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On Constituent Power

Martin Loughlin

I. INTRODUCTION

Constituent power is a modern concept. Its source can certainly be traced to debates in medieval political thought,¹ but it emerges in distinct form only with the establishment of the modern institution of the state. The concept is a product of the secularizing and rationalizing movement of eighteenth-century European thought known as the Enlightenment and it comes to occupy a central place in constitutional thought only after the late-eighteenth century American and French Revolutions. Its meaning derives from two elementary assumptions of Enlightenment thinking: that the ultimate source of all political authority is located in an entity known as ‘the people’, and that a ‘constitution’ is a thing – specifically, a document – that is made. Consequently, the concept of constituent power comes into its own only when the constitution is understood

¹ See, e.g., Francis Oakley, ‘The Absolute and Ordained Power of God and King in the Sixteenth and Seventeenth Centuries: Philosophy, Science, Politics, and Law’, *Journal of the History of Ideas* 59 (1998): 669-90. Cf. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. G. Schwab) (Chicago: University of Chicago Press, 2005 [1922]), 36.

as a juridical instrument which derives its authority from some principle of popular self-determination. The constitution is, in short, an expression of the constituent power of the people to make and re-make the institutional arrangements through which they are governed.

In this distinctively modern understanding, constituent power performs the critical role of a boundary concept. Bolstering the autonomous character of the political domain, it operates to police the boundaries, and to specify the limits, of this singular worldview.² It is, for example, by virtue of the workings of this concept that material force is converted into ‘political power’, that a ‘crowd’ is transformed into a ‘people’, and that a governing regime (i.e., constituted power) is conceived as one that derives its authority from the consent of its subjects. The concept thereby enables us to identify the source and nature of the constitutional authority within modern political regimes.

Given this pivotal function, it should not be surprising to discover that constituent power remains a contested concept. It evidently expresses a democratic aspiration, but this remains an aspiration of uncertain institutional form. Commonly expressed in the language of ‘we the people’, it authorizes the establishment of a constitution founded on some notion of popular consent. The particular question I want to consider in this Chapter is whether, and to what extent, this democratic foundation also incorporates adherence to

² See Schmitt, *Political Theology*, 5; Ernst-Wolfgang Böckenförde, ‘Die verfassunggebende Gewalt des Volkes. Ein Grenzbegriff des Verfassungsrechts’ in his *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht* (Frankfurt-a-M: Suhrkamp, 2nd edn. 1992), 90-112.

certain liberal values associated with the political theory of constitutionalism.

This is not obviously the case. In 1804, for example, Napoleon notoriously claimed that ‘I am the constituent power’, a conviction that many authoritarian rulers have subsequently – if only implicitly - embraced.³ I examine this question by considering three main perspectives on the concept of constituent power. These are emanations of three types of legal thought: normativism, decisionism and relationalism.

Normativism is the prevailing mode of legal thought today. It fashions itself on the autonomy of legal and constitutional ordering. In its positivist form – the idiom which in this volume is referred to as ‘structural liberalism’ – it presents itself as a scientific analysis that eliminates all questions of value from its inquiries. In its anti-positivist variant, which includes the ‘moral liberalism’ of such scholars as Lon Fuller, Ronald Dworkin, and David Dyzenhaus – it extolls the values of liberal legal ordering. But, significantly, in both cases it renders constituent power a redundant concept. Normativism promotes liberal legal ordering and marginalises the significance of democratic foundation.

By contrast, the second type of legal thought - decisionism - finds itself on a conception of law as will, and especially as an expression of democratic will-formation. Although one strand can be identified in the school of American legal realism and its various instrumentalist offshoots, its most prominent exponent within constitutional thought is Carl Schmitt. Schmitt maintains that, being unable to guarantee the terms of

³ Napoleon I, *The Corsican: A Diary of Napoleon's Life in His Own Words* (ed., R.M. Johnston) (Boston: Houghton Mifflin Co, 1910), 182.

their own existence, modern constitutions must be underwritten by a sovereign will. This sovereign will is the constituent power. Decisionist legal thought highlights the importance of democratic will and marginalises the significance of liberal constitutionalist values.

