the decisionist claim, it cannot be equated to the actual material power of a multitude. This is the materialist fallacy, entailing the reduction of constituent power to fact.⁴² Constituent power exists only when that multitude can project itself not just as the expression of the many (a majority) but – in some senses at least - of the all (unity). Without this dimension of symbolic representation, there is no constituent power.⁴³ Constituent power, produced by an intrinsic connection between the symbolic and the actual, signifies the dynamic aspect of constitutional discourse.⁴⁴

But constituent power similarly cannot entirely be absorbed into the constituted order and equated with some founding norm. Were this to be the case, then the tension that gives the political domain its open and provisional quality would be eliminated. This is the normativist fallacy. Its realization would not result in the achievement of ‘the rule of law’, which is an impossible dream, but it would surely lead to the destruction of political freedom.

The relational account also explains why constituent power is not engaged only at the (virtual) founding moment but continues to function within an established regime as an expression of the open, provisional, and dynamic aspects of constitutional ordering.⁴⁵ There are various ways in which this open quality can be formulated. In terms already adopted, it exhibits a tension between sovereignty and the sovereign. This replicates the distinction Rousseau draws between sovereignty (the general will) and government (the institution charged with its actual realization). Rousseau believed that, owing to the lack of any *institutionalized* will to oppose to the constituted power, this distinction establishes a tension that leads only to the corruption of the constitution (SC, 106). That could be so, though Rousseau’s pessimism derives from his postulation of an ideal at the foundation (the general will), while in reality constitutional development is the ongoing struggle to give particular institutional meaning to general democratic ideals.

But Rousseau's account is important. Constituent *power* might just as appropriately be termed constituent *right* since this struggle entails the attempt to explicate the meaning of political right (*droit politique*). It follows that constituent power/right does not spring from 'normative nothingness': the written constitution formalizes precepts of political right that express the political unity of a people. Furthermore, he claims that the constitution is eventually corrupted because 'the people' remains a non-institutionalized entity. But it is not so much the fact that 'the people' remains unformed as that political struggle involves a challenge to the claim by constituted authorities to act as the authoritative voice of the people. Noting that the people are institutionalized in various ways within a constitutional framework (eg, as electors, participants in referendums, or as a voice in the adoption of constitutional amendments), in *Constitutional Theory* Schmitt stresses that their potential political role is not exhausted by the allocation of these competencies. The people 'continue to exist as an entity that is directly and genuinely *present*, not mediated by previously defined normative systems, validations, and fictions'. The people cannot become a mere organ of the state: in a democracy they must persist 'as an entity that is unorganized and unformed' (CT, 271). This argument flows from his distinction between constitutional law and the constitution: the people in its non-instituted manifestation irritate the instituted power in a dialectic engagement through which real political will results.

When elaborating this point, Schmitt develops it beyond the idea of the people as a political unity. Following Sieyès' claim about the third estate,⁴⁶ he states that the people 'are everyone ... *not* honoured and distinguished, everyone *not* privileged' (CT, 271). Moving beyond Sieyès' historical context, Schmitt suggests that now the bourgeoisie dominates government, the proletariat has become the people, 'because it becomes the bearer of this negativity' (CT, 272). Schmitt here partitions the ideal unity of the people. The concept of the people is now 'the part of the population that does not have property, does not participate in the productive majority, and finds no place in the existing order' (CT, 272).

This double aspect of the people is accentuated in the relational method. The paradoxical nature of the foundation rests on the fact that it both constitutes a unity (a state) and establishes a hierarchy (a governing relationship). In this foundational moment, so too must 'the people' be grasped in a double sense, conceptualized not only as a virtual unity (the nation/state) but also as a non-institutionalized entity established in opposition to the constituted authority (the multitude, the ordinary people).

In *The Social Contract*, Rousseau elaborates an ideal arrangement which can ‘combine what right permits with what interest prescribes’ (SC, 41). We might doubt that this ideal can be realized, but the tension between right and interest (the virtual and the actual) throws into relief the double aspect to this concept of the people. From a juristic perspective, the driver of constitutional development is the struggle over the explication of right. But from a phenomenological perspective, the driver is interest rather than right, and in particular the interests of ordinary people rather than the virtual entity. Constituent power embraces both right and interest and the relation between them.

