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## Essay

### The Boundaries of Constituent Authority

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*This Article delves into the question of the boundaries of constitution-making power. Traditionally, constituent power is regarded as an original, inherent and unlimited power. That is why constitution-making moments are described in the literature as a kind of 'wild-west.' Constituent power is unbound by prior constitutional rules. But does this mean that it is unlimited in the sense that it can disregard any basic principles, or should we endorse Benjamin Constant's declaration that "sovereignty of the people is not unlimited"?*

*This Article provides a preliminary sketch of possible limits of constituent power. First, according to some approaches to constitution-making powers, there must be certain limitations even on constituent power derived from natural law. In fact, Sieyès himself remarked that 'prior to and above the nation, there is only natural law,' which implies that Sieyès viewed constituent power as limited by certain principles.*

*Moreover, nowadays, international and supra-national law may impose various limitations on the constitution-making power.*

*Furthermore, if the goal of constitution-making is not to produce a written constitution, but to promote constitutionalism, then a plausible argument is that constitutionalism and constitutions are inseparably linked so that an exercise of constituent power cannot undermine constitutionalism but must be linked to certain common principles of law.*

*Finally, the very concept of constituent power may carry certain inherent limitations, since in order to be consistent with the idea of 'the people giving itself a constitution,' it must observe certain fundamental rights that are necessary for constituent power to preserve itself and reappear in the future.*

*This Article evaluates the various routes of restrictions on constituent power.*

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# The Boundaries of Constituent Authority

YANIV ROZNAI\*

*Dedicated to Rick Kay, a legal giant and a friend*

## INTRODUCTION

The concept of *Constituent Power* involves legal theory at its highest level. Claude Klein proposes that this is why “jurists throughout history have always been fascinated by the constituent power and its theory.”<sup>1</sup> However, whereas continental European and Latin American scholarship frequently dealt with constituent power, Anglo-American legal debates somehow neglected it.<sup>2</sup> In the United Kingdom, this was probably due to the absence of a written constitution, and in the American debates, this was possibly due to the stability of the 1787 Constitution and the prevailing approach of constituent power contained within Article V that describes the amendment process—therefore, constituent power “plays no direct role in American constitutionalism.”<sup>3</sup>

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<sup>1</sup> Claude Klein, *A Propos Constituent Power: Some General Views in a Modern Context*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 31, 31 (A Jyränki ed., 1999).

<sup>2</sup> See, e.g., Dario Azzellini, *Constituent and Constituted Power: Reading Social Transformation in Latin America*, in POPULAR SOVEREIGNTY AND CONSTITUENT POWER IN LATIN AMERICA 15, 18–19 (Emelio Betances & Carlos Figueroa Ibarra eds., 2016) (discussing the “wave of liberalization” that swept Latin America in the 1970s and the demand for direct democracy in the region, leading to “constituent moments” which resulted in some Latin American countries drafting and passing new constitutions).

<sup>3</sup> Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 49, 50, 65–66 (Martin Loughlin & Neil Walker eds., 2007). See also Edward S. Corwin & Mary Louise Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME L. REV. 185, 188 (1951) (raising the question of whether “[i]t is the purpose and result of Article V to delegate a certain power of constitutional amendment to the agencies designated by it, or [whether

Yet, constituent power has—and should have—an immense prominence to modern constitutionalism.<sup>4</sup> That is why the unawareness of constituent power in the English-speaking world was at a very high price. Only in recent years, against the backdrop of recurring constitutional replacements,<sup>5</sup> there is a renewed interest in the issue of constitution-making,<sup>6</sup> a reintroduced discussion on the relationship between revolution and constitutional change,<sup>7</sup> and accordingly a revival of attention to the concept of constituent power.<sup>8</sup>

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it is] merely to provide a method for the more convenient future use of an already existing power of the people”).

<sup>4</sup> See Marco Goldoni & Christopher McCorkindale, *Why We (Still) Need a Revolution*, 14 GERMAN L.J. (SPECIAL ISSUE) 2197, 2213 (2013) (arguing that “the British tradition of political constitutionalism . . . has paid insufficient attention to the concept of constituent power”).

<sup>5</sup> See Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 202 (2009) (estimating that in any given year, about four or five constitutions are replaced).

<sup>6</sup> For examples of recent publications exploring the topic of constitution-making, see generally ANDREW ARATO, *POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY* (2016); *COMPARATIVE CONSTITUTION MAKING* (David Landau & Hanna Lerner eds., 2019); *CONSTITUENT ASSEMBLIES* (Jon Elster et al. eds., 2018); *CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER* (Gregory Shaffer et al. eds., 2019); *CONSTITUTION-MAKING IN ASIA: DECOLONISATION AND STATE-BUILDING IN THE AFTERMATH OF THE BRITISH EMPIRE* (H. Kumarasingham ed., 2016); *CONSTITUTION MAKING* (Sujit Choudhry & Tom Ginsburg eds., 2016); TODD A. EISENSTADT ET AL., *CONSTITUENTS BEFORE ASSEMBLY: PARTICIPATION, DELIBERATION, AND REPRESENTATION IN THE CRAFTING OF NEW CONSTITUTIONS* (2017); *FOUNDING MOMENTS IN CONSTITUTIONALISM* (Richard Albert et al. eds., 2019); *PATTERNS OF CONSTITUTIONAL DESIGN: THE ROLE OF CITIZENS AND ELITES IN CONSTITUTION-MAKING* (Jonathan Wheatley & Fernando Mendez eds., 2013).

<sup>7</sup> See generally BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* (2019) (discussing Ackerman’s “three ideal types” of paths to constitutional legitimacy, the first of which considers revolutionary movements); GARY J. JACOBSON & YANIV ROZNAI, *CONSTITUTIONAL REVOLUTION* 34 (2020) (conceptualizing the term ‘constitutional revolution’ as “a paradigmatic displacement, however achieved, of the conceptual prism through which constitutionalism is experienced in a given polity”); *REVOLUTIONARY CONSTITUTIONALISM: LAW, LEGITIMACY, POWER* (Richard Albert ed., 2020) (a collection of essays engaging with Ackerman’s book *Revolutionary Constitutions*); NIMER SULTANY, *LAW AND REVOLUTION: LEGITIMACY AND CONSTITUTIONALISM AFTER THE ARAB SPRING* (2017) (discussing the Arab Spring and the surrounding issues of “revolutions, legitimacy, legality, [and] constitutions”).

<sup>8</sup> For examples of publications exploring the concept of constituent power, see generally ANDREW ARATO, *THE ADVENTURES OF THE CONSTITUENT POWER: BEYOND REVOLUTIONS?* (2017) (discussing constituent power in regime transitions in Spain and South Africa); JOEL COLÓN-RÍOS, *CONSTITUENT POWER AND THE LAW* (2020); ZORAN OKLOPCIC, *BEYOND THE PEOPLE: SOCIAL IMAGINARY AND CONSTITUENT IMAGINATION* (2018); *POPULAR SOVEREIGNTY AND CONSTITUENT POWER IN LATIN AMERICA: DEMOCRACY FROM BELOW* (Emelio Betances & Carlos Figueroa Ibarra eds., 2016); *CONSTITUENT POWER: LAW, POPULAR RULE AND POLITICS* (Matilda Arvidsson, Leila Brännström & Panu Minkkinen eds., 2020); LUCIA RUBINELLI, *CONSTITUENT POWER: A HISTORY* (2020); MIKAEL SPANG, *CONSTITUENT POWER AND CONSTITUTIONAL ORDER: ABOVE, WITHIN AND BESIDE THE CONSTITUTION* (2014); ILLAN RUA WALL, *HUMAN RIGHTS AND CONSTITUENT POWER: WITHOUT MODEL OR WARRANT* (2012); MARK WENMAN, *AGONISTIC DEMOCRACY: CONSTITUENT POWER IN THE ERA OF GLOBALISATION* (2013).