The third type of legal thought, relationalism, rejects both the (liberal) normativist assumption that constituent power is redundant and the (democratic) decisionist contention that it expresses the will of a constituent subject. For relationalists, constituent power involves a relationship of right: it is a manifestation of political right (*droit politique / jus politicum*), and it expresses the open, provisional, and dynamic dimensions to constitutional ordering. It acknowledges the significance of both democracy and liberalism in the constitution of political authority, while keeping active the tensions between those two aspirations. I suggest, finally, that the relational method provides the key to understanding the nature and function of the concept of constituent power in contemporary constitutional thought.

II. ORIGINS

Before examining these three basic perspectives, I should set the context by briefly sketching an account of the origins of the concept of constituent power. Its main source is to be found in Calvinist reinterpretations of Bodinian sovereignty.⁴ Calvinist

⁴ See Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 60-73.

jurists maintained that within any political regime, there existed what they called a ‘double sovereignty’, with personal sovereignty (*majestas personalis*) being held by the ruler and real sovereignty (*majestas realis*) vesting in the people. This dualist distinction was then deployed in various conflicts that arose during the sixteenth and seventeenth centuries over the 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 being drawn between the ‘constituted power’ (the power vested in the prince to rule) and the ‘constituent power’ (the power through which the prince’s power to rule was authorized).⁵

This distinction left its mark on late-18th century revolutionary thought. Locke’s influence over the American colonists is evident, for example, 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.”⁶ The constituent power of the people is also invoked to establish the authority of the American Federal Constitution notwithstanding an unlawful break with

⁵ See, e.g., Samuel Pufendorf, *De jure naturae et gentium* [1672]. *On the Law of Nature and Nations* vol. 7 (trans. C.H. and W.A. Oldfather) (Oxford: Clarendon Press, 1934 [1672]), 2-3.

⁶ *American Declaration of Independence*, July 4, 1776 (emphasis supplied). Compare John Locke, *Two Treatises of Government* vol. 2 (ed. P. Laslett) (Cambridge: Cambridge University Press, 1998), § 222.

the Articles of Confederation.⁷ But it was most explicitly deployed in French revolutionary discourse, where the Abbé Sieyès pressed home the claim 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.”⁸

It has become an orthodox tenet of modern legal thought that constitutional law is fundamental law. The point Sieyès makes 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. 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.”⁹ 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.

As constitutions came to be drafted in the name of ‘the people’, Sieyès’ formulation became a staple of constitutional discourse. But it has 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’ —

⁷ [Dowdle to get cite]

⁸ Emmanuel-Joseph Sieyès, *What is the Third Estate?* (trans. M. Blondel) (London: Pall Mall Press, 1963 [1789]), 126.

⁹ *Ibid.* at 124.

meaning that the sovereign people are also subjects. De Maistre not surprisingly felt that there is “something equivocal if not erroneous here, for the people which *command* are not the people which *obey*.”¹⁰ Sieyes 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 be exercised only through the constituted (i.e., representative) authorities.¹¹ Or, as de Maistre put it more caustically, “the people are the sovereign which cannot exercise their sovereignty.”¹² Some have finessed this problem by contending that ‘the people’ are not sovereign as such but are merely the source of the sovereign authority of the established regime.¹³ But that hardly provides an unambiguous solution.

One 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 seem to offer an adequate explanation of its

¹⁰ Joseph de Maistre, ‘Study on Sovereignty’ in *Works* (ed., J. Lively) (London: Allen & Unwin, 1965), 93.

¹¹ Sieyès, *What is the Third Estate*, 139.

¹² *Id.*

¹³ Westel Willoughby, *The Fundamental Concepts of Public Law* (New York: Macmillan, 1924), 99-100.

source: the world of classical natural law is precisely what is being left behind.¹⁴ Sieyes uses this terminology because once he moves beyond the positive law relationship between sovereign and subject he can conceive only 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 *les principes du droit politique*. Rousseau contended that, 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*.”¹⁵ The relationship “of the Sovereign [the people] to the State,’ he explained, is governed not by natural law but by fundamental laws called ‘political laws’.¹⁶ This modern idea of constitution acquires its meaning within the broader frame of the political life of the nation.

¹⁴ See Richard Tuck, ‘The “Modern” School of Natural Law’, in Anthony 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).

¹⁵ Jean-Jacques Rousseau, *The Social Contract*, in *The Social Contract and Other Later Political Writings* (trans., V. Gourevitch) (Cambridge: Cambridge University Press, 1997), 51.