One of the greatest challenges of modern republican government has been to maintain the power of ‘ordinary people’. In a regime that acquires symbolic authority as ‘a government of the people, by the people and for the people’, the main danger is that of institutionalized co-optation. There is no shortage of contenders for the job of representing the people as ‘a sovereign that cannot exercise sovereignty’. In the British system, for example, Parliament played a pivotal role in constitutional struggles over such a long period that it came to be perceived as the ‘nation assembled’, acting not merely as a legislative body but also as the constituent power.⁴⁷ The growth of presidential power in republican regimes has led many to accept the substance of Schmitt’s Weimar claim that the President acts as the bearer of constituent power.⁴⁸ With the recent growth in the constitutional jurisdiction of courts, some even claim that constitutional courts no longer speak in an adjudicative or even legislative voice: they speak directly in the name of the sovereign people and as the authentic voice of constituent power.⁴⁹ And some might even argue that the expression of ‘public opinion’, which has traditionally been invoked to explain shifts in the meaning of the constitution law,⁵⁰ has become the prerogative of the institutionalized mass media.⁵¹

Constituent power exists only insofar as it resists institutionalized representation. Claude Lefort notes that modern democracy leads to the creation of the ‘empty place’ of the political.⁵² The problem is not that it is empty, but that the space is crowded with the many who claim the authentic voice of constituent power. This is his point: legitimacy must be claimed in the name of the people, and the question of who represents the people remains the indeterminate question of modern politics. The function of constituent power is to keep that question open, not least because ‘the people-as-one’ is the hallmark of totalitarianism. In that struggle, perhaps the most pressing issue today concerns the continuing significance of Machiavelli’s thesis that political development is driven by the struggle between two

opposing classes: the nobility who rule and the people who desire not to be oppressed.⁵³ In a world in which government seems both ubiquitous and increasingly remote from ordinary people,⁵⁴ a concept of constituent power that conjoins right and interest - the symbolic representation of all with the concerns of the many – must not disappear from constitutional thought.

¹ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* [1922] George Schwab trans. (Cambridge, Mass.: MIT Press, 1988), 5 (hereafter PT); E-W Böckenförde, 'Die verfassungsgebende Gewalt des Volkes. Ein Grenzbegriff des Verfassungsrechts' in his *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht* (Frankfurt-am-Main: Suhrkamp, 2nd edn. 1992), 90-112.

² Max Weber, *Economy and Society* G. Roth and C. Wittich ed. (Berkeley: University of California Press, 1978), 26-56, 212-226.

³ John Locke, *Two Treatises of Government* P.Laslett ed. (Cambridge: Cambridge University Press, 1998), II, § 222; *American Declaration of Independence*, 4 July 1776 (emphasis supplied).

⁴ The Convention of 1787 that drafted the Federal Constitution had been called into existence by summons of the Continental Congress acting under the authority of the Articles of Confederation and charged with the task only of revising those Articles. Claiming the authority to act as the people, the Convention went beyond this task and proposed a fundamentally new constitutional arrangement. The legality/constitutionality of this proposal was directly addressed by Madison in *Federalist* No.40 who argued, in true lawyerly fashion, (a) that the claim has no foundation, (b) that even if the Convention had exceeded its powers it was obliged to according to the circumstances and (c) that if they had violated both their powers and their obligations in proposing the new Constitution, this should be accepted as necessary to promote the people's well-being. Madison argued finally that since the Constitution 'was to be submitted to the people themselves ... its approbation [would] blot out antecedent errors and irregularities'.

⁵ Emmanuel-Joseph Sieyès, *What is the Third Estate?* [1789] M. Blondel trans. (London: Pall Mall Press, 1963), 126 (emphasis in original).

⁶ *Ibid.* 124.

⁷ Joseph de Maistre, "Study on Sovereignty" in Jack Lively (ed.), *The Works of Joseph de Maistre* (London: Allen & Unwin, 1965), 93-129, 93.

⁸ *Ibid.*

⁹ Westel Willoughby, *The Fundamental Concepts of Public Law* (New York: Macmillan, 1924), 99-100.

¹⁰ On the radical reformulation of the precepts of natural law in early-modern European thought see: Richard Tuck, 'The "Modern" School of Natural Law' in A. Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), 99-122; Knud Haakonssen, *Natural Law and Moral Philosophy from Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996).

¹¹ J-J Rousseau, *The Social Contract* in his *The Social Contract and other later political writings* V. Gourevitch trans. (Cambridge: Cambridge University Press, 1997), 39-152, at 51 (emphasis in original) (hereafter SC).