Constituent power is the driving force behind constitution-making,<sup>9</sup> which, in the modern era, is considered to be held by “the people.”<sup>10</sup> This vague idea, however, conceals many complexities. Who are the people? Can they speak in one voice? How can they express their will? These are just some of the vexing questions that surround the question of the people’s constituent power.<sup>11</sup>

There are, of course, different modalities of exercise of constituent power, and experience in diverse countries indicates a wide variety of options as to the arenas for constitution-making, such as constituent assemblies, referenda, popular initiatives, round-tables, expert committees, parliamentary legislation, and even judicial involvement. This Article does not focus on the process of constitution-making, important as this issue may be, but rather it focuses on a more theoretical question: Are “the people,” in their constituent capacity, substantively limited in any way? In other words, what are (if any) the material boundaries of constituent power? This question may carry practical implications since, if constituent power is conceived as limited, then certain actions by the constituent authority may be considered as *ultra vires* or illegitimate from the legal perspective and hence, at least as a matter of theory, a constitution may be considered “unconstitutional.”<sup>12</sup>

In his seminal article, *Constituent Authority*, Richard Kay refers to constituent authority as “the things that a given people in a given time and place understand as competent to make a binding constitution.”<sup>13</sup> Kay thus focuses on the practical authority that actually produces a constitution

<sup>9</sup> MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 100 (2003).

<sup>10</sup> Ulrich K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe*, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 3, at 211–12 (2007) (noting that the authority of constituents—the people—is what gives constitutions validity, but that such a simple explanation raises additional questions).

<sup>11</sup> See generally Mark Tushnet, *Constitution-Making: An Introduction*, 91 *TEX. L. REV.* 1983, 1988–89 (2013) (discussing one complication stemming from the people’s constituent power—the ability of constituent power to “call itself into being, disregarding restraints created by itself in an earlier appearance”). For a discussion on the concept of constituent power, see Joel I. Colón-Ríos, *Five Conceptions of Constituent Power*, 130 *LAW Q. REV.* 306 (2014); Martin Loughlin, *The Concept of Constituent Power*, 13 *EUR. J. POL. THEORY* 218 (2014); Alexander Somek, *Constituent Power in National and Transnational Contexts*, 3 *TRANSNAT’L LEGAL THEORY* 31 (2012); Chris Thornhill, *Contemporary Constitutionalism and the Dialectic of Constituent Power*, 1 *GLOBAL CONSTITUTIONALISM* 369 (2012); Martin Loughlin, *On Constituent Power*, in *CONSTITUTIONALISM BEYOND LIBERALISM* 151, 171 (Michael W. Dowdle & Michael A. Wilkinson eds., 2017); Yaniv Roznai, “*We the People*”, “*Oui, the People*” and the Collective Body: Perceptions of Constituent Power, in *COMPARATIVE CONSTITUTIONAL THEORY* 295 (Gary Jacobsohn & Miguel Schor eds., 2018).

<sup>12</sup> For a discussion on the idea of unconstitutional constitutions, see generally Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations*, 50 *CORNELL INT’L L.J.* 169 (2017); David Landau, Rosalind Dixon & Yaniv Roznai, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 8 *GLOBAL CONSTITUTIONALISM* 40 (2019).

<sup>13</sup> Richard S. Kay, *Constituent Authority*, 59 *AM. J. COMP. L.* 715, 716 (2011).

because, as he notes, “constituent authority, like constituent power, is a factual not a moral competence.”<sup>14</sup> This Article’s theoretical approach would be a methodological dualism. Like Kay, in this Article I use comparative examples of actual cases in which constituent authority was regarded as limited. But I also suggest a normative theory for how the proper use of constituent authority should be understood.

### I. CONSTITUTION-MAKING MOMENTS – A “WILD-WEST”?

In order to properly address the scope of constitution-making power one ought to return to the theoretical roots of constituent power. Although appearing in earlier periods, the concept of constituent power is relatively modern; emerging most forcefully in the French and North-America’s revolutionary thinking.<sup>15</sup> In his famous political pamphlet *Qu’est-ce que le Tiers état?*, Abbé Emmanuel Joseph Sieyès writes that “in each of its parts a constitution is not the work of a constituted power but a constituent power.”<sup>16</sup> Sieyès made a distinction between constituted power—the power created by the constitution, and constituent power—the extraordinary power to form a constitution, the immediate expression of the nation. In contrast with the independence of constituent power from any constitutional forms and restrictions, constituted power is an ordinary, limited power, that functions according to the forms and mode the nation grants it in positive law.<sup>17</sup> And consequently, according to the traditional constitutional thinking, the two powers are different: constituent power is a power external to the constitutional order and therefore considered to be free and independent from any formal bonds of positive law: “The nation,” Sieyès wrote, “exists prior to everything; It is the origin of everything. Its

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<sup>14</sup> *Id.* at 720.

<sup>15</sup> See, e.g., CLAUDE KLEIN, THÉORIE ET PRATIQUE DU POUVOIR CONSTITUENT 31–34 (1996) (analyzing the question of whether there can be an extra-constitutional amendment outside Amendment V to the U.S. Constitution); William Partlett, *The American Tradition of Constituent Power*, 15 INT’L J. CONST. L. 955, 958 (2017) (explaining that “Section 1 will describe the dominant belief that a revolutionary expression of constituent power requires broad inherent powers in constitution-making bodies, the basis for this approach in the practice of French revolutionary constitution-making . . . . Section 2 will begin an understanding of the American agency approach to constituent power, describing how Founding-era Americans saw conventions not as unlimited representatives of the people but instead as proposing bodies”); Lucia Rubinelli, *Taming Sovereignty: Constituent Power in Nineteenth Century French Political Thought*, 44 HIST. EUR. IDEAS 60, 60 (2018) (arguing “that the analysis of nineteenth-century French political thought offers a different account of constituent power’s history”).

<sup>16</sup> EMMANUEL JOSEPH SIEYÈS, *What Is the Third Estate?*, in POLITICAL WRITINGS 136 (Michael Sonenscher ed. & trans., 2003). See generally Lucia Rubinelli, *How to Think Beyond Sovereignty: On Sieyès and Constituent Power*, 18 EUR. J. POL. THEORY 47, 47 (2019) (“Based on extensive research in the archives, I show how Sieyès opposed the deployment of sovereignty by the revolutionary Assemblies and recommended replacing it with the idea of constituent power.”).

<sup>17</sup> SIEYÈS, *supra* note 16, at 134–37.

will is always legal. It is the law itself.”<sup>18</sup> Constituted power, on the other hand, is inseparable from a pre-established constitutional order.<sup>19</sup>

According to Sieyès, the positive constitution emanates “solely from the nation’s will,”<sup>20</sup> and because “it would be ridiculous to suppose that the nation itself could be constricted by the procedures or the constitution to which it had subjected its mandatories,”<sup>21</sup> constituent power has to be regarded as free from constitutional limits. “Not only is the nation not subject to a constitution,” Sieyès insists, “it *cannot* be and *should* not be . . .”<sup>22</sup> So, according to this idea of constituent power, the nation (or the sovereign people) is exterior to the institutions and thus remains above the constitution. The constitution cannot limit the nation but only the constituted powers it created.<sup>23</sup>

In his book from 1928, *Verfassungslehre*, Carl Schmitt further developed the doctrine of constituent power. Reiterating the idea that “the constitution does not establish itself,”<sup>24</sup> Schmitt argued that the constitution “is valid because it derives from a constitution-making capacity . . . and is established by the will of this constitution-making power.”<sup>25</sup> This “constitution-making 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.”<sup>26</sup> Thus, the act of political will creates the constitution and decides the fundamental political decisions regarding the form of government, the state’s structure, and society’s highest principles and symbolic values.<sup>27</sup>

Schmitt accepted Sieyès’ distinction between constituent and constituted power, and understood constituent power to be external to (and above) the constitution and, accordingly, unlimited and unrestricted by

<sup>18</sup> *Id.* at 136–37.

<sup>19</sup> See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 39 (1998); Luigi Corrias, *The Legal Theory of the Juridical Coup: Constituent Power Now*, 12 *GERMAN L.J.* 1553, 1558–59 (2011) (describing “the relationship between constituent and constituted power”).

<sup>20</sup> SIEYÈS, *supra* note 16, at 136.