¹⁶ *Id.* at 12.

In general, the origins of constituent power 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, clearly specifies the hierarchical relationship existing 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.

III. NORMATIVISM

IV.

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.¹⁷

Many contemporary jurists reject this categorization. The most prominent illustration concerns the school of legal positivism, which presents itself as a science of

¹⁷ See Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), ch.6.

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, with the result that even positive constitutional law is merely a type of political morality and not strictly law at all.¹⁸ But this school reaches its apogee in Hans Kelsen's 'pure theory of law', in which Kelsen presents legal theory as a science that is "purified of all political ideology and every element of the natural sciences."¹⁹ He is therefore able to portray law as a scheme of interpretation whose reality rests in the sphere of meaning.²⁰ Law is, in short, a system of norms.²¹

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. But if law is 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. Who authorizes this original constitution? Kelsen answers that, in legal science, this particular question – the question

¹⁸ John Austin, *The Province of Jurisprudence Determined* (ed. W. Rumble) (Cambridge: Cambridge University Press, 1996 [1832]). See also A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th edn., 1915), 70-71.

¹⁹ Hans Kelsen, *Introduction to the Problems of Legal Theory* (trans., B.L. Paulson & S.L. Paulson) (Oxford: Clarendon Press, 1992 [1934]), 1.

²⁰ *Id.* at 10.

²¹ *Id.* at 55-58.

of constituent power – cannot be addressed: the *Grundnorm* can only be presupposed.²² 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 either belongs 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.²³ Legal science limits itself to a question of validity: is this or is this not a valid norm of an extant legal order? The theory thus 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.

What this volume calls the structural-liberal vision of constitutionalism is ultimately a particular expression of normative positivism, in which the central features of structural liberalism – separation of powers, judicial review, multiparty elections for national office – take the form of norms whose authority or validity is presupposed. From this perspective, constituent power is indistinguishable from raw power and it therefore ultimately is anti-constitutional and of no affirmative constitutional significance.

This stance of rejecting the concept of constituent power as being of no juristic or constitutional significance is not confined to the school of legal positivism. It is now

²² See *id.* at 61-62, 113-125.

²³ See *id.* at 105. Cf. Schmitt, *Political Theology*.

being implicitly promoted by a broad range of contemporary normative legal theory founded on the autonomy – or intrinsic morality – of law. This is an alternative version of liberalism that be called legal-moral liberalism. 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 Lon Fuller, Ronald Dworkin, Robert 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.”²⁴ 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 (i.e., ‘the people’ as authorizing agent) is redundant.²⁵

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

²⁴ David Dyzenhaus, ‘Constitutionalism in an Old Key: Legality and Constituent Power’, *Global Constitutionalism* 1 (2012): 233.

²⁵ See also David 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, 2007), 129-145.

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. And this, they argue, yields a distorted image of the authority of ‘government under law’.

This is a prominent theme running 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.”²⁶ Anti-positivists make a similar argument, adjusting only to incorporate in their claim an ‘intrinsic morality’ of law.²⁷ Either way, public law and private law is undifferentiated. In legal positivism, these are merely conventional categories (or 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.²⁸ In the anti-positivist normativist reformulation of this argument, legality is a moral practice of subjecting official conduct to principles and values that make up an ideal, and entirely 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 forms of human conduct. To the extent that this version accepts the first strand of public law (i.e., the acquisition and generation of political power), this is regarded as an intrinsically moral endeavour. In

²⁶ Kelsen, *Problems of Legal Theory*, 37.

²⁷ Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 2nd ed. 1969) ch.2.

²⁸ Kelsen, *Problems of Legal Theory*, 92-96.

both strands of normativism – which together embrace a very broad swathe of Anglo-American jurisprudence – the notion of constituent power simply does not register. Law, it would appear, is a liberal practice whose authority in no way rests on a democratic decision of a majority to promulgate rules.

