The Concept of Constituent Power

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It is widely accepted in modern politics that power rests ultimately with ‘the people’. This is the motive force of the most dramatic upheavals of modern times, from the late-18th century American and French Revolutions to the events of the ‘Arab spring’ in 2011. But the notion that power rests with the people is ambiguous. From a legal perspective, that power is exercised by the adoption of constitutions made in the name of the people. These constitutions are foundational documents and they assume the status of fundamental law … until they are overthrown. Is this all that can be said about the authority of constitutions? This is the subject of this paper. It concerns the status of modern constitutions and at the core of the issue sits the concept of constituent power, the constitution as both foundational and at the same time provisional.

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 enables us to 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 to find that that concept is itself contested. Constituent power is not only a Grenzbegriff; it is also a Kampfbegriff (a fighting concept). That is, its meaning and status are bound up in a series of broader disputes over the nature of legal, political and constitutional ordering. In these circumstances, it is difficult to avoid getting entangled in disputes of an ideological as well as an epistemological nature.

I try to minimize these inherent difficulties by first 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 – has both legal positivist and anti-positivist strands, and fashions itself on the autonomy of legal ordering. In this mode of thought, constituent power is a redundant category. The second type – decisionism - is the product of law as will. One strand can be found in American legal realism and its various instrumentalist offshoots. But the most prominent exponent within constitutional thought is Carl Schmitt. Schmitt treats constituent power as a surrogate expression of the will of the sovereign. Although a modern constitution might be set in place, this constitution is unable to guarantee the terms of its own existence and must be underwritten by a sovereign will. This will is, in effect, the constituent power. The third type of legal thought, relationalism, rejects the normativist assumption that constituent power is a redundant category but, contrary to decisionism, it also rejects the notion that this power rests in any particular locus (whether that of the prince or of the people). Constituent power is not the will of a constituent subject: it expresses a relationship of right. In this respect, relationalism has affinities with the medieval concept of ‘fundamental law’, although with the transition to modernity that concept is transformed into the ‘law’ that sustains the autonomous political domain. The concept of constituent power is an expression of political right, of droit politique or jus politicum; it expresses the open, provisional, dynamic, evolutionary dimension to constitutional ordering. Constituent power is a relational concept reflecting the play of forces within the political domain.

After examining what each of these perspectives reveals about law, constitution and political order, I try to show how the relational approach offers the best method of understanding the significance of the concept in contemporary constitutional thought.
Constituent power is a modern concept. The concept has medieval roots, but appears in distinct form only with the emergence of the modern idea of the state. Its primary function is to provide a means of specifying in constitutional language the ultimate source of authority in the state. In his celebrated analysis of legitimate power (ie the means by which authority is acquired), Max Weber contended that there are three main sources of legitimacy: charismatic, which involves devotion to the exemplary or sacred character of a leader; traditional, involving acceptance of the authority of immemorial custom; and the rational, entailing belief in the rightful nature of a ruler’s authority to make law. In the history of governmental forms, these sources of legitimation follow a sequential arrangement, from ancient to modern. They also suggest an ascending order of clarity, from opaque to transparent. Most importantly for our purposes, constituent power derives primarily from the emergence of the third source of legitimacy: the rational. It presents itself as a modern, rational concept, one that does not fit with claims to the traditional or sacred authority of the sovereign.

The concept emerges as a consequence of the secularizing and rationalizing movement of 18th century European thought known as the Enlightenment. It performs its role only when two conditions are set in place: first, when it is recognized that the ultimate source of political authority derives from an entity known as ‘the people’, and secondly when the modern idea of a constitution as a ‘thing’ that is ‘made’ is generally accepted. The concept comes into its own only when the constitution is understood as a juridical instrument that derives its authority from some 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 it is governed.

The origins of this modern concept lie in Calvinist reinterpretations of Bodin’s account of sovereignty as elaborated during the 17th century by such scholars as Althusius, Arnisaeus, Lawson and Locke. The common theme is that there is a ‘double sovereignty’, with personal sovereignty (majestas personalis) being held by the ruler and real sovereignty (majestas realis) vesting in the people. This type of legal argument was deployed by radicals during the various conflicts in European regimes between competing claims of ‘divine right of kings’ and ‘popular sovereignty’. Though the details of these historic struggles are local and particular, the trajectory of this line of thought coalesced in the drawing of 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 formulation was central to the great late-18th century revolutionary movements. It is illustrated by Locke’s influence over the leaders of the American colonists, 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’. And similarly this concept of a constituent power of the people was critical in establishing the authority of the Federal Constitution,

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5 This distinction also performs a critical role in Pufendorf’s analysis of the state-building process. Pufendorf argues that it does not simply require one fundamental pact, but two covenants and a decree. In the first, the many are ‘joined together for the forming and constituting any Civil Society’, after which it is determined that ‘there should be a Constitution agreed on by a publick Decree, setting forth, what Form of Government is to be pitched upon’, and this is followed in turn by a second covenant by which ‘the Persons that are to govern, do oblige themselves to take Care of the Common Safety, and the other Members do in like manner oblige themselves to yield Obedience to them’. The first covenant establishes the nation or state and it is the nation (the constituent power) that acts to constitute the government. Pufendorf’s scheme incorporated a double juristic aspect: the exercise of a right that constitutes and the right to make law that is created as a consequence of that constitution. Samuel Pufendorf, De jure naturae et gentium [1672], On the Law of Nature and Nations C.H and W.A. Oldfather trans. (Oxford: Clarendon Press, 1934), VII. 2-3.
6 See John Locke, 2nd Treatise, para 222: ‘Whensoever … the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties and estates of the people, by this breach they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society.’ (emphasis supplied).
7 American Declaration of Independence, 4 July 1776 (emphasis supplied).
8 It might be noted that Locke here uses the concept of right and power interchangeably. See eg at para. 226, where he refers to ‘this doctrine of a power in the people of providing for their safety a-new, by a new legislative, when their legislators have acted contrary to their trust’.
notwithstanding the apparently illegal break with the Articles of Confederation. But the concept that was implicit in the American debates is much more explicit in French revolutionary discourse. The Abbé Sieyes paid close attention to the notion that ‘the people’, or what he called ‘the nation’, possesses the constituent power of political establishment. Government, Sieyes explained, is an office of delegated authority. It is a form of constituted power. And he was at pains to emphasize that it is the government - not the nation - that is constituted. ‘Not only is the nation not subject to a constitution’, he states, ‘but it cannot be and must not be’.  