<sup>21</sup> *Id.* The ‘nation’ is “a body of associates living under a common law, represented by the same legislature, etc.” *Id.* at 97.

<sup>22</sup> *Id.* at 137. See also Lucien Jaume, *Constituent Power in France: The Revolution and Its Consequences*, in LOUGHLIN & WALKER, *supra* note 3, at 67–68 (explaining what constituent power is and how French constitutional debates “generally evoked a sense of *exteriority* of the sovereign people in relation to their institution”).

<sup>23</sup> Olivier Jouanjan, *What Is a Constitution? What Is Constitutional History?*, in *CONSTITUTIONALISM, LEGITIMACY, AND POWER: NINETEENTH-CENTURY EXPERIENCES* 323, 330 (Kelly L. Grotke & Markus J. Prutsch eds., 2014).

<sup>24</sup> CARL SCHMITT, *CONSTITUTIONAL THEORY* 76 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

<sup>25</sup> *Id.* at 64.

<sup>26</sup> *Id.* at 125.

<sup>27</sup> *Id.* at 76–77. See also ANDREAS KALYVAS, *DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT AND HANNAH ARENDT* 139 (2008).

positive constitutional forms or rules.<sup>28</sup> Schmitt, in the words of Cristi, rejected “juridical normativism.”<sup>29</sup> Constituent power is the “unmediated will” that cannot be regulated or limited by legal procedures or process.<sup>30</sup> Formalizing constituent power, Scheuerman wrote, would be “akin to transforming fire into water.”<sup>31</sup>

Another “omnipotent” version of constituent power arrives from Antonio Negri, for whom any legal approach to constituent power fails because constituent power “comes from a void and constitutes everything.”<sup>32</sup> Due to its extra-legal features, it is cable of upsetting constituted boundaries.<sup>33</sup>

The idea that constituent power is unlimited was supported by legal and political theorists from different jurisdictions and diverse intellectual traditions. Olivier Beaud regards constituent power as sovereign. And for French positivists, such as Raymond Carré de Malberg, Georges Burdeau, Roger Bonnard, Guy Héraud, and Georges Vedel, constituent power—which exists outside of any constitutional authority—is exercised in revolutionary settings, external to the positive laws (either forms, procedures, and limits) established by the constitution. It is not a legal power, but a pure fact.<sup>34</sup> Hans Kelsen did not engage deeply with the question of constituent power, but rather claimed that the question of the basic norm or obedience to the historically first constitution is simply assumed or presupposed as a hypothesis in juristic thinking.<sup>35</sup> Similarly, noted political scientist Carl Friedrich regarded constituent power not as a *de jure* power but a *de facto* power that is not based on a prior legal norm;

<sup>28</sup> SCHMITT, *supra* note 24, at 125–27 (discussing constituent power and constitutional change).

<sup>29</sup> See Renato Cristi, *Carl Schmitt on Sovereignty and Constituent Power*, 10 CANADIAN J.L. & JURIS. 189, 198 (1997) (discussing Carl Schmitt’s changing views on topics such as sovereignty).

<sup>30</sup> SCHMITT, *supra* note 24, at 132.

<sup>31</sup> WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* 71 (1999).

<sup>32</sup> See generally ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* (Maurizia Boscagli trans., 1999) (discussing the void from which constituent power emerges).

<sup>33</sup> *Id.* at 321 (on how “constitutionalism is an apparatus that denies constituent power and democracy. It should not appear strange . . . that constitutionalism runs into paradoxes when it tries to define constituent power”). On Negri’s thinking of the constituent power, see Miguel Vatter, *Legality and Resistance: Arendt and Negri on Constituent Power*, in 2 *THE PHILOSOPHY OF ANTONIO NEGRI: REVOLUTION IN THEORY* 52, 52 (Timothy S. Murphy & Abdul-Karim Mustapha eds., 2007).

<sup>34</sup> For an overview of these approaches, see generally KEMAL GÖZLER, *POUVOIR CONSTITUANT* (1999).

<sup>35</sup> Hans Kelsen, *Why Should the Law Be Obeyed?*, in *WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE: COLLECTED ESSAYS BY HANS KELSEN* 257, 261–63 (2001) (discussing the importance of norms in the acceptance of constitutional power); HANS KELSEN, *PURE THEORY OF LAW* 201–03 (Max Knight trans., The Law Book Exch., Ltd. 2005) (1967); Hans Kelsen, *The Function of a Constitution*, in *ESSAYS ON KELSEN* 110 (Richard Tur & William Twining eds., 1986). See also Joseph Raz, *Kelsen’s Theory of the Basic Norm*, in *NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES* 47, 48 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., Bonnie Litschewski et al. trans., 1998) (discussing Kelsen’s theory of normative systems).



hence, it is unlimited, independent, and unconditional.<sup>36</sup> Thus, the traditional approach regards constituent power as an absolute power to establish a new legal order.<sup>37</sup>

The theory of a formless and limitless power of “the people” to break any legal or constitutional constraints at any time was regarded by some thinkers as dangerous and open to abuse. Hannah Arendt wrote about “the extraordinary ease with which the national will could be manipulated and imposed upon whenever someone was willing to take the burden or the glory of dictatorship upon himself. Napoleon Bonaparte was only the first in a long series of national statesmen who, to the applause of a whole nation, could declare: ‘I am the *pouvoir constituant*’”.<sup>38</sup> Indeed, throughout history dictators seized governmental power, through revolutionary acts or coups, claiming to be the bearers of the constituent power.<sup>39</sup> And even more recently, charismatic leaders have relied upon appeals to constituent power in order to manipulate popular sentiment and revolutionize the state’s institutional framework.<sup>40</sup>

The classical view of constituent power, as described thus far, regards it as a power that is not, conceptually and logically, constrained by existing constitutional rules or procedures. It cannot be brought “within the four corners of the constitution.”<sup>41</sup> This poses a dilemma. On the one hand, in a democracy, a new constitution is seen as the product of the people’s constituent power, a force that does not find limits in the existing constitution and that has always been directly associated with the “right to revolution.”<sup>42</sup> As Kay noted, the ability of constituent power to disregard pre-existing legality is not necessarily negative as it may be conceived as establishing the “political bottom” for a new democratic constitution.<sup>43</sup> On the other hand, not only is constituent power open to abuse but it also provides a *carte blanche* for transforming democracy to non-democratic

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<sup>36</sup> CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* (4th ed. 1968).

<sup>37</sup> See, e.g., Upendra Baxi, *Some Reflections on the Nature of Constituent Power*, in *INDIAN CONSTITUTION: TRENDS AND ISSUES* 122, 136 (Rajeev Dhavan & Alice Jacov eds., 1978).

<sup>38</sup> HANNAH ARENDT, *ON REVOLUTION* 163 (1965).

<sup>39</sup> Renato Cristi, *The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile’s 1980 Constitution*, 21 *CARDOZO L. REV.* 1749, 1763–75 (2000) (discussing the rise of General Francisco Franco Bahamonde).

<sup>40</sup> See William Partlett, *The Dangers of Popular Constitution-Making*, 38 *BROOK. J. INT’L L.* 193, 226 (2012) (discussing the use of popular constitution-making in former Soviet countries); David Landau, *Constitution-Making Gone Wrong*, 64 *ALA. L. REV.* 923, 938–41 (2013) (discussing the Chávez regime’s rise to power and influence on Venezuela’s constitution); David Landau, *Abusive Constitutionalism*, 47 *U.C. DAVIS L. REV.* 189, 191 (2013) (discussing the use of constitutional means to erode democratic systems).

<sup>41</sup> CARL JOACHIM FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND POLITICS: NATURE AND DEVELOPMENT* 117 (1937).

<sup>42</sup> Joel Colón-Ríos & Allan Hutchinson, *Democracy and Revolution: An Enduring Relationship?*, 89 *DENV. U. L. REV.* 593, 599 (2012).