V. DECISIONISM

However sophisticated it may be as legal theory, normativism is a peculiarly inadequate expression of constitutional thought. In its positivist variant (as structural liberalism), it either assumes the existence of a sovereign (e.g., Austin), or else adopts a conception of law as a system of norms authorized by some founding norm whose authority is pre-supposed (e.g., Kelsen). In its anti-positivist variant (as moral-legal liberalism), this type of legal thought focuses on the moral evolution of legality as a social practice, but avoids any analysis of the political conditions under which constitutional authority is established. In place of a founding norm, the anti-positivist variant postulates a morality of law that promotes certain (intrinsically good) legal values.

Such inquiries avoid reference to the institution of the state (i.e., the state as the political unity of a people) or to the concept of sovereignty.²⁹ 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

²⁹ See Kelsen, *Problems of Legal Theory*, 99.

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 that of the ideal constitution or of some overarching principles of legality. In either case, the constitution is posited 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.³⁰ For scholars who inquire into these factors – and indeed also for lawyers and judges³¹ – 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.³² 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

³⁰ Ernst-Wolfgang Böckenförde, ‘The Emergence of the State as a Process of Secularization’, in *State, Society, Liberty: Studies in Political Theory and Constitutional Law* (Oxford: Berg, 1981), 26-64.

³¹ See, e.g., Joel I. Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (London: Routledge, 2012), 79-80.

³² See also Raymond Carré de Malberg, *Contribution à la Théorie générale de l’Etat* (Paris: Sirey, 1922), 483-504 ; Olivier Beaud, *La puissance de l’état* (Paris: Presses Universitaires de France, 1994), 17-19.

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 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.³³

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,³⁴ 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.

³³ Schmitt, *Political Theology*, 12.

³⁴ Carl Schmitt, *The Concept of the Political* (trans., G. Schwab) (University of Chicago Press, 1996 [1927]), 19.

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.”³⁵ It is “concrete political being.”³⁶ 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.”³⁷ The latter, the set of provisions laid down in a text called ‘the constitution’, is a ‘relative concept’ that 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. The relative nature of constitutional law means that “the concept of

³⁵ Carl Schmitt, *Constitutional Theory* (trans., J. Seitzer) (Durham NC: Duke University Press, 2008 [1928]), 125.

³⁶ *Id.*

³⁷ *Id.* at 75.

the constitution is lost in the concept of individual constitutional *law*.³⁸ Many provisions in written constitutions relate to matters that do not concern the fundamentals of a state's constitution. These provisions may be fundamental from the perspective of normativism, but this is merely the perspective of positive law. The foundational claim made by normativists for constitutional *law* is a formal condition, whereas for Schmitt the constitution itself is a substantive concept.

Since the provisions of 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.³⁹ 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.”⁴⁰ Whatever unity one finds in the constitution arises from “a pre-established, unified will” that is not found in norms but only in “the political existence of the state.”⁴¹

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.”⁴² The constitution equates to the

³⁸ *Id.* at 71.

³⁹ *Id.* at 76-77.

⁴⁰ *Id.* at 64.

⁴¹ *Id.* at 65.

⁴² *Id.* at 60.

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 in Schmitt's thought 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*."⁴³ 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.⁴⁴

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?"⁴⁵ Although in the early-modern period that power was held by the prince, Schmitt recognizes that since the eighteenth century the decisionist and personalist elements of sovereign will have become submerged in the concept of 'the people' as an organic unity.⁴⁶ Following Donoso Cortés, he accepts that 1848 marks the end of the epoch of kingship.⁴⁷ But does he also follow Donoso Cortés in arguing that the

⁴³ Id. at 61.

⁴⁴ Id. at 62.

⁴⁵ Schmitt, *Political Theology*, 64.

⁴⁶ Id. at 99-102.

⁴⁷ Carl Schmitt, *The Crisis of Parliamentary Democracy* (trans., E. Kennedy) (Cambridge, Mass: MIT Press, 1985 [1923]), 8.

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 Max Weber's 'charismatic' and 'traditional' categories of authority) and the democratic (an expression of the rational). 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.

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 de Maistre in maintaining that the concept of 'the people' in this constitution takes an essentially representative form.⁴⁸ The people as such cannot deliberate or advise, govern or execute: they are able to act only in plebiscitary mode and in response to a precise question.⁴⁹ 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

⁴⁸ See Schmitt, *Constitutional Theory*, 272-3.