It has become an orthodox tenet of modern legal thought that constitutional law is fundamental law. What Sieyes highlights is 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. The 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’. By expressing in legal language the idea that ‘the nation’ is the ultimate source of political authority, Sieyes produced a concise and irrefutable statement of the concept of constituent power.

This formulation has since become a staple of modern constitutional discourse: constitutions are drafted in the name of ‘the people’, the acknowledged source of ultimate authority. But it is not without its ambiguities. 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

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9 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, But 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 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’.


11 Ibid. 124.
surprisingly felt that there is ‘something equivocal if not erroneous here, for the people which command are not the people which obey’.  

Sieyes had in fact already acknowledged this point when arguing that all 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 by the constituted authorities. Or, as Maistre put it more caustically, ‘the people are the sovereign which cannot exercise their sovereignty’. Some jurists have tried to finesse this difficulty by contending that the people is not sovereign as such: it is merely the source that is to be treated as having established the sovereign authority of the established regime. That, however, is hardly an unambiguous solution.

A further problem with Sieyes’ formulation derives from his use of legal terminology. ‘Prior to and above the nation’, he states, ‘there is only natural law’. Sieyes believed that without an instituted order of government the nation exists in a state of nature, and is therefore governed only by the law of nature. But if the concept of constituent power is an essentially modern idea, brought into being with the establishment of the concept of the state as an expression of self-actualization, the idea of natural law is unlikely to offer an adequate formulation. The world of classical natural law is precisely what is being left behind.

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 should this be so? Rousseau had argued that the establishment of the formal constitution of the office of government was regulated not by natural law but by what he called principes du droit politique. Rousseau had sought to show how, by virtue of the basic 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

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13 Ibid.
15 Sieyes, above n., 124
16 Locke was of the same view. When the bond of trust is broken, we revert to a state of nature: see esp. para.225
17 On the radical reformulation of the precepts of natural law in early-modern European thought see: Tuck, Haakonsen
18 SC
the name of people, and severally are called citizens. Prior to the constitution conceived as an instrument of government there exists the political life of the nation. And this modern concept of constitution can acquire its meaning only when situated within the broader frame of this political life of the nation. Rather than conceiving this ‘life of the nation’ in terms of natural law, it is better grasped through the concept of droit politique.

The origins of constituent power thus 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. The reason why Sieyes invokes natural law, it would appear, is that, he is closer to Locke than Rousseau. Locke argued that life in a state of nature was relatively tranquil: humans formed communities founded on proprietorial relations and they consented to civil rule only for the purpose of securing life, liberty and estate. For Sieyes, constituent power is the expression of social power that already exists in the pre-contractual state. Contrary to Rousseau, he argues that political will is not some pure expression of ideal principles; it must be generated through representative arrangements. Rather than simply discerning the ‘general will’, a constituent assembly is required to deliberate and forge agreement from plurality. This concept of constituent power performs a role similar to Locke’s right of rebellion. If the constituted authority breaches the terms of trust, power as of right reverts to the people. Constituent power is exercised by way of delegation rather than alienation.

Constituent power is not the expression of the nation operating in accordance with the law of nature. It expresses the evolving precepts of political conduct which breathe life into the constitution and express the character of the nation (i.e., the state). Sieyes explains very clearly the strict hierarchical relationship between the legislative power, the constitution, and the constituent power of the nation with respect to that constitution. In this sense he was a leading architect of the concept in modern constitutional thought. But the concept needs further explication. The way constituent power situates itself within the main categories of modern jurisprudence must be examined.

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20 In Bk.II, ch.12 Rousseau talks of the division of laws into four types – civil law, criminal law and customary law. The fourth is not that of natural law but rather of the relation ‘of the Sovereign to the State’ and he explains that: ‘The laws which regulate this relation bear the name of political laws, and are also called fundamental laws’.
22 Locke – ref life liberty estate
NORMATIVISM

Constituent power is a political concept, but it is also a public law concept. In the broad conception of the subject, public law can be divided 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 issues deal directly with aspects of ‘constituted power’ – conventionally of (positive) constitutional and administrative law respectively. But constituent power relates only to the first strand, the way in which political power is generated.

This broad framework of public law is one that the dominant legal philosophy of legal positivism rejects. Legal positivism presents itself as a science of 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. Even constitutional law is merely a type of political morality. Legal positivism reaches its apogee in the ‘pure theory of law’ propounded by Hans Kelsen. Kelsen’s theory presents law as a science that on the one hand remains untainted by moral or political ideals and, on the other, avoids reductive attempts to portray law as analogous to the natural or social sciences. His solution is to show that law is a scheme of interpretation whose reality rests in the sphere of meaning. Law is, in short, a system of norms.