<sup>43</sup> Richard S. Kay, *The Illegality of the Constitution*, 4 *CONST. COMMENT.* 57, 58 (1987).

regimes. Claude Klein explains that while the transition from non-democratic regimes to democracy is always welcome, by accepting that said transition we need to accept the power of a transition in the other direction.<sup>44</sup> In other words, the ability of constituent power to overthrow regimes must work in both directions.<sup>45</sup> Ben Nwabueze puts it as follows:

It would be expected that a democratic constitution would establish a constitutional government, indeed a constitutional democracy, and ideally, that should be the case, but this cannot be insisted upon as a condition of a democratic constitution. A people should be at liberty to choose . . . any form of government . . . it considers suitable for itself. . . . [T]here is no inherent limitation on their power of choice.<sup>46</sup>

So, in light of the unrestricted and boundless nature of constituent power, constitution-making moments were considered as a kind of “wild-west”, in the words of David Landau, free from any substantive limitations.<sup>47</sup> In the next section, I offer an alternative conception of constituent power as was understood even by early writers.

## II. REVISITING CONSTITUENT POWER

Constituent power as expressing the people’s power to establish their constitutional order is considered as some kind of a natural right. As The American Declaration of Independence of 1776 states, “whenever any Form of Government becomes destructive of [its] ends, it is the Right of the People to alter or abolish it, and to institute new Government . . . .”<sup>48</sup> In the famous *Marbury v. Madison* case, it was declared that the people have an “original right” to establish their government and fundamental principles according to which they wish to be governed.<sup>49</sup> It is the people’s “original and supreme will” that organises the government and may define its limits.<sup>50</sup> Nevertheless, is the people’s constituent power not simply the total of ‘natural sovereignty’ inherent in each individual with respect to himself?<sup>51</sup> This begs the question why to prioritize this natural right over

<sup>44</sup> Klein, *supra* note 1, at 31.

<sup>45</sup> *Id.*

<sup>46</sup> B.O. NWABUEZE, *IDEAS AND FACTS IN CONSTITUTION MAKING* 10 (1993).

<sup>47</sup> David Landau, *The Importance of Constitution-Making*, 89 DENV. U. L. REV. 611, 616 (2011-2012).

<sup>48</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See also* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside of Article V*, 94 COLUM. L. REV. 457, 458 (1994) (delineating the right of the polity to create, alter, or abolish their government given majority opinion in favor).

<sup>49</sup> *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

<sup>50</sup> *Id.*

<sup>51</sup> Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 56–60 (discussing natural rights as understood by the Founders in comparison to modern natural rights).

other natural rights supposedly belonging to individuals? In this section, I claim that the traditional conception according to which constituent power is unlimited is simply a misunderstanding of its nature, and that even the early revolutionary approach to constituent power regarded it as a power with boundaries.

Returning to Abbe Sieyès, and his often-cited phrase, which is used to describe the unlimited nature of the constituent power: “The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself.”<sup>52</sup> The final words of this sentence, which are often omitted, are of crucial importance: “Prior to the nation and above the nation there is only natural law.”<sup>53</sup> This might imply that even Sieyès, the greatest theorist of constituent power, viewed it as limited by certain principles derived from his natural law conceptions.<sup>54</sup> If one takes Sieyès’ understanding of the nation as “the mass of associated men . . . all equal in rights,”<sup>55</sup> it may well be that constituent power is bound to respect certain rights that belong to all peoples. In other words, constituent power is preceded by and subordinated to natural rights of man, which the political association serves to protect.<sup>56</sup>

It is not difficult to understand this conception which finds its roots in the medieval understanding of natural law as a certain “divine will of god” with immutable characteristics.<sup>57</sup> Natural law is based on the premise that there is a perpetual higher law which is superior even to the sovereign. This is compatible with how early political writers conceived natural law. Even in Jean Bodin’s theory of sovereignty, the power of the “sovereign prince” was not unlimited, but was restricted by natural law:

[f]or if we say that to have absolute power is not to be subject to any law at all, no prince of this world will be sovereign, since every earthly prince is subject to the laws of God and of nature and to various human laws that are common to all peoples.<sup>58</sup>

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<sup>52</sup> SIEYÈS, *supra* note 16, at 136.

<sup>53</sup> *Id.*

<sup>54</sup> See William E. Scheuerman, *Revolutions and Constitutions: Hannah Arendt’s Challenge to Carl Schmitt*, 10 CANADIAN J.L. & JURIS. 141, 149 (1997) (exploring Sieyès’s conception of natural law).

<sup>55</sup> Emmanuel Joseph Sieyès, *A Preliminary to the Constitution* [1789], in AN ACCOUNT OF THE LIFE OF SIEYÈS 77, 95 (Konrad Engelbert Oelsner ed., 2013).

<sup>56</sup> Raymond Kubber, *L’Abbe de Sieyès—Champion of National Representation, Father of Constitutions*, in CONSTITUTIONS AND THE CLASSICS: PATTERNS OF CONSTITUTIONAL THOUGHT FROM FORTESCUE TO BENTHAM 290, 299 (D.J. Galligan ed., 2014).

<sup>57</sup> THOMAS AQUINAS, TREATISE ON LAW 63–64 (Richard J. Regan trans., 2000).

<sup>58</sup> JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH 10 (Julian H. Franklin ed. & trans., 2004). See Stéphane Beaulac, *The Social Power*

If natural law is supreme, then it cannot be violated, not even by the constitution. Indeed, many great Eighteenth and Nineteenth Century European thinkers such as Pufendorf, Vattel, Burlamaqui, and Rutherford believed that governmental power was limited by natural law and could not contradict it.<sup>59</sup>

Within modern ideas of natural law and natural rights, which rest upon the relationship between law and morals, law is a means to achieve certain moral values, which can be discovered by reason.<sup>60</sup> Invoking “natural law” or “natural rights,” some scholars hold the view that certain rights have a *supra-constitutional* status in that they cannot be altered even by constitutional means, such as constitution-making.<sup>61</sup> If the constitution is a form of human law, it must be subject to the higher standard of natural law.<sup>62</sup> As Roscoe Pound explained, “there are rights in every free government beyond the reach of the state, apparently beyond the reach even of a constitution . . . .”<sup>63</sup>

In France, the question of the existence of any *supra-constitutional* limits on the *constituent power* has received rather wide attention.<sup>64</sup> For example, authors such as Maurice Hauriou and Léon Duguit defend the

*of Bodin's 'Sovereignty' and International Law*, 4 MELBOURNE J. INT'L L. 1, 13–15 (2003) (discussing Bodin's theory of sovereignty).

<sup>59</sup> J. J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 156 (7th ed. 1859); T. RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 373 (2d ed. 1832); EMER DE VATTEL, *THE LAW OF NATIONS* 20 (Joseph Chitty & Edward D. Ingraham eds., 1852); 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO: THE TRANSLATION OF THE EDITION OF 1688*, at 1133 (C. H. Oldfather & W. A. Oldfather trans., 1934).

<sup>60</sup> See, e.g., ALEXANDER PASSERIN D'ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 54, 78–79 (Routledge 2017) (1951) (discussing the relationship between morals, law, and reason).

<sup>61</sup> Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 INT'L J. CONST. L. 69, 84 n.40 (2007); Everett V. Abbott, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183, 184 (1920); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1073–74 (1991).

<sup>62</sup> CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 115 (Ignatius Press rev. ed. 1999) (1993).

<sup>63</sup> ROSCOE POUND, *JURISPRUDENCE* 499 n.92 (2008).