⁴⁹ Carl Schmitt, *Legality and Legitimacy* (trans., J. Seitzer) (Durham NC: Duke University Press, 2004 [1932]), 89.

basic criterion of democracy is not representation but the identity of rulers and ruled.⁵⁰ 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 made elsewhere. Contrary to normativists, who claim a strict political neutrality for the role of the President, Schmitt argues that the President, being directly elected by the people, has become “the republican version of the monarch.”⁵¹ The President is the true bearer of constituent power. Schmitt explains this claim using legal analysis, especially of the breadth of the emergency power vested in the President under Article 48 of the Weimar Constitution.⁵² But his formal, legal argument is underpinned by the decisionist claim that the bearer of constituent power exists “alongside and above the constitution.”⁵³ That is, the President is not merely a creature of the *legal* constitution (i.e., of constitutional ‘law’), he also possesses the constituent power to maintain the unity of political will. The President’s power exists to safeguard the ‘substance’ of the

⁵⁰ Schmitt, *Constitutional Theory*, 264-7; Schmitt, *The Crisis of Parliamentary Democracy*, 1-17.

⁵¹ *Ibid.* 316.

⁵² Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (trans., M. Hoelzl and G. Ward) (Cambridge: Polity Press, 2014 [1921]), 180-226.

⁵³ Schmitt, *Constitutional Theory*, 126.

constitution.

The significance of Schmitt's claim that the sovereign is he "who decides on the exception" can now be grasped.⁵⁴ 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.⁵⁵ But what type of sovereign power does the President possess? Writing *Dictatorship* (1921) in the shadow of the Bolshevik Revolution, Schmitt was conscious of the emergence of a new type of constituent power, that of 'sovereign dictatorship': a power not merely to suspend normal legal procedures to preserve the state (and which Schmitt calls 'commissarial dictatorship'), but one that could be used to overturn the old regime and replace it with a new state founded on social revolution.⁵⁶ 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 of a 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 *Dictatorship* reflects the ambivalent political situation in 1921. He concludes that it was unclear whether, under the Weimar Constitution, these

⁵⁴ Schmitt, *Political Theology*, 5.

⁵⁵ Schmitt, *Constitutional Theory*, 154.

⁵⁶ Schmitt, *Dictatorship*, ch.4.

powers were of a commissarial or sovereign character.⁵⁷ However, in the supplement to the second edition of *Dictatorship*, published in 1928, he changed his position. Explaining that the two types of power (i.e., commissarial or sovereign) are incompatible, he argued that since the regime of the Weimar Republic had now consolidated its authority, the President's emergency powers under Article 48 of the Weimar Constitution take the form of commissarial rather than sovereign powers.⁵⁸ 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, and they are of a commissarial nature.

This 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

⁵⁷ Ibid. 177: 'These contradictions are not conspicuous in the German Constitution of 1919 because they are the result of a combination of sovereign and commissarial dictatorship.'

⁵⁸ Id. at 204.

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.

VI. RELATIONALISM

Valuable though Schmitt's decisionist 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, such as liberalism. 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.⁵⁹

But relationalism diverges in significant respects from Schmitt's decisionism. The pivotal issue concerns representation. Sieyès founds his analysis of constituent power on the principle of representation, but this he conceives 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.⁶⁰ 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).⁶¹

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.

⁵⁹ See Martin Loughlin, *The Idea of Public Law*, ch. 5 ('Sovereignty'), ch. 6 ('Constituent Power'), and ch. 8 ('Method').

⁶⁰ Schmitt, *Constitutional Theory*, 289.

⁶¹ See Loughlin, *The Idea of Public Law*, ch. 4 ('Representation').

The transcendent belief in divine authority might be effaced but that space remains.⁶² 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 normativist liberalism – whether in its positivist (structural) or anti-positivist (moral) variation – seeks to remove from constitutional discourse. The former does this by equating state with a particular legal construction 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’.⁶³ Schmitt accepts the autonomy of the political but cannot conceive the maintenance of the political domain without the constant presence of 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’.⁶⁴ If

⁶² Claude Lefort, ‘The Permanence of the Theological-Political?’, in *Democracy and Political Theory* (trans., D. Macey) (Cambridge: Polity Press, 1988), 213-255. Cf. Paul Ricoeur, ‘The Symbol ... Food for Thought’, *Philosophy Today* 3 (1960): 196-207.