Following Hume’s injunction against deriving an ‘ought’ from and ‘is’, Kelsen argues that a norm acquires its meaning and status as law only from another norm, a higher norm that authorizes its enactment. But if law is conceived as a hierarchy of norms, eventually the chain of authorization runs out: 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. If we ask about constituent power – who authorizes the original constitution? – Kelsen answers that in legal science this question

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23 The Idea of Public Law, ch.6.
24 Austin, Lectures on Jurisprudence… Dicey, a disciple of Austin, adopted a similar manoeuvre. Acknowledging that the term sovereignty is occasionally used in a political ‘rather than in a strictly legal sense’, he noted that in the political sense ‘the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is invested’. For Dicey, however, this is purely a political fact and it has not legal resonance: Dicey, LC, 70-71
25 Pure Theory 1, 10.
simply cannot be addressed. The Grundnorm can only be presupposed.\(^{26}\) From Kelsen’s normative version of legal positivism the notion of a ‘constituent power’ – a will that makes the constitution - is a political and not a legal issue. From the perspective of positivist legal science, the concept of constituent power belongs either to the world of myth – it is a political myth deployed in an attempt to ground the authority of the basic norm – or is an expression of raw power.\(^{27}\)

For legal positivists, constituent power is a political, metaphysical or theological concept with no juristic significance. Legal positivism narrows the scope of ‘legal science’ to the issue of validity: is this or is this not a valid norm of an extant legal order? The theory acquires a scientific status only by limiting the range of questions that can be asked in public law. From this point of view, the first strand of public law - that concerning the establishment and maintenance of authority - is not the subject of legal cognition.

Such formality is not confined to Kelsen’s scheme: the claim that constituent power is superfluous for all normative legal theory has recently been made by David Dyzenhaus. This is a broad jurisprudential claim, extending beyond normative legal positivism to embrace the legal theories of scholars such as Fuller, Dworkin, Alexy and their followers. What unites this group, Dyzenhaus argues, is that they are ‘committed 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’.\(^{28}\) Law acquires its authority from these intrinsic qualities. Without these, Dyzenhaus explains, 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.\(^{29}\)

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’. It requires the adoption of a reconstructive methodology

\(^{26}\) Kelsen in places considers the idea that the basic norm of a legal order of the state derives from a basic norm of public international law (Pure Theory 1 61–62, though more hesitantly in PT2, 214–215). This suggests that there is one universal legal order from which the validity of municipal legal orders derive. We should return to this point.


which promotes the integrity of legal ordering and it rejects the concept of constituent power on the ground that it is tied to the status of an enacted constitution whose author is an entity known as ‘the people’. Theorists of constituent power are obliged to hypothesize an event – a decision by ‘the people’ – that takes effect as the ultimate authority of a legal/constitutional order and this yields a distorted image of the authority of ‘government under law’.

Public law and private law is undifferentiated in legal positivist thinking; they are merely conventional categories – subsets - of positive legal norms. Since law can only be understood in terms of positive law, the ‘law’ that establishes the authority of government does not exist. In the anti-positivist normativist reformulation of this argument, legality is treated not as a system of legal norms but as the moral practice of subjecting official conduct to the governance of a set 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 an intrinsically moral, as distinct from political, practice. In both positivist and anti-positivist 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

Normativism assumes an already-existing state with a recognized and accepted structure of authority. It is therefore a peculiarly emaciated expression of constitutional thought. In its positivist variant it posits either the existence of a sovereign with the authority to have its commands recognized as law or else a concept of law purely as a system of norms authorized by a founding norm whose authority is pre-supposed as a condition of legal thinking. In its anti-positivist variant, this type of legal thought focuses on the moral evolution of legality as a social practice but it avoids saying anything about the political conditions under which constitutional authority is established. In place of the founding norm, the anti-positivist variant postulates a morality of law which promotes the goodness of certain general legal values. It is therefore not surprising that this type of inquiry avoids
any reference to the institution of the state (ie, the state as the political unity of a people) or to the concept of sovereignty.

What is substituted in place of the state is an autonomous concept of constitution. In the writing of many liberal constitutional lawyers, the constitution – in whatever idealized form grips the imagination – becomes the fundamental unit of analysis. The position 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 of thought is the abstract and ideal character of the directing idea, whether that is the ideal constitution or some overarching principle of legality. In either case, the constitution is presented as an 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. For scholars who seek to bring these factors into their inquiries – and indeed also for lawyers and judges - the constituent decisions of sovereign actors must remain part of the analysis.

Once questions concerning the genesis of constitutional ordering are included, it seems evident that constituent power invariably acts as a surrogate for the concept of sovereignty. Constituent power is sometimes invoked as a formal concept, that is, as that which is postulated to make sense of the authority of an agent to alter the terms of the constitution. In this type of usage the concept is treated merely as a pre-supposition. But if the conditions that sustain constitutionality are to be taken on board, we are obliged to examine how legal authority is generated within the political domain. This is what Carl

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30 Refs?
32 See, eg, Joel I. Colón-Ríos, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (London: Routledge, 2012), who discusses 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).
Schmitt seeks to do. For Schmitt, the modern type of written constitution is the circumstantial product of particular historical conditions. It is the result of a specific political decision. This political decision – the concrete manifestation of a political will – is given jural form as the constituent power.

Schmitt’s point is grasped only once situated within his general theory of state and constitution. The state is the political unity of a people. Given the various competing interests within any association, unity is maintained only if some means of overcoming conflict can be devised. This is achieved by way of a sovereign power able to impose its will in response to a threat to political unity. In normal times, the existence of the sovereign will might be masked; under relatively peaceful conditions, formal constitutional mechanisms will generally 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 is able to act to resolve that threat. In this situation, the law may recede but the state remains.\(^\text{35}\)

The state as the political unity of a people is not simply a hypothesis. The state is an entity that comes into existence through a historical process. Unity does not rest on some general and 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,\(^\text{36}\) so too does the concept of the constitution presuppose the state. Contrary to jurists who treat the constitution as a contract, Schmitt argues that at base it is a decision. It is a decision of the sovereign will: in other words, it involves an exercise of constituent power. Normativist jurists try in various ways to eliminate from the sphere of legal thought all reference to the existence of this sovereign act of will. Decisionists claim that, by severing the norms of legal ordering from the facts of political existence, normativism distorts understanding of the true 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’.\(^\text{37}\) It is


‘concrete political being’.\textsuperscript{38} It thus determines the nature of the institutional arrangement of political unity. It establishes the constitution. And the continuing existence of this constituent power (or sovereign will) undergirds the authority of the constitution.