<sup>64</sup> See, e.g., Stéphane Rials, *Supraconstitutionnalite et Systematicite du Droit*, in ARCHIVES DE PHILOSOPHIE DE DROIT 57 (1986) (defining the notion of supra-constitutionality and demonstrating how supra-constitutionality manifests itself in particular through the French Declarations of Rights, and analyzing the consequences of supra-constitutional principles on the legal system); Serge Arné, *Existe-t-il des normes supra-constitutionnelles*, 2 REVUE DU DROIT PUBLIC 460 (1993) (defining supra-constitutionality as the superiority of certain rules or principles qualified as ‘norms,’ which may appear expressly or implicitly in the text, over the content of the Constitution); Louis Favoreu, *Souveraineté et supraconstitutionnalité*, 67 POUVOIRS 71 (1993) (covering sovereignty and supra-constitutionality); Georges Vedel, *Souveraineté et supraconstitutionnalité*, 67 POUVOIRS 79 (1993) (discussing the points at which sovereignty and supra-constitutionality intersect); Michel Troper, *On Super-Constitutional Principles*, in JUSTICE, MORALITY AND SOCIETY: A TRIBUTE TO ALEKSANDER PECZENIK ON THE OCCASION OF HIS 60TH BIRTHDAY 411 (Aulis Aarnio et al. eds., 1997) (discussing the contradictory terms in the expression “super-constitutional”).

view that the Declaration of the Rights of Man and the Citizen of 1789 is not constitutive but rather recognizes and declares pre-existing rights and therefore has a supra-constitutional status. Accordingly, the Declaration of Rights imposes limits on the state's ordinary legislative powers and even on constitutional legislation.<sup>65</sup>

Drawing on the writings of Hauriou, even Schmitt had argued, during the Weimar period, that certain basic freedoms “have, as an outstanding French theorist of public law, Maurice Hauriou has explained, a ‘*superlégalité constitutionnelle*’, which is raised not only above the usual simple laws, but also over the written constitutional laws . . . .”<sup>66</sup>

Paradoxically perhaps, this notion was revived after the Second World War as German jurisprudence in the post-Nazi regime era was characterised by the rejection of pure positivism and the endorsement of natural law ideas and supra-constitutional principles which are superior to positive law.<sup>67</sup> This was best expressed by the Bavarian Constitutional Court's famous statement from 1950: “There are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms . . . can be void because they conflict with them.”<sup>68</sup> In the 1951 *Southwest* case, the German Federal Constitutional Court cited and re-affirmed this statement.<sup>69</sup> According to this understanding, the constitution-making power can establish a system of rules and values only within the limits imposed by higher natural law which exists “above” positive law.<sup>70</sup>

Since by definition, natural law is considered as external and superior to all positive law, a theory that recognises natural law as a form of a superior higher law must lead to the conclusion that the constituent power is limited. Accordingly, the reading of the traditional conception of constituent power as extra-legal, does not necessarily draw the conclusion that it is an unlimited power. In other words, according to this

<sup>65</sup> MAURICE HAURIU, *PRÉCIS DE DROIT CONSTITUTIONNEL* 245 (1923); LÉON DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 560–61 (2d ed. 1923). For sources cited in both HAURIU and DUGUIT, see Alain Laquière, *État de Droit and National Sovereignty in France*, in *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* 267–68 (Pietro Costa & Danilo Zolo eds., 2007).

<sup>66</sup> GOPAL BALAKRISHNAN, *THE ENEMY: AN INTELLECTUAL PORTRAIT OF CARL SCHMITT* 162 (2000). For Schmitt's original language, see CARL SCHMITT, *LEGALITY AND LEGITIMACY* 58–60 (Jeffrey Seitzer ed. & trans., 2000) (1932).

<sup>67</sup> Gottfried Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany*, 42 *VA. L. REV.* 1, 8–9 (1956); Heinrich Rommen, *Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany*, 4 *NAT. L.F.* 1, 5 (1959).

<sup>68</sup> Decision from April 4, 1950, 2 *Verwaltungs-Rechtsprechung* No. 65, *quoted in* Dietze, *supra* note 67, at 16.

<sup>69</sup> Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Oct. 23, 1951, *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFGE] 1, 14 (Ger.).

<sup>70</sup> OTTO BACHOF, *VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN?* 15–32 (1951).

understanding, constituent power may be extra-constitutional and unbound by existing constitutional forms or limitations, allowing the people to replace the constitution with a new one or adopt a constitution in a constitutional vacuum, but it might still be subordinated to natural law and rights boundaries.<sup>71</sup>

Theories of natural law are of course controversial and raise many difficulties. In the sections that follow, I argue that even if one does not accept the above understanding of constituent power as bound by natural law, there are nowadays three possible routes of restrictions on constituent power. These derive from international law, basic principles of constitutionalism, and limits inherent in the notion of constituent power as the power of a people giving itself a constitution.

### III. EXPLORING THREE ROUTES OF RESTRICTIONS ON CONSTITUENT POWER

In this section I would like to argue that constituent power must be regarded as limited by evolving norms of international law, constitutionalism, and the nature of constituent power itself.

#### A. *International and other Supra-national Law*

Contemporary international and supra-national law influence our understanding of the constitution-making process,<sup>72</sup> and may also shape our understanding of constituent power as a limited power.<sup>73</sup>

It has been increasingly argued of late that the constitutional powers, including constitution-making and amending powers, are substantially limited by international law, such as international human rights law or jus cogens norms.<sup>74</sup> Also, emerging international and supra-national legal rules

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<sup>71</sup> MARKKU SUKSI, BRINGING IN THE PEOPLE: A COMPARISON OF CONSTITUTIONAL FORMS AND PRACTICES OF THE REFERENDUM 25–26 (1993).

<sup>72</sup> See, e.g., Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 3, 3–5 (Laurel E. Miller ed., 2010); Vivien Hart, *Constitution Making and the Right to Take Part in a Public Affair*, in FRAMING THE STATE, *supra* at 20, 20–22; Thomas M. Franck & Arun K. Thiruvengadam, *International Law and Constitution-Making*, 2 CHINESE J. INT'L L. 467, 468–70 (2003).

<sup>73</sup> See Didier Maus, *The Influence of Contemporary International Law on the Exercise of Constituent Power*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION, *supra* note 1, at 45, 54–57 (discussing constituent power within international public law, specifically in the form of treaties).

<sup>74</sup> For further discussion on the limitations that international law imposes on constitutional law, see, for example, Matthias Hartwig, *What Legitimises a National Constitution? On the Importance of International Embedding*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 311, 324–27 (Armin von Bogdandy & Pál Sonnevend eds., 2015); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1195–97 (2005); Vincent J. Samar, *Can a Constitutional Amendment Be Unconstitutional?*, 33 OKLA. CITY U. L.

now address issues such as constitutional transformations.<sup>75</sup> Larry Backer summarises this idea: “[S]upra-national constitutionalism posited limits on national constitution-making grounded in an evolving set of foundational universal norms *derived* from the understandings of basic right and wrong developed by consensus among the community of nations.”<sup>76</sup>

In an earlier work, I examined possible supra-constitutional limitations on the constitutional amendment power.<sup>77</sup> I have argued that from the perspective of international law, a state has to comply with its international obligations regardless of any conflicting domestic laws, even if it is constitutional law.<sup>78</sup> According to Article 27 of the Vienna Convention on the Law of Treaties of 1969: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>79</sup> The phrase ‘internal law’ includes internal constitutional law. This is supported by international judicial practice. In the international arbitration case of *Montijo* from 1875, it was stated that “a treaty is superior to the constitution, which latter must give way.”<sup>80</sup> In the Permanent Court of International Justice Advisory Opinion from 1932 regarding *Treatment of Polish Nationals in the Danzig Territory*, the Court stated that according to generally accepted principles: “[A] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”<sup>81</sup> Such superiority of supra-national law over domestic constitutions was also established in regional jurisprudence. For example, in several cases, the European Court of Human Rights (ECtHR) established its authority to review constitutional

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REV. 667, 693 (2008); Jorge Tapia Valdés, *Poder Constituyente Irregular: Los Límites Metajurídicos del Poder Constituyente Originario*, 6 ESTUDIOS CONSTITUCIONALES 121, 122–24 (2008).

<sup>75</sup> David Landau, *Democratic Erosion and Constitution-Making Moments: The Role of International Law*, 2 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 87, 100–05 (2017); Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. MIAMI L. REV. 417, 422 (2008).

<sup>76</sup> Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISS. C. L. REV. 11, 16–17 (2007).

<sup>77</sup> Yaniv Roznai, *The Theory and Practice of ‘Supra-Constitutional’ Limits on Constitutional Amendments*, 62 INT’L & COMP. L.Q. 557, 558, 593 (2013).