¹² John Austin, *The Province of Jurisprudence Determined* [1832] Wilfred Rumble ed. (Cambridge: Cambridge University Press, 1996).

¹³ Hans Kelsen, *Introduction to the Problems of Legal Theory* B.L. Paulson and S.L. Paulson trans. of first edn. [1934] of *Reine Rechtslehre* (Oxford: Clarendon Press, 1992), 1; hereafter RR.

¹⁴ David Dyzenhaus, 'Constitutionalism in an old key: legality and constituent power' (2012) 1 *Global Constitutionalism* 229-260, 233. See also Dyzenhaus, 'The Question of Constituent Power' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2007), 129-14x

¹⁵ E-W Böckenförde 'The Emergence of the State as a Process of Secularization' in his, *State, Society, Liberty: Studies in Political Theory and Constitutional Law* (Oxford: Berg, 1981).

¹⁶ See, eg. Joel I. Colón-Ríos, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (London: Routledge, 2012), discussing a case of the Supreme Court of Justice of Venezuela in 1999 concerning

the constitutionality of a government decision to hold a referendum to determine whether to convene a constituent assembly to establish a new Constitution. The procedure under the existing constitution placed the amending power in the legislature and it was argued that that procedure should have been adopted with respect to the referendum proposal. Colón-Ríos reports that the Court held that ‘the constitutional amendment rule applied only to the government and not to the people in the exercise of their constituent power, which included the ability to alter the constitutional regime through extra-constitutional means’ (at 79-80).

¹⁷ Raymond Carré de Malberg, *Contribution à la Théorie générale de l'Etat* (Paris: Dalloz, 2004), xx. See Olivier Beaud, *La puissance de l'état* (Paris: Presses Universitaires de France, 1994), 17-xx.

¹⁸ Carl Schmitt, *The Concept of the Political* G. Schwab trans. (Chicago: University of Chicago Press, 1996), 19.

¹⁹ Carl Schmitt, *Constitutional Theory* J. Seitzer trans. (Durham NC: Duke University Press, 2008), 125 (hereafter CT).

²⁰ Carl Schmitt, *The Crisis of Parliamentary Democracy* E. Kennedy trans. (Cambridge, Mass: MIT Press, 1985), Preface to Second Edition, p.8: ‘The epoch of monarchy is at an end ...’

²¹ Contrary to some claims, this admission does not constitute evidence that under the Weimar regime Schmitt had fully endorsed the principle of the ‘sovereignty of the people’. See Kalyvas who seeks to rework Schmitt’s argument on the basis of democracy: Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge: Cambridge University Press 2008), ch.4; *per contra*, Renato Cristi, ‘Schmitt on Constituent Power and the Monarchical Principle’ (2011) 18 *Constellations* 352-64.

²² Carl Schmitt, *Legality and Legitimacy* J. Seitzer trans. (Durham NC: Duke University Press, 2004), 89.

²³ Carl Schmitt, *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (Munich: Duncker & Humblot, 2nd edn. 1928), 213-259 (hereafter DD). In this study, first published in 1921, Schmitt undertakes a historical analysis and draws a distinction between ‘commissarial dictatorship’ and ‘sovereign dictatorship’. Commissarial dictatorship involves investment of special powers in an agent to act decisively to the threat in an emergency to the established constitutional order (the power of the extraordinary magistrate in the Roman Republic offers a classical illustration). This power, invoked by drawing a clear distinction between normal and emergency conditions, was a standard model until the 18th century. Thereafter, the power was no longer deployed only to preserve the state but instead to bring into existence a new type of state: this sees the rise of sovereign dictatorship. At the core of this analysis is the concept of the constituent power, the power of a body to act in the name of the sovereign people to establish a new regime, and which may change its meaning with the emergence of the idea of sovereign dictatorship. In the first edition, published in 1921, Schmitt did not examine the constituent power in the Weimar Constitution in detail. He therefore produced an extended supplement to the second edition, which remedied this deficiency: *Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung*, 213-259.

²⁴ *Die Diktatur*, 203: ‘Diese Widersprüche sind in der deutschen Verfassung von 1919 nicht auffällig, weil sie auf der Kombination einer souveränen mit einer kommissarischen Diktatur beruhen ...’. [These contradictions in the German Constitution of 1919 were not noticed because they are based in the combination of a sovereign and a commissarial dictatorship.]