What Schmitt means by the constitution, it should be emphasized, does not correlate with the orthodox modern juristic conception: ‘A concept of the constitution is only possible when one distinguishes constitution and constitutional law.’\textsuperscript{39} Schmitt calls the latter, the set of provisions laid down in a text called ‘the constitution’, a ‘relative concept’. This relative understanding emerges 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’.\textsuperscript{40} Many provisions in written constitutions concern questions that are far removed from the fundamentals of the constitution of the state. These provisions may be fundamental in the perspective of normativism but this is purely the perspective of positive law (or, in the case of anti-positivists, it arises only because of their assertion of the autonomy of constitutional law). This foundational claim is a formal condition, whereas for Schmitt the constitution is a substantive concept.

The norms included in modern constitutional documents, he argues, do not always regulate fundamental political matters and these texts invariably contain ambiguities and gaps. These positive constitutional laws should therefore not be confused with fundamental decisions made through an exercise of constituent power.\textsuperscript{41} 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’.\textsuperscript{42} 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’.\textsuperscript{43}

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\textsuperscript{38} CT ibid.
\textsuperscript{39} CT 75.
\textsuperscript{40} CT 71.
\textsuperscript{41} CT 76-77.
\textsuperscript{42} CT 64.
\textsuperscript{43} CT 65. Later: ‘the distinction between the “written and unwritten constitution” is in truth the opposition of the constitution (in its positive sense) and the constitutional law which is based on it’ [check]
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’. The constitution equates to the form that the state takes. This is not an expression of legal principle: it is an existential condition.

With respect to the concept of constituent power, the key is to note that the state is not a static entity. The state 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’. So, constituent power is not entirely encapsulated in the term ‘sovereign will’; it also expresses the formative process by which the sovereign will exhibits itself through time.

The question then arises: 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?’ In the early-modern period, the answer given by writers such as Bodin and Hobbes is that this power is held by the prince. Schmitt endorses this: ‘sovereignty is the highest power, not a derived power’. But he also recognizes that since Rousseau the decisionist and personalist elements of the sovereign have tended to be submerged in the concept of ‘the people’ as an organic unity. Following Donoso Cortés, he accepts that 1848 marks the end of the epoch of kingship. For Donoso Cortés, however, the only solution to this gap in authority is that of dictatorship. Is this also Schmitt’s position?

In *Constitutional Theory* (1928), Schmitt recognizes that the bearer of constituent power has varied over time. There are, he argues, two main types of legitimacy: the dynastic (blending the charismatic and traditional Weberian categories) and the democratic (an expression of the rational). These two types of legitimation correspond to the two main bearers of constituent power: the prince and the people. In this later work, Schmitt accepts

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44 Ibid. 60.
45 Ibid. 61 (emphasis in original).
46 Ibid. 62.
47 Pol Theol 64.
48 Pol Theol, 6.
51 Also note Arendt, *On Revolution*, 156: French Revolution comes to an end only when Napoleon, with the whole nation’s approval, declares: “I am the pouvoir constituant”.'
the notion that ‘the people’, or at least some powerful group acting in the name of the people, could qualify as bearers of constituent power.\textsuperscript{52}

In his analysis of the Weimar Constitution, Schmitt recognizes that the sovereign people has defined its mode of political existence by adopting a modern-style constitution that allocates governmental powers to various offices. But Schmitt essentially follows Maistre in maintaining that ‘the people are a sovereign which cannot exercise sovereignty’.\textsuperscript{53} He thus recognizes that the critical factor becomes that of representation. For Schmitt, the concept of ‘the people’ in frameworks such as the Weimar Constitution assumes an essentially representative form.\textsuperscript{54} He notes that the people as such cannot deliberate or advise, govern or execute; at best, they can act only in plebiscitary mode and in response to a precise question.\textsuperscript{55} In accordance with his decisionist method, it follows that political action is undertaken by those who claim to act in the name of the people. For the most part, then, the constituent power of the people is effectively delegated to their elected representatives.

Although Schmitt embraces the modern idea of constituent power being formally vested in the people, by refracting the principle of representation through a decisionist lens, he shows how that power is actually exercised by those who hold governmental offices. This decisionist approach is also evident in his claim that in reality democracy is not expressed through representation but rests ultimately upon an ‘identity’ of rulers and ruled.\textsuperscript{56} Following

\textsuperscript{52} Contrary to some claims, this admission hardly amounts to 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.

\textsuperscript{53} Maistre, Study on Sovereignty above n.12.

\textsuperscript{54} Schmitt recognizes that the people must be able to make ‘simple and elementary appearances’ in order to ‘secure for itself its authority and recognize the actual problem of modern democracy’. But ‘genuine popular assemblies and acclamations are entirely unknown to the constitutional regime of contemporary bourgeois democracy’ in which the people’s powers are reformulated as ‘bourgeois liberty rights’. ‘Whoever confuses the constitution of democracy with such sets of norms can easily dispute that there is a problem at all. … [This is because] a distinctive feature of the bourgeois Rechtsstaat constitution is to ignore the sovereign, whether this sovereign is the monarch or the people’. CT 272-3.

\textsuperscript{55} Schmitt, Legality and Legitimacy 89: ‘The people can only respond yes or no. They cannot advise, deliberate, or discuss. They cannot govern or administer. They also cannot set norms, but can only sanction norms by consenting to a draft set of norms laid before them. Above all, they also cannot pose a question, but can only answer with yes or no to a question placed before them.’

\textsuperscript{56} See CT 264-7 (definition of democracy). This identity - homogeneity - need not be racial or ethnic in origin. And see comments on concept of class not replacing concept of the people in democracy (266). See also Schmitt, The Crisis of Parliamentary Democracy pp.1-17, MIT Press (1988). Preface to 2nd edn 1926 ‘On the contradiction between parliamentarism and democracy’. Identity of governed and governing: ‘democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity’.
this logic, Schmitt re-interprets the relative roles of Parliament and President in the scheme of the Weimar Constitution. As a merely deliberative or opinion-forming assembly, Parliament is an unsuitable vehicle for decision-making. By contrast, Schmitt argues, against normativists who claim a strict political neutrality for the role, that the President, being directly elected by the people, is ‘the republican version of the monarch’.\(^{57}\) The President is the true bearer of constituent power.