<sup>78</sup> *See id.* at 577 (“For international law, a state has to comply with its international obligations regardless of any conflicting domestic laws—be it primary legislation, secondary legislation or even a constitutional norm.”).

<sup>79</sup> United Nations Vienna Convention on the Law of Treaties art. 27, May 22, 1969, 1155 U.N.T.S. 331.

<sup>80</sup> Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 ICL J. 170, 183–84, 184 n.74 (2009) (citing JOHN BASSETT MOORE, *Case of the “Montijo”: Agreement Between the United States and Colombia of August 17, 1874*, in HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1421, 1440 (1898)).

<sup>81</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 42, at 24 (Feb. 4).

provisions vis-à-vis the European Convention on Human Rights (ECHR).<sup>82</sup> In one case, the ECtHR criticized Article 70(5) of the Hungarian Constitution for indiscriminately depriving the right to vote from persons placed under total or partial guardianship.<sup>83</sup> In *Sejdic and Finci v. Bosnia and Herzegovina*, the ECtHR held that a constitutional provision limiting the right to be elected in parliamentary and presidential elections to people belonging to Bosniak, Croatian, and Serb groups is discriminatory, and the disqualification of Jewish and Roma origin candidates constitutes a breach of the ECHR.<sup>84</sup> In the case of *Anchugov and Gladkov*, the ECtHR declared that the Russian Constitution's absolute ban on the right to vote for prisoners was incompatible with the Convention.<sup>85</sup> Accordingly, Marco Antonio Simonelli rightly claimed that "the Strasbourg Court is in the right position to play a key role in verifying the compliance with the Convention . . . of constitutional amendments and provisions and thus in the dissemination of the idea of a supranational constitutionalism."<sup>86</sup> Thus, today, the core protections of the ECHR functions as some kind of "minimum constitutional guarantees."<sup>87</sup>

The superiority of regional law over domestic constitutional law is not restricted to Europe. In its advisory opinion number four, the Inter-American Court of Human Rights held that its authority includes all national legislation, including constitutional legislation.<sup>88</sup> For fifteen years, this determination had not been applied until the *Castillo Petruzzi and Others v. Peru* case, in which the court ordered, for the first time, to amend a constitutional provision that limited access to the court.<sup>89</sup> And, in *Olmedo-Bustos et al. v. Chile*, the court held that the Chilean Constitution concerning film censorship is incompatible with the Inter-American

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<sup>82</sup> See Lech Garlicki & Zofia A. Garlicki, *External Review of Constitutional Amendments? International Law as a Norm of Reference*, 44 ISR. L. REV. 343, 362–63, 363 n.42 (2011) (discussing two cases in which the European Court of Human Rights reviewed the conventionality of constitutional provisions).

<sup>83</sup> *Alajos Kiss v. Hungary*, App. No. 38832/06, Eur. Ct. H.R. 2, 12–13 (2010).

<sup>84</sup> *Sejdić v. Bosnia & Herzegovina*, App. No. 27996/06 & 34836/06, Eur. Ct. H.R. 32–36 (2009).

<sup>85</sup> *Anchugov & Gladkov v. Russia*, App. No. 11157/04 & 15162/05, Eur. Ct. H.R. 1, 30 (2013).

<sup>86</sup> Marco Antonio Simonelli, *Towards a Theory of "Unconventional Constitutional Amendments": Some Lessons from the Baka Case*, 39 DPCE ONLINE 1561, 1578 (2019).

<sup>87</sup> Tilmann Altwicker, *Convention Rights as Minimum Constitutional Guarantees? The Conflict Between Domestic Constitutional Law and the European Convention of Human Rights, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA*, *supra* note 74, at 331, 333.

<sup>88</sup> Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 14 (Jan. 19, 1984), [http://www.corteidh.or.cr/docs/opiniones/seriea\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_04_ing.pdf).

<sup>89</sup> *Castillo Petruzzi et al. Case, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 52, at 67, ¶ 14 (May 30, 1999), <https://www.refworld.org/pdfid/44e494cb4.pdf>.



Convention on Human Rights, and following which Chile amended its constitution accordingly.<sup>90</sup>

In Africa, the African Court on Human and People's Rights established its authority to review the compatibility of constitutional norms with the African Convention on Human and People's Rights.<sup>91</sup> In 2013, in *Mtikila and Others v. Republic of Tanzania* case, the African Court held that certain prohibitions on the right of independent candidates to be elected infringes the Convention and ordered Tanzania to reexamine its constitutional provisions.<sup>92</sup>

A final example is the Security Council (SC) Resolution 554 of 1984 regarding the Constitution of South Africa of 1983 that entrenched apartheid.<sup>93</sup> In that resolution, the SC declared that it “strongly rejects and declares as null and void the so-called ‘new constitution,’” due to its contradiction of the principles of the U.N. Charter, mainly racial equality.<sup>94</sup> This resolution demonstrates that constitutions can no longer ignore international settings.<sup>95</sup>

This section aimed to show that it is now plausible to derive certain limitations on constituent authority from international and supra-national norms, which place boundaries on constitutional powers.

Nevertheless, as I elaborated elsewhere, the main problem with such limitations is their enforceability. Recall, although the South African Constitution of 1983 was declared “null and void,” it remained in force for ten years, until it was replaced by the Interim Constitution in 1994.<sup>96</sup> And decisions of the Strasbourg Court of Human Rights, or any other regional court for that matter, do not directly affect the legal validity of domestic constitutional provisions.<sup>97</sup> In the cases of *Sejdie and Finci v. Bosnia and*

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<sup>90</sup> Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶ 4 (Feb. 5, 2001), [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_73\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf).

<sup>91</sup> Adem Kassie Abebe, *Taming Regressive Constitutional Amendments: The African Court as a Continental (Super) Constitutional Court*, 17 INT'L J. CONST. L. 89, 105 (2019). On the court generally, see *id.* at 105–12.

<sup>92</sup> Christopher R. Mtikila v. Republic of Tanzania, Nos. 009/2011 & 011/2011, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 109, 126 (June 14, 2013), <http://en.african-court.org/index.php/55-finalised-cases-details/843-app-no-011-2011-rev-christopher-r-mtikila-v-united-republic-of-tanzania-details>.

<sup>93</sup> Goler Teal Butcher, *Legal Consequences for States of the Illegality of Apartheid*, 8 HUM. RTS. Q. 404, 433 (1986).

<sup>94</sup> S.C. Res. 554, ¶ 2 (Aug. 17, 1984), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/487/84/IMG/NR048784.pdf?OpenElement>.

<sup>95</sup> See Ulrich K. Preuss, *Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization*, 51 N.Y.L. SCH. L. REV. 466, 492 (2006–2007) (discussing the need to consider global surroundings in evaluating the role of constitutions).

<sup>96</sup> Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 67 (1999).

<sup>97</sup> Nils Muižnieks, *Non-Implementation of the Court's Judgments: Our Shared Responsibility*,

*Herzegovina, Mtikila and Others v. Republic of Tanzania*, and *Anchugov and Gladkov*, notwithstanding the regional courts' decisions, the "unconventional" constitutional provisions remain valid. The influence of supra-national tribunals is only in the external—not internal—juridical sphere.<sup>98</sup>

This does not mean that international law has no role to play within the domestic sphere. A recent development in Latin America, in that respect, is telling. In several cases, domestic courts in Costa Rica, Nicaragua, Honduras, and Bolivia, used international law, and especially human rights law, to declare invalid or ineffective constitutional provisions concerning presidential term limits.<sup>99</sup> Limiting the term of office, according to these cases, contradicts international human rights law and the right to elect or be elected.<sup>100</sup> Arguably, such decisions, although making international law effective within the domestic sphere, are not necessarily a blessing for international law as they also demonstrate how courts (and often captured courts) can misuse international human rights to promote anti-democratic agendas.<sup>101</sup>

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COMMISSIONER FOR HUM. RTS. (Aug. 23, 2016), <https://academic.oup.com/ejil/article/23/2/401/487300>.

<sup>98</sup> Roznai, *supra* note 77, at 560; see also Kemal Gözler, *La Question de la Supériorité des Normes de Droit International Sur la Constitution*, 45 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ 195, 206 (1996) (arguing that the superiority of international law norms does not invalidate internal standards).