²⁵ *Die Diktatur*, 238: ‘Trotz aller Wendungen wie “schrakenlose Gewalt” oder “plein pouvoir”, die für die Befugnisse des Reichspräsidenten aus Art.48, Abs.2 gebraucht worden sind, wäre es doch unmöglich, daß er auf Grund dieser Verfassungsbestimmung, wenn auch nur in Verbindung mit der gegenzeichnenden Reichsregierung, eine souveräne Diktatur ausübt.’ [Despite the use of such phrases as “unbridled power” or “full power” with respect to the powers of the President under Art.48, para. 2, it would be impossible for him on this basis of this constitutional provision, even in conjunction with the countersignature of the national government, to exercise sovereign dictatorship.]

²⁶ Schmitt later wrote a critical analysis of the court’s claim to be ‘guardian of the constitution’. Schmitt argued that the Reichsgericht could not perform this essentially political role; this responsibility had to be exercised by the President: Carl Schmitt, ‘Das Reichsgericht als Hüter der Verfassung’ [1929] in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954* (Berlin: Dunker & Humblot, 1958), 63-109.

²⁷ Claude Lefort, ‘The Permanence of the Theological-Political?’ in his *Democracy and Political Theory* David Macey trans. (Cambridge: Polity Press, 1988), 213-255.

²⁸ G.W.F. Hegel, *Philosophy of Right* [1821] T.M. Knox trans. (Oxford: Clarendon Press, 1952), § 337.

²⁹ Cf. Lefort’s studies on totalitarianism: Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* J.B. Thompson trans. (Cambridge, Mass.: MIT Press, 1986).

³⁰ Paul Ricoeur, *Time and Narrative* Vol.3 (Chicago: University of Chicago Press, 1988); Paul Ricoeur, ‘Narrative Identity’ *Philosophy Today* Spring 1991, 73-81.

³¹ Hans Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in Loughlin & Walker (eds), above n.14, 9-24 at 9.