Schmitt defends this claim by conventional legal analysis, especially with respect to the breadth of the emergency power vested in the President by Article 48 of the Weimar Constitution.\(^{58}\) But his formal legal argument is underpinned by the decisionist claim that the bearer of constituent power exists ‘alongside and above the constitution’.\(^{59}\) 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.

We can now see what Schmitt means in stating that sovereign is he ‘who decides on the exception’.\(^{60}\) The constituent power vested in the President authorizes him to undertake a sovereign act, an act that demonstrates the primacy of the existential over the merely normative.\(^{61}\) In this respect we see that in important respects Schmitt’s analysis of constituent power follows Donoso Cortés. In \textit{Die Diktatur}, Schmitt accepts that 1848 was the moment marking a turning point in European political history from commissarial to sovereign dictatorship.\(^{62}\) It was the moment when ‘the people’ in the sense of the masses –

\(^{57}\) CT 316.

\(^{58}\) Carl Schmitt, \textit{Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf} (Munich: Duncker & Humblot, 2\textsuperscript{nd} edn. 1928), 213-259. 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 classic illustration). This power, invoked by drawing a clear distinction between normal and emergency conditions, was a standard model until the 18\textsuperscript{th} 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: \textit{Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung}, 213-259.

\(^{59}\) Schmitt, \textit{Constitutional Theory}, 126 (also 268).

\(^{60}\) Schmitt, above n.1 at 5: ‘Sovereign is he who decides on the exception’.


\(^{62}\) Schmitt, \textit{Die Diktatur}, above n.58, 204-5.
the proletariat – emerged as an active and potentially mighty political force. Writing *Die Diktatur* in 1921, in the shadow of the Bolshevik Revolution, Schmitt was conscious of the emergence of this new conception of constituent power as sovereign dictatorship, a power not merely to suspend normal legal procedures to preserve the state but which could overturn the old regime and replace it with a completely new type of state. And this new type of state, it might be noted, treats law merely as an instrument that exists to promote the cause of social revolution.

The emergence of this new manifestation of constituent power foreshadows Schmitt’s analysis in *Constitutional Theory*. Modern constitutional regimes, he argues, must be underwritten by a political actor who is not simply the agent of a principal (the people); that actor – exercising constituent power to maintain political unity – in reality possesses an independent will. [That is, the exercise of this power cannot be anchored purely by rational norms; it requires the charismatic authority of a leader]. The question that looms over Schmitt’s analysis in *Constitutional Theory* is whether the constituent power that underpins the Weimar Constitution, which is of social-democratic form but of uncertain authority, is of a commissarial or sovereign nature. The power is to be exercised in the name of the people and it exists to safeguard the unity of the people, but the question remains: what type of unity does the Weimar Republic express? Under the Weimar Constitution, this existential question is one that, of necessity, falls to the President to determine.

Schmitt’s analysis in *Die Diktatur* reflected the ambivalence of the political situation in 1921. He concluded that it was not clear whether, under the Constitution, these powers were of a commissarial or sovereign character. But in the supplement to the second edition in 1928, he argued that the two types of power are incompatible and, since the regime of the

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63 CT 271: ‘In a special meaning of the word, the people are everyone who is not honored and distinguished, everyone not privileged, everyone prominent not because of property, social position, or education.’[see final section]

64 See Schmitt, *Die Diktatur*, ch.4: ‘Der Begriff der souveränen Diktatur’. Of the constituent power in the form of sovereign dictatorship Schmitt claims that: ‘From its endless, elusive, groundless power constantly emerges newer forms, which can break at any time and which power is itself unlimited.’ [*Aus dem unendlichen, infaßbaren Abgrund ihrer Macht entstehen immer neuen Formen, die sie jederzeit zerbrechen kann und in denen sich ihre Macht, niemals definitive abgrenzt*] (at 142).

65 Here, we must not forget the unpropitious circumstances of its founding moment, in which defeat in war led to the fall of the Kaisersreich and the formation of a republic framed by a constitution whose popular mandate remained ambivalent.

66 *Die Diktatur*, 203: ‘Diese Widersprüche sind in der deutschen Verfassung von 1919 nicht auffällig, weil sie auf der Kombinierung 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.]
Republic had by then been able to consolidate its authority, the President’s emergency powers under Art.48 take the form of commissorial rather than sovereign powers. Schmitt was undoubtedly 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 governmental ordering under the Weimar Constitution. The extensive decision-making powers needed to protect this order were vested in the President.

**RELATIONALISM**

Normative legal positivists reject the concept of constituent power as an extra-legal notion that addresses power purely as a *de facto* rather than a *de iure* phenomenon. The anti-positivist normativists also reject the concept, in this case because it views law from an external rather than a purely internal perspective. As expressions of constitutional thought, these accounts are singularly lacking. The decisionist account has evident qualities, 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 are drafted at particular moments in time and are able to establish their authority only through a political process in which allegiance to the constitution is forged. As Schmitt saw more clearly than most, building constitutional loyalty while also generating political will is complicated. For the purpose of building political unity and overcoming conflict and difference the imposition of will – whether through use of emergency powers and the promotion of a cult of strong (charismatic) leadership – is required. Even in mature

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67 *Die Diktatur*, 238: ‘Trotz aller Wendungen wie “scharfenlos 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 soveräne 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.]

68 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, ‘Der Hüter der Verfassung’ (1929) 16 *Archiv des öffentlichen Rechts* 161-237.