<sup>99</sup> Sentencia 02771, Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice] Apr. 4, 2003, XII (Costa Rica); Sentencia [S.] No. 504, de las 5:00 p.m., 19 Oct. 2009, Sala de lo Constitucional, Boletín Judicial [B.J.] [Supreme Court of Justice] p. 23, Cons. III (Nicar.); Sentencia F-165, Corte Suprema de Justicia: Sala de lo Constitucional [Supreme Court of Justice: Constitutional Chamber] Apr. 22, 2015, F-165, F-180 (Hond.); Sentencia Constitucional Plurinacional 84/2017, Tribunal Constitucional Plurinacional [Plurinational Constitutional Court] 28 Nov. 2017, p. 79 (Bol.). See also David Landau, *Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine*, 12 LAW & ETHICS HUM. RTS. 225, 227 (2018) (describing the decisions in these four cases holding term limits unconstitutional); David Landau, Yaniv Roznai & Rosalind Dixon, *Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America*, in THE POLITICS OF PRESIDENTIAL TERM LIMITS 53 (Alexander Baturo & Robert Elgie eds., 2019) (describing the decisions in a number of countries, including these four, holding term limits unconstitutional); Yaniv Roznai, *Constitutional Unamendability in Latin America Gone Wrong?*, in CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA 93, 94 (Richard Albert et al. eds., 2019) (describing the decisions in these four cases holding term limits unconstitutional).

<sup>100</sup> Sentencia Constitucional Plurinacional 84/2017, Tribunal Constitucional Plurinacional [Plurinational Constitutional Court] 28 Nov. 2017, p. 79 (Bol.); Sentencia F-165, Corte Suprema de Justicia: Sala de lo Constitucional [Supreme Court of Justice: Constitutional Chamber] Apr. 22, 2015, F-165, F-180 (Hond.); Sentencia [S.] No. 504, de las 5:00 p.m., 19 Oct. 2009, Sala de lo Constitucional, Boletín Judicial [B.J.] [Supreme Court of Justice] p. 23, Cons. III (Nicar.); Sentencia 02771, Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice] Apr. 4, 2003, XII (Costa Rica).

<sup>101</sup> See generally David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313 (2020) (discussing authoritarians seeking to capture courts and deploy them as part of a broader project of democratic erosion).

In any case, both these domestic and supra-national courts' decisions demonstrate that there are supra-national boundaries on constituent authority—boundaries that may even be enforced in courts.

## B. *Basic Constitutional Principles*

A second route of restricting constituent power is through basic constitutional principles. In this section, I have divided such principles into three sub-groups: eternity clauses, pre-agreed-upon principles, and basic principles of constitutionalism.

### 1. *Eternity Clauses*

Over one third of world constitutions include “eternity clauses.”<sup>102</sup> Eternity clauses are constitutional provisions that stipulate that certain values, rules, or institutions are beyond the constitutional amendment power.<sup>103</sup> They are unamendable.<sup>104</sup> Perhaps the best example is Art. 79(3) of the German Basic Law from 1949, which prohibits constitutional amendments affecting the division of the Federation into Länder, human dignity, the constitutional order, or basic institutional principles describing Germany as a democratic and social federal state.<sup>105</sup> This provision was written against the backdrop of the Weimar Constitution's experience in an attempt to declare these fundamental values as perpetual.<sup>106</sup>

The crucial questions for our matter are: do these provisions limit in any way the constituent authority? Can they? In other words, if the German people exercise their constituent power to create a totally new constitution, are they bound by the limits of Art. 79(3)? This is a question that intrigued Richard Kay.<sup>107</sup> Some German authors have opined that Art. 79(3) must

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<sup>102</sup> Dainius Žalimas, President, Constitutional Court of Lithuania, *Eternity Clauses: A Safeguard of Democratic Order and Constitutional Identity*, [http://www.gjk-ks.org/wp-content/uploads/vendimet/Speech\\_of\\_the\\_President\\_of\\_the\\_Constitutional\\_Court\\_of\\_Lithuania\\_Prof.Dr.\\_Dainius\\_alimas.pdf](http://www.gjk-ks.org/wp-content/uploads/vendimet/Speech_of_the_President_of_the_Constitutional_Court_of_Lithuania_Prof.Dr._Dainius_alimas.pdf) (last visited Feb. 26, 2020).

<sup>103</sup> Yaniv Roznai, *Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability*, in *AN UNAMENDABLE CONSTITUTION?* 30 (Richard Albert & Bertil Emrah Oder eds., 2018).

<sup>104</sup> See YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS* 16 (2017) (describing “eternity clauses,” or “unamendable” constitutional provisions); Yaniv Roznai, *Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability*, in *AN UNAMENDABLE CONSTITUTION*, *supra* note 103, at 30 (discussing “eternity clauses” or “provisions of unamendability”); SILVIA SUTEU, *ETERNITY CLAUSES IN DEMOCRATIC CONSTITUTIONALISM* (forthcoming 2021).

<sup>105</sup> See Helmut Goerlich, *Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany*, 1 NAT'L U. JUD. SCI. L. REV. 397, 401 (2008) (discussing Article 79(3) and the underlying principles); Ulrich K. Preuss, *The Implications of “Eternity Clauses”*: *The German Experience*, 44 ISR. L. REV. 429, 440 (2011) (discussing the origins and purpose of Article 79(3)).

<sup>106</sup> Goerlich, *supra* note 105, at 398.

<sup>107</sup> Kay, *supra* note 13, at 727.

apply to future constitution-making processes.<sup>108</sup> Others have claimed that the eternity clause does not limit the people's constituent power, while some have remarked that this issue should be solved by the Federal Constitutional Court.<sup>109</sup> However, in the Lisbon Case, the Constitutional Court left this question unanswered.<sup>110</sup>

I think that the answer to this complex question should be negative. Such provisions limit only the more limited amendment power, but they cannot limit the constituent power, which—as aforementioned—is unbound by the rules of the prior constitution. Eternity clauses restrict the amending power (what I term the secondary constituent power), but they do not restrict the original (or primary) constituent power of the people, who are ultimately free to shape and reshape their society, independent from constitutional boundaries.<sup>111</sup> This, however, does not mean that constitutional principles cannot limit constituent authority in certain instances.

## 2. *Pre-determined Principles*

At times, the constitution-making process is guided by pre-determined, pre-agreed-upon, or pre-imposed principles. An example of the latter might be “the terse instructions of the military governors in Germany to the *Parlamentarischer Rat* in 1948, provid[ing] parameters that facilitated the expeditious production of a clear basic law.”<sup>112</sup>

In the 1970s, the prescription of binding principles to constitution-makers occurred in the international involvement in Namibia.<sup>113</sup> In 1977, the U.S., Canada, France, the U.K., and Germany initiated diplomatic efforts to solve the problem of South Africa.<sup>114</sup> In 1982, in consultation with all interested parties, they (the “Western Contact Group”) produced a set of “principles for a constitution for an independent

<sup>108</sup> For a discussion of the debate among German authors, see Christoph Möllers, ‘*We are (afraid of) the people*’: *Constituent Power in German Constitutionalism*, in LOUGHLIN & WALKER, *supra* note 3, at 87, 97.

<sup>109</sup> *Id.*; see also JO ERIC KHUSHAL MURKENS, FROM EMPIRE TO UNION: CONCEPTIONS OF GERMAN CONSTITUTIONAL LAW SINCE 1871, at 173–75 (2013).

<sup>110</sup> BverfG, 2 BvR 182/09, June 30, 2009, [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html) (discussing the “open question” of whether the eternity clause limits the people’s constituent power); see also Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says “Ja Zu Deutschland”*, 10 GERMAN L.J. 1241, 1256 (2009) (noting that the court “explicitly leaves open whether the German people themselves might not be bound by the eternity clause”).

<sup>111</sup> ROZNAI, *supra* note 104, at 113.

<sup>112</sup> François Venter, *Constitution Making and the Legitimacy of the Constitution*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION, *supra* note 1, at 9, 16.