- ³² Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph Bendersky trans. (Westport, Conn: Praeger, 2004), 62. It should be noted, however, that this argument is made in a work that criticizes decisionism.
- ³³ Paul Ricoeur, *Critique and Conviction* Kathleen Blaney trans. (New York: Columbia University Press, 1998).
- ³⁴ Cf. G.W.F. Hegel, *Philosophy of Right* [1821] T.M. Knox trans. (Oxford: Oxford University Press, 1952), § 279: ‘the sovereignty of the people is one of the confused notions based on the wild idea of the “people”. Taken without its monarch and the articulation of the whole which is the indispensable and direct concomitant of monarchy, the people is a formless mass and no longer a state. It lacks every one of those determinate characteristics – sovereignty, government, judges, magistrates, class-divisions, etc., - which are to be found only in a whole which is inwardly organized.’
- ³⁵ Paul Ricoeur, ‘The Political Paradox’ in W. Connolly (ed.), *Legitimacy and the State* (Oxford: Blackwell, 1984), ??
- ³⁶ Lindahl, above n.31, 22.
- ³⁷ Maurice Hauriou, *Précis de Droit Constitutionnel* (Paris: Sirey, 2nd edn. 1929), esp.73-74.
- ³⁸ This could not be termed institutionalism because Schmitt in 1934, for evident political reasons, was obliged to avoid any association with the neo-Thomism exhibited in Hauriou’s work.
- ³⁹ Hermann Heller, ‘Bemerkungen zur Staats- und Rechtstheoretischen Problematik der Gegenwart’ [1929] in his *Gesammelte Schriften* (Leiden: A.W. Sijthoff, 1971), vol. 2, 249-78, at 275: ‘... *der Begriff des Rechtes kann nicht gebildet werden ohne die keineswegs mit ihm identische Idee des Rechtes, die letztere aber nicht ohne die Relativierung des positiven Rechtes auf überpositive, logische und sittliche Rechtsgrundsätze*’.
- ⁴⁰ Hermann Heller, *Staatslehre* [1934] in Heller, *Gesammelte Schriften*, *ibid.*, vol.3, 79-395 at 393. Most of Part III of this work has been translated by David Dyzenhaus as Hermann Heller, ‘The Nature and Function of the State’ (1996) 18 *Cardozo Law Review* 1139-1216, at 1214 (hereafter S).
- ⁴¹ Jean Bodin, *The Six Bookes of a Commonweale* Richard Knolles trans. 1606, Kenneth Douglas McRae ed. (Cambridge, Mass: Harvard University Press, 1962), 517. Jon Elster claims that it is now situated at the core of a field called ‘constraint theory’, which works on ‘the proposition that sometimes *less is more*’: Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraint* (Cambridge: Cambridge University Press, 2000), 1.
- ⁴² eg Antonio Negri, *Insurgencies: Constituent Power and the Modern State* M. Boscagli trans. (Minneapolis: University of Minnesota Press, 1999).
- ⁴³ For this reason, constituent power cannot be built on the foundation of ethnicity: see Ulrich Preuss, ‘The Exercise of Constituent Power in Central and Eastern Europe’ in Loughlin & Walker eds, above n. 11.
- ⁴⁴ Zoran Oklopčić discusses the interesting question of what he calls ‘external constituent powers’ – Rousseau’s Lawgiver made reality - with respect to constitutional formation in Kosovo, Montenegro and Bosnia-Herzegovina. But he uses the concept in an overly broad manner. In Hobbesian terminology, constituent power relates only to rights of the sovereign by institution, not by acquisition or (in the case of the Balkans) by imposition. See Zoran Oklopčić, ‘Constitutional (Re)vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans’ (2012) 19 *Constellations* 81-101.
- ⁴⁵ For this reason, the distinction drawn in the standard juristic accounts that make a distinction between ‘original constituent power’ and ‘derived constituent power’ (to express the distinction between the act of founding and the conferred power to amend the constitution) is misconceived. The distinction is a product of positivist-inspired decisionism. See Carré de Malberg, above n.17, 489-500; Beaud, above n.17, 315-19; 336-7.
- ⁴⁶ What is the third estate? Nothing. What does it want to be? Something. What is it capable of being? Everything. [check]
- ⁴⁷ Alexis de Tocqueville, *Democracy in America* H. Reeve trans., D. J. Boorstin intro. (New York: Vintage Books, 1990), 000: ‘In England the constitution may change continually, or rather it does not in reality exist. The Parliament is at once a legislature and constituent assembly.’ There is growing recognition that this claim now acts as a barrier to continuing constitutional innovation: see Nevil Johnson, *In Search of the Constitution: Reflections of State and Society in Britain* (Oxford: Pergamon Press, 1977); Martin Loughlin, ‘Constituent Power Subverted: From English Constitutional Argument to British Constitutional Discourse’ in Loughlin & Walker eds, above n.14, 27-48.
- ⁴⁸ Schmitt’s argument had been made earlier by Woodrow Wilson: Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 68: The President ‘is the representative of no constituency, but the whole people’ and ‘if he rightly interpret the national thought and boldly insist upon it, he is irresistible’. See also Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, Mass: Belknap Press, 1997).
- ⁴⁹ Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011), 13-17.

⁵⁰ Schmitt, CT 275; Walter Lippman, *Public Opinion* (1922); Jürgen Habermas, *Structural Transformation of the Public Sphere*; Richard Bernstein, 'The Normative Core of the Public Sphere' (2012) 40 *Political Theory* 767-778.

⁵¹ Schmitt (CT 275) had noted these concerns. He states that public opinion 'would be deprived of its nature if it became a type of official function' and he recognizes that the 'danger always exists that invisible and irresponsible social powers direct public opinion and the will of the people'.

⁵² Lefort, above n.27, 226

⁵³ See John McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011) which examines the techniques, besides elections, by which ordinary citizens might restrain constituted authorities and rich citizens and assesses how these techniques might be adopted in contemporary democracies.

⁵⁴ This issue has been engaged primarily with respect to the growth in governmental power beyond the framework of the nation-state. See, eg, Neil Walker, 'Post-constituent Constitutionalism? The case of the European Union' in Loughlin & Walker eds, above n.14, ch.13; Alexander Somek, 'Constituent power in national and transnational contexts' (2012) 3 *Transnational Legal Theory* 31-60. It might be noted that since Somek accepts that the transnational context is not a sphere of public autonomy (at 54-58), this power – whatever it might be (economic, legal, epistemic) – is not constituent power. For a functionalist account of this trend which deploys a reductive formulation of the concept see Chris Thornhill, 'Contemporary constitutionalism and the dialectic of constituent power' (2012) 1 *Global Constitutionalism* 369-404.