69 See Dyzenhaus, above n.28, 233.

70 In some regimes, especially those in which emergency provisions are in constant force, the party system works to maintain the stability of the state and is the constituent power. Singapore, Malaysia.
constitutional democracies, jurists often overlook the work carried on through political party mechanisms to make the system of government function effectively, work that cannot easily be reconciled with constitutional norms.\textsuperscript{71}

But valuable though Schmitt’s account is, it might appear now to contain limitations in formulation or ambiguities in expression. Rather than rejecting his analysis, however, it might is more productive to rework it. This is what the relational account seeks to do.\textsuperscript{72} The relational account accepts many of Schmitt’s convictions 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 that the political domain is one of indeterminacy, and is therefore one which cannot be organized in accordance with some grand theory. It recognizes that the constitution is the way of political being and consequently 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. Further, since conflicts in this domain are inevitable, it accepts that the activity of governing is a sphere of domination (of rulers and ruled) 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.

Although endorsing these basic propositions, relationalism diverts in significant respects from Schmitt’s decisionism. Perhaps because of the immediate political challenges that the Weimar Republic directly faced, Schmitt places great reliance on the presence of a sovereign. This is evident from his treatment of the concept of representation. Schmitt largely follows Sieyes in accepting that the modern regime is formed through a principle of representation. Sieyes identified the people - ‘the nation’ - as the constituent power and realized that that body could not govern. Again Schmitt tends to agree. But Sieyes claimed that social conflicts could be overcome through the principle of representation and this

\textsuperscript{71} refs
\textsuperscript{72} This approach is outlined in Loughlin, \textit{The Idea of Public Law} (Oxford: Oxford University Press, 2003), esp. chs 5(Sovereignty) and 6 (Constituent Power) and developed further in \textit{Foundations of Public Law} (Oxford: Oxford University Press, 2010), esp. chs. 6 (Political Jurisprudence) and 8 (The Constitution of the State).
Schmitt doubts. Representation ‘contradicts the democratic principle of self-identity of the people present as a political unity’.73

To rework the concept of constituent power from a relationalist perspective, this identity/representation argument needs further consideration. Sieyes treated the principle of representation as a necessity: it was the product of a general process of the continuing division of labour in modern society. Yet rather than accepting representation as technique – as the arrangements of representative government – his claim that political power originates in representation should be considered further. A deeper sense of the significance of representation if democracy is treated as a practice rather than a mechanism. Specifically, if representation is needed for the purpose of generating political power, ‘the people’ must also be regarded as itself 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 recognizes this point but only implicitly,74 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). Yet this is not the only way to conceptualize the issue or to posit a solution. The transfer of authority from prince to people in modernity also brings about a significant change in the order of symbolic representation. The transcendent belief in divine authority might be effaced, but that space remains and this yields what Claude Lefort calls the ‘theological-political question’.75 We lose the transcendent figure of the sovereign, but we retain the space of sovereignty. This is the space of the political, an autonomous but uncertain domain which expresses a distinctive way of being exhibited in its logic of action and its distinctive 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.76 The latter is achieved by conceiving constitutional discourse as a type of

73 CT 289.
74 See above n.54.
76 Kelsen (1927) ‘The question on which natural law focuses is the eternal question of what stands behind the positive law. And whoever seeks an answer will find, I fear, neither an absolute metaphysical truth nor the
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’.\textsuperscript{77} Schmitt accepts the autonomy of the political but is unable to conceive the maintenance of the political domain without the constant presence a determinate figure of the sovereign, hence his focus on dictatorship in its various manifestations. 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 ultimately only to totalitarianism, in which any form of opposition is to be regarded as ‘the enemy’.\textsuperscript{78} If the democratic potential of this modern shift in the source of authority is to be retained – if, that is, the space of the political is itself to be retained - then the political space must be seen as incorporating an unresolved dialectic of determinacy and indeterminacy. It simultaneously needs closure and openness, so that any closure remains provisional. This is the basis of the relational approach.

A relational inquiry therefore starts with the puzzle of the foundational moment marking the break with traditional forms. Rousseau was the first to highlight its paradoxical character: how is a multitude of strangers able to meet, deliberate and rationally agree a constitution for the common good? For this to happen, he explained, ‘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.\textsuperscript{79} How, in other words, can ‘the people’ act as the constituent power to establish the form of the political unity if they can be identified as such only by virtue of the pact? Normativism resolves this by the formality of 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?

This paradox of constituent power can be overcome only by adopting a relational approach. The notion of ‘self-constitution’ is to be understood by reference to reflexive

identity. Building on Paul Ricoeur’s distinction between *idem*-identity (sameness) and *ipse*-identity (selfhood, implying ability to initiate), 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’. 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 should be understood to express a dialectical relation between ‘the nation’ posited for the purpose of self-constitution and the constitutional form through which it is able to 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’. 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 in effect founds an 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 go a long way towards explaining the necessity of government. The space of the political might be conceived as a space of freedom (‘the absolute beginning’), but if it is to be maintained institutionalization of rule is required. This institutionalization, which is needed for power-generation, also implies domination. This in turn results in a dialectical engagement between what Ricoeur calls conviction and critique,

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82 Schmitt, *On the Three Types of Juristic Thought* / *Über die drei Arten des rechtswissenschaftlichen Denkens* (Joseph Benderskey trans. (Westport, Conn: Praeger, 2004), 62. It should be noted, however, that this argument is made in a work that criticizes decisionism. See below at 00.
83 Oakeshott – modern European state
84 One of the most powerful ways by which government promotes unity is by writing exemplary stories about the character of ‘the people’ belonging to these ‘imagined communities’: see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006).
institutionalization and its irritation. 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. 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). It founds a constitutional rationality (or normativity), but the association evolves only through action (or 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 constituent power is set in a relational frame and this power is conceived as an elaboration of right then the paradoxical aspects of the subject 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”’. 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