⁶³ Georg Wilhelm Friedrich Hegel, *Hegel’s Philosophy of Right* (trans., T.M. Knox) (Oxford: Clarendon Press, 1952 [1821]), § 337.

⁶⁴ Cf. Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing*

the democratic potential of this modern shift in the source of authority is to be retained, 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 upon 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 already be beforehand that which they can only become as a consequence of the foundational pact itself.⁶⁵ 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

(Cambridge: Cambridge University Press, 2005), esp. ch. 3.

⁶⁵ Jean-Jacques Rousseau, *The Social Contract*, 71. See also Louis Althusser, ‘Rousseau: *The Social Contract* (the Discrepancies)’, in *Politics and History: Montesquieu, Rousseau, Marx* (trans., Ben Brewster) (London: Verso, 2007), 113-160; Jacques Derrida, ‘Declarations of Independence’, *New Political Science* 15 (1986): 7-15; Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca, NY: Cornell University Press, 1993).

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 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),⁶⁶ 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.”⁶⁷ 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” that “springs from the normative nothing and a concrete disorder.”⁶⁸ From a

⁶⁶ Paul Ricoeur, ‘Narrative Identity’, *Philosophy Today* 35 (1991): 73-81.

⁶⁷ Hans Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’, in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism* (Oxford University Press, 2008), 9.

⁶⁸ Carl Schmitt, *On the Three Types of Juristic Thought* (trans., J. Benderskey) (Westport,

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.⁶⁹ 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.⁷⁰ 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.⁷¹ Constituent power expresses a virtual equality of citizens. This is generated *inter homines* (establishing the principle of unity)

Conn: Praeger, 2004), 62.

⁶⁹ See Michael Oakeshott, *On Human Conduct* (Oxford University Press, 1975), 188.

⁷⁰ See generally Paul Ricoeur, *Critique and Conviction* (trans., K. Blaney) (New York: Columbia University Press, 1998).

⁷¹ Cf. Hegel, *Philosophy of Right*, § 279.

but it finds an actual association divided into rulers and ruled in a relation of domination (establishing the principle of hierarchy).⁷² It finds 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’.”⁷³ 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

⁷² See Paul Ricoeur, ‘The Political Paradox’, in *History and Truth* (trans., C.A. Kelbley) (Evanston, Ill.: Northwestern University Press, 1965), 247-70.

⁷³ Lindahl, ‘Constituent Power and Reflexive Identity’, 22.

sense) but to the continuous construction of political unity through *droit politique*.⁷⁴ 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 from the late-1920s, in response to criticisms of his decisionism, Schmitt modified his position and adopted an institutionalist method similar to that of the early 20th century French public lawyer, Maurice Hauriou.⁷⁵ 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.⁷⁶ Concrete order thinking is his

⁷⁴ See Loughlin, *The Idea of Public Law*, ch, 8; Loughlin, *Foundations of Public Law*, ch. 6.

⁷⁵ See Maurice Hauriou, *Précis de Droit Constitutionnel* (Paris: Sirey, 2nd edn. 1929), 73-74.

⁷⁶ See also Joseph Bendersky, ‘Introduction: The Three Types of Juristic Thought in German Historical and Intellectual Context’, in Carl Schmitt, *On the Three Types of Juristic Thought* (trans., J. Benderskey) (Westport, Conn: Praeger, 2004), 14.

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."⁷⁷

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."⁷⁸ 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."⁷⁹ Normativism and decisionism, he is suggesting, are erroneous legal methodologies. Once

⁷⁷ Schmitt, *Three Types of Juristic Thought*, 78.

⁷⁸ Hermann Heller, 'Bermerkungen zur Staats- und Rechtstheoretischen Problematik der Gegenwart', in *Gesammelte Schriften* vol. 2 (Leiden: A.W. Sijthoff, 1971 [1929]), 275 (my translation).

⁷⁹ Hermann Heller, 'Staatslehre', in his *Gesammelte Schriften* vol.3 (Leiden: A.W. Sijthoff, 1971 [1934]), 393. See also Hermann Heller, 'The Nature and Function of the State', *Cardozo Law Review* 18 (1996): 1214 (trans., David Dyzenhaus).

the “power-forming quality of law” has been grasped, it is impossible to understand the constitution “as the decision of a norm-less power.”⁸⁰ 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.”⁸¹ Heller’s relationalism points in the right direction, though it still leaves us with a highly abstract account of constituent power.

VII. CONCLUSION: CONSTITUENT POWER IN CONSTITUTIONAL THOUGHT

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

⁸⁰ Heller, ‘Staatslehre’, 393.

⁸¹ *Id.* at 332. See Loughlin, *Foundations of Public Law*, 234-237.

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 constitution*.

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.”⁸² 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 constitutionalization and is then applied through the action of

⁸² Jean Bodin, *The Six Bookes of a Commonweale* (trans., R. Knolles) (Cambridge, Mass: Harvard University Press, 1962), 517. Cf. Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraint* (Cambridge: Cambridge University Press, 2000), 1.

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.

The meaning of constituent power in constitutional thought can now be specified: 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 (democratic) materialist fallacy, entailing the reduction of constituent power to fact.⁸³ 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. Constituent power, produced by an intrinsic connection between the symbolic and the actual, signifies the dynamic aspect of constitutional discourse.⁸⁴

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 liberal (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

⁸³ See, e.g., Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (trans., M. Boscagli) (Minneapolis: University of Minnesota Press, 1999).

⁸⁴ Cf. Zoran Oklopčic, ‘Constitutional (Re)vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans’, *Constellations* 19 (2013): 81-101.

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. 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.⁸⁵ That could be so, although 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 pessimism is contestable. 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'. Rather, the written constitution formalizes precepts of political right that express the political unity of a people. Similarly, Rousseau claims that the constitution is eventually corrupted because 'the people' remains a non-institutionalized entity. But the problem here lies not so much in the fact that 'the people' remains unformed, as it does in the claims by constituted

⁸⁵ Rousseau, 'Social Contract', 106.

authorities to act as the authoritative voice of the people. Noting that the people are institutionalized in various ways within a constitutional framework (e.g., as electors, participants in referendums, or as a voice in the adoption of constitutional amendments), Carl Schmitt, in *Constitutional Theory*, stresses that their potential political role is not exhausted by ‘constituted’ manifestations. 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 persist “as an entity that is unorganized and unformed.”⁸⁶ 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 takes it beyond the idea of the people as a political unity. He states that the people “are everyone ... *not* honoured and distinguished, everyone *not* privileged.”⁸⁷ Now that the bourgeoisie dominates government, he explains, the proletariat has become the people, “because it becomes the bearer of this negativity.”⁸⁸ 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.”⁸⁹

⁸⁶ Schmitt, *Constitutional Theory*, 271.

⁸⁷ *Id.*

⁸⁸ *Id.* at 272.

⁸⁹ *Id.*

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 ordinary people, the people-as-the governed).

In *The Social Contract*, Rousseau elaborates an ideal arrangement which can “combine what right permits with what interest prescribes.”⁹⁰ 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

⁹⁰ Rousseau, ‘Social Contract’, 41.

merely as a legislative body but also as the constituent power.⁹¹ 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.⁹² 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 speak directly in the name of the sovereign people and as the authentic voice of constituent power.⁹³ 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, has become the prerogative of the institutionalized mass media.

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.⁹⁴ 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

⁹¹ See Alexis de Tocqueville, *Democracy in America* (trans., H. Reeve) (New York: Vintage Books, 1990), 100.

⁹² See also Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 68.

⁹³ Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011), 13-17.

⁹⁴ Lefort, 'The Permanence of the Theological-Political?', 226.

is to keep that question open, not least because ‘the people-as-one’ is the hallmark of totalitarianism.⁹⁵ 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.⁹⁶ This requires an understanding of constituent power that, unlike liberal normativism, does not seek to erase it and, unlike decisionism, does not reduce it to one particular form of institutionalized action. A relational account, by contrast, recognizes the need to conjoin right and interest, the symbolic representation of all with the concerns of the many, and it sets in place an understanding of the concept of particular importance in a world in which government is both ubiquitous and increasingly remote from ordinary people.

⁹⁵ See, e.g., Carl Schmitt, *State, Movement, People: The Triadic Structure of the Political Unity* (trans., S. Draghici) (Corvallis, Oregon: Plutarch Press, 2001 [1933]).

⁹⁶ See also John McCormick, *Machiavellian Democracy* (Cambridge University Press, 2011).