86 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.’
88 Lindahl, above n.81, 22.
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 argument on a clear distinction between the constitution and positive constitutional law and recognizes that the state is constantly in the process of formation. Most significantly, it might be noted that, in response to criticisms of his decisionism, during the 1930s Schmitt modified his position and adopted an institutionalist method that had certain affinities with the work of the early 20th century French public lawyer, Maurice Hauriou.89 This development is most clearly illustrated in his advocacy of ‘concrete-order’ thinking in his work, On the Three Types of Juristic Thought.90 In this book, Schmitt not only once again criticizes normativism but also argues against decisionism and in favour of what he calls concrete-order thinking.91 Concrete order thinking can be understood as an 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’.92

In this work, Schmitt comes close to adopting a relational method, though this concept of concrete order thought remained under-developed. A better illustration is found in the work of his contemporary, Herman Heller. Heller explicitly 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

89 Hauriou developed a juristic concept of ‘directing ideas’ (idées directrices) that, he claimed, performed a generative role in the shaping and giving meaning to public institutions. Directing ideas give meaning to the basic principles of French public law, which unfold progressively with the power to shape the character of governmental institutions. See Maurice Hauriou, Précis de Droit Constitutionnel (Paris: Sirey, 2nd edn. 1929), esp. 73-74.
90 Above n.82. In his introduction to the English translation, Jospeh Bendersky, explains the shift in the following terms: ‘It was one thing to advocate sovereign decisionism within the Weimar constitutional framework or even to entrust Paul von Hindenburg, a political figure of proven responsibility deeply devoted to German traditions and western civilization generally, with broad exceptional powers in an Ausnahmezustand. It was quite another when such decisions would be made by the leader of a dynamic, revolutionary movement unrestrained by the values, traditions, and institutions that conservatives such as Schmitt cherished’ (at 14).
91 This could not be termed institutionalism because Schmitt – for evident political reasons in 1934 (when the book was first published) -had to avoid any association with neo-Thomism exhibited in Hauriou’s work: see Bendersky’s note in Three Types at 112 (n59).
92 Ibid. 78.
principles of law’. 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’. In short, normativism and decisionism are erroneous legal methodologies. The reason is that once the ‘power-forming quality of law’ has been grasped, it becomes impossible to understand the constitution ‘as the decision of a norm-less power’. 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’.

THE SIGNIFICANCE OF THE CONCEPT OF CONSTITUENT POWER

Given the structure of this paper, some might think that constituent power expresses three stages in the evolution of constitutional order. All legal theories deploy the concepts of norm, decision and order and simply accentuate some over others. So, the centrality of decision might be highlighted at the moment of founding a constitution, relational ordering in explaining the processes of constitutional development, and normativity in a mature system with a well-entrenched culture of legal-constitutionalism. But this is not a solution to the conundrum of constituent power. The relationalist account, it is suggested, provides the best method of not only explaining constitutional change but also of addressing the issues of foundation and constitutional jurisdiction. Schmitt and Heller point the way, though Schmitt’s concrete-order thought remains under-developed and Heller’s theory is both

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95 Heller, ibid.

incomplete and highly abstract. It remains, then, to explain how the relational method enriches our understanding of constitutional order.

The key lies 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 cannot be eliminated. 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 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’. But however much the constitution institutionalizes power, the constituted authorities retain an extensive, discretionary authority to determine where the best interests of the group lie. 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.

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97 It should be noted that Heller’s magnum opus on Staatslehre was not complete at the moment of his untimely death, at the age of 42, in 1933.

This account yields the meaning of constituent power: the concept 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, which entails the reduction of constituent power to fact. 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 symbolic, representative aspect, there is no constituent power. Constituent power, born of the intrinsic connection between the symbolic and the actual, marks the formation of constitutional discourse.

But constituent power similarly cannot entirely be absorbed into the constituted order and equated with some founding norm (Grundnorm). 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’ (an impossible dream), but it would surely lead to the destruction of political freedom.

Viewed from a relational perspective, constituent power is not engaged only at the (virtual) founding moment. It continues to function within an established regime as an expression of the open, provisional, and dynamic aspects of constitutional ordering. There are various ways in which this open quality might be expressed. In terms already adopted, it exhibits a tension between sovereignty (the ideal representation of the autonomy of the political domain) and the sovereign (the institution of government charged with making decisions that maintain this ideal representation of unity). This replicates the distinction Rousseau draws between sovereignty (the general will) and government (the institution charged with its actual realization). Rousseau believed that this distinction sets up a...

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99 Negri, Insurgencies.
100 For this reason, a coup d’état is not of itself an expression of constituent power [??? More work. Cromwell?].
101 See Foundations of Public Law, ch.11.
102 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) seems misconceived. It remains rooted in decisionism. See Carré de Malberg, above n.33, 489-500; Beaud, above n.33, 315-19; 336-7. [more on this see Gözler].
103 Rousseau, SC, 62: The general will ‘is not so much the number of voices, as it is the common interest that unites them’. See also at 60: ‘There is often a considerable difference between the will of all and the general will: the latter looks only to the common interest, the former looks to the private interest, and is nothing but a sum of particular wills; but if, from these same wills, one takes away the pluses and the minuses which cancel each other out, what is left as the sum of the differences is the general will’.
dissonance that can lead only to the corruption of the constitution (as general will). This flows from the lack of any institutionalized will to oppose to the constituted power.\textsuperscript{104} That might be so, though Rousseau’s pessimism is attributable to the fact that he postulates the formation of an ideal at the foundation (the general will), and it is more realistic to depict constitutional development as an ongoing struggle to give particular institutional meaning to general democratic ideals.

Important insights can nonetheless be gleaned from Rousseau’s account. The first is that constituent power might just as appropriately be termed constituent right since it is evident that this struggle entails the attempt to explicate the meaning of political right (droit politique).\textsuperscript{105} It follows that constituent power/right does not spring from ‘normative nothingness’: the written constitution is established to formalize existing precepts of political right that express the political unity of a people. The second is the claim that the constitution is eventually corrupted because ‘the people’ remains a non-institutionalized entity. Rousseau here highlights an important point, but it is not so much the fact that ‘the people’ remains unformed as that the political struggle manifests itself as an ongoing attempt by institutionalized entities to claim to be the authoritative expression of the 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 approval of constitutional amendments), in his Constitutional Theory Schmitt stressed 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’.\textsuperscript{106} This flows from his distinction between constitutional law and the constitution: the people in its non-instituted form exists to irritate the instituted power in a dialectic engagement through which real political will results.

Schmitt then develops his argument in an interesting direction, taking it beyond the idea of the people as a political unity. Following the logic of Sieyes’ claim about the third

\textsuperscript{104} Social Contract, ibid. 106.

\textsuperscript{105} It might be note that in The Social Contract Rousseau states that his aim is to explain the ‘political laws, which constitute the form of Government’ (at 81). And the point is manifest in the subtitle of Le Contrat Social which reads: principes du droit politique.

\textsuperscript{106} CT, 271.
estate,\textsuperscript{107} he states that the people ‘are everyone who is \textit{not} honoured and distinguished, everyone \textit{not} privileged.’\textsuperscript{108} Moving beyond Sieyes’ historical context, he suggests that since that the bourgeoisie has come to dominate government, the proletariat has become the people, ‘because it becomes the bearer of this negativity.’\textsuperscript{109} Schmitt here partitions the ideal unity of the people. The concept of the people is now presented as ‘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.’\textsuperscript{110} This distinction is highlighted in a relational perspective. As indicated, 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). What must now be emphasized is that in this foundational moment, so too must ‘the people’ be grasped in a double sense. The people must be 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 ordinary people, ‘the people out of doors’).

In \textit{The Social Contract}, Rousseau explains that his aim is to elaborate an ideal arrangement which is able ‘to combine what right permits with what interest prescribes’.\textsuperscript{111} We might doubt whether that ideal can be realized, but the tension between right and interest (the virtual and the actual) not only specifies the driving force but also illuminates the double aspect to the concept of the people. From a juristic perspective, the driver of constitutional development is the struggle over the elaboration of right. But from a sociological perspective, the driver is interest rather than right, and in particular interests which concern 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 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

\textsuperscript{107} What is the third estate? Nothing. What does it want to be? Something. What is it capable of being? Everything.

\textsuperscript{108} CT 271. He quotes from Schopenhauer: ‘Whoever does not understand Latin is part of the people’.

\textsuperscript{109} CT 272.

\textsuperscript{110} CT 272. In this conception, the people is present only in the public sphere, a point that encompasses the core truth of Rousseau’s claim that the people cannot be represented. CT 272: ‘by its presence … the people initiate the public’.

\textsuperscript{111} SC 41.
example, Parliament has played a pivotal role in constitutional struggles over such a long period that it came to be perceived as the nation assembled, acting not only as a legislative body but also as the constituent power.\textsuperscript{112} 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.\textsuperscript{113} With the recent growth in the constitutional jurisdiction of courts, some claim that constitutional courts no longer speak in an adjudicative or even legislative voice: they now speak directly in the name of the sovereign people and therefore as the authentic voice of constituent power.\textsuperscript{114} 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,\textsuperscript{115} has become the prerogative of the institutionalized mass media.\textsuperscript{116}

This brings us to the final point: constituent power exists only insofar as it is able to resist such institutionalized representation. Claude Lefort notes that modern democracy leads to the creation of the ‘empty place’ of the political.\textsuperscript{117} The problem is not that it is empty, rather that the space is filled with the many who each claim to speak in the authentic voice of constituent power. But this was his point: legitimacy can ultimately be claimed only in the name of the people, and the question of who represents the people remains the indeterminate question of modern politics. Keeping that question open remains the special

\textsuperscript{112} Tocqueville, Democracy in America: ‘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 is now acting as a barrier to continuing constitutional innovation. Johnson; Loughlin, ‘Constituent Power Subverted: From English Constitutional Argument to British Constitutional Discourse’ in M. Loughlin & N. Walker eds. The Paradox of Constitutionalism: Constituent Power and Constitutional Form Oxford: Oxford University Press, 2007, 27-48.

\textsuperscript{113} Schmitt’s argument on this point 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’. The office acquires its authority from its role in providing national opinion leadership. See further, Loughlin, Foundations, ch.13.

\textsuperscript{114} Paul Kahn, Political Theology: Four New Chapters on the Concept of Sovereignty (New York: Columbia University Press, 2011), 13-17.

\textsuperscript{115} Schmitt, CT 275: ‘democracy is designated as the rule of public opinion … Public opinion is the modern type of acclamation. It is perhaps a diffuse type, and its problem is resolved neither sociologically nor in terms of public law. However, its essence and political significance lie in the fact that it can be understood as acclamation. There is no democracy and no state without public opinion, as there is no state without acclamation.” Walter Lippman, Public Opinion (1922); Tönnies, On Public Opinion (Kritik der öffentlichen Meinung) (1922); Habermas, Structural Transformation of the Public Sphere, Hennis …

\textsuperscript{116} Schmitt 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’. CT 275.

\textsuperscript{117} Lefort, Democracy and Political Theory, 226
task of the concept of constituent power, not least because ‘the people-as-one’ is the hallmark of totalitarianism. In that struggle, the most pressing issue today involves recognition of 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.\footnote{118 John McCormick, \textit{Machiavellian Democracy}} In a world in which government seems both ubiquitous and increasingly remote from ordinary people,\footnote{119 See, eg, Walker, Paradox; Alexander Somek, ‘Constituent power in national and transnational contexts’ (2012) 3 \textit{Transnational Legal Theory} 31-60. Somek accepts that the transnational context is not a sphere of public autonomy (at 54-58). If so, then this power – whatever it might be (economic, legal, epistemic) – is not constituent power.} a concept of constituent power that conjoins right and interest - the symbolic representation of all and the concerns of the many - should not be permitted to disappear from constitutional thought.