<sup>113</sup> Marinus Wiechers, *Namibia: The 1982 Constitutional Principles and Their Legal Significance*, in NAMIBIA: CONSTITUTIONAL AND INTERNATIONAL LAW ISSUES 2 (Dawid Van Wyk et al. eds., 1991).

<sup>114</sup> *Id.* at 3.

Namibia” to guide the constitution-making process.<sup>115</sup> The principles included: supremacy of a rigid and justiciable constitution, separation of powers, regular multi-party democratic elections, bill of rights, prohibition on retroactive legislation, balanced public and security services, fair personnel policies, and elected councils for regional or local administrations.<sup>116</sup> The principles obtained international legitimacy through their acceptance by the U.N. Security Council.<sup>117</sup> When the constituent assembly was established, it abided by the latter principles.<sup>118</sup>

The idea of fundamental principles as limiting constitution-making received an interesting treatment during the establishment of the new post-apartheid South-African constitution. The interim Constitution of 1994 stipulated that the constitution-making process would take place within a framework of thirty-four agreed-upon principles.<sup>119</sup> These principles ensured that political parties publicly pledge themselves to a definite vision, clarifying the direction of the constitution-making process.<sup>120</sup> The Constitutional Court of South Africa was empowered to review the draft Constitution’s compliance with those principles. In its review (the famous *Certification* case), the Court declared that the Constitution, although establishing democratic institutions and protecting human rights, failed to comply with certain agreed-upon principles, and was therefore unconstitutional.<sup>121</sup> Only after the amendment of the draft Constitution did the Constitutional Court declare that it complied with the principles.<sup>122</sup>

Therefore, it appears that there is a possibility of imposing limitations on constitution-making powers through pre-determined principles. Yet, it

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<sup>115</sup> Principles for a Constitution for an Independent Namibia, *reprinted in* SOUTHERN AFRICA IN THE COLD WAR, POST-1974, at 434 (Sue Onslow & Anna-Mart Van Wyk eds., 2013).

<sup>116</sup> *Id.*

<sup>117</sup> Wiechers, *supra* note 113, at 8.

<sup>118</sup> François Venter, *Constitution Making and the Legitimacy of the Constitution*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION, *supra* note 1, at 9, 16; *see also* Wiechers, *supra* note 113, at 8 (noting that these principles became “part and parcel of the overall peace plan”); Dawid Van Wyk, *The Making of Namibian Constitution: Lessons for Africa*, 24 COMP. & INT’L L.J. S. AFR. 341, 342 (1991) (describing the drafting of the Namibian Constitution).

<sup>119</sup> Arthur Chaskalson, *Constitutions Are Shaped by History: An Account of The Making of South Africa’s New Constitution*, in LAW AND JUSTICE: AN ANTHOLOGY 153, 167–68, 171–77 (Soli J. Sorabjee ed., 2003).

<sup>120</sup> Sam Brooke, *Constitution-Making and Immutable Principles* 3, 10 (2005) (unpublished M.A. thesis, The Fletcher School, Tufts University).

<sup>121</sup> *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) at 264–67 (S. Afr.). *See* Albie Sachs, *South Africa’s Unconstitutional Constitution: The Transition from Power to Lawful Power*, 41 ST. LOUIS U. L.J. 1249, 1257 (1997) (“In nine respects, it was deficient, and therefore we could not certify that this new Constitution complied with the principles.”).

<sup>122</sup> *Certification of the Amended Text of the Constitution of the Republic of South-Africa*, 1996 (2) SA 97 (CC) at 118–120 (S. Afr.). *See* HEINZ KLUG, *THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS* 85 (2010) (discussing the making of the Constitution Court’s role in certifying that South Africa’s constitution followed the principles).

is fair to say that constituent power voluntarily accepted upon itself these limitations rather than being obliged by them. Alternatively, one may claim that the initial decision concerning the guiding principles was the “real” constitution-making moment.<sup>123</sup> Regardless of any theoretical approach taken to explain such constitution-making process, what is clear is that constitution-making power may be successfully restricted by pre-agreed principles.

In the next sub-section, I argue the modern understanding of constitutionalism may limit the scope of exercise of constitution-making powers.

### 3. *Basic Principles of Constitutionalism*

In the Eighteenth century, a significant political objective behind constitution-making was freedom. Constitutionalism as a movement was directed against monarchical absolutism, and its consequent oppressive restrictions upon individual freedoms. Likewise, as lessons of totalitarian dictatorships, post-WWII constitution-making put, once again, freedom as its prime objective.<sup>124</sup> Clearly, nowadays it is a common understanding that “[p]rinciples of freedom should guide the liberated nations and republics in framing their constitutions.”<sup>125</sup>

In the past, the idea of constitutionalism seemed to introduce a supra-positivist element of evaluation to constitutional theory by insisting that a law may be “legal” according to positive law but “unconstitutional” if it conflicts with historically received, imperative constitutional norms—a “spirit of the laws” to use Montesquieu,<sup>126</sup> or *Volksgeist*, as juridically formulated by von Savigny as the accumulated weight of the national legal tradition.<sup>127</sup>

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<sup>123</sup> See JACOBSON & ROZNAI, *supra* note 7, at 63–64; 235–36; see also Henk Botha, *Instituting Public Freedom or Extinguishing Constituent Power? Reflections on South Africa’s Constitution-Making Experiment*, 26 S. AFR. J. HUM. RTS. 66, 75 (2010) (explaining the “difficulties in the notion of a self-present, unified ‘people’ capable of self-legislation without the mediation of pre-established legal procedures”); Karol Edward Soltan, *Constitution Making at the Edges of Constitutional Order*, 49 WM. & MARY L. REV. 1409, 1419 (2008) (asserting that there is “no such moment” of constitution-making).

<sup>124</sup> Carl J. Friedrich, *Some Reflections on the Meaning and Significance of Constitution-Making in Our Time*, in Festschrift für Karl Loewenstein: Aus Anlass seines achtzigsten Geburtstages 119, 122–24 (1971).

<sup>125</sup> BERNARD H. SIEGAN, *DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM* 72 (2d ed. 1994).

<sup>126</sup> CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., 1989).

<sup>127</sup> Neetij Rai, *Basic Concept of Savigny’s Volksgeist* (Mar. 16, 2011) (unpublished paper, Kathmandu School of Law), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1788347](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788347); see also FREDERICK CHARLES VON SAVIGNY, *Origin of Positive Law*, in *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 26–27, 29 (Abraham Hayward trans., Littlewood & Co., 2d ed.

Nowadays, constitutionalism is anchored on certain principles such as the recognition of the people as the source of all governmental authority; the supremacy of the constitution; the constitutional regulation and limitations of the power of government; and adherence for the rule of law and respect for fundamental rights.<sup>128</sup> And it appears, as François Venter claimed, that the growing universality of standards of constitutionalism represents a significant form of integration whereby a common language of constitutionalism is being developed. These principles of the modern constitutional states which are becoming globally standardized may have a powerful influence on the legitimacy of the constitution.<sup>129</sup>

Vicki C. Jackson asserts that the goal of constitution-making is not to produce a written constitution, but to promote constitutionalism.<sup>130</sup> *Constitutions are a means, not goals themselves.* Therefore, an emerging approach may well be that constitutionalism and constitutions are inseparably linked so that an exercise of constituent power which would undermine principles of constitutionalism would not automatically bind society.<sup>131</sup> Recall Art. 16 of the French Declaration of the Rights of Man of 1789 that puts it bluntly: “A society in which the guarantee of rights is not assured, nor the separation of powers provided for, has no constitution.”<sup>132</sup> This is a conceptual argument. Just as a chair requires certain features to be considered a chair, so thus a constitution must include certain features in order to be described as a constitution. In other words, in order to be legitimately exercised, constituent power must ensure certain basic principles of constitutionalism.<sup>133</sup> This might seem to be a limitation which is imposed upon constituent power from its very purpose. As Carlos Bernal recently argued:

[T]here cannot be a constitution without constitutionalism. In this regard, the concept of a constitution, which we use in both ordinary and technical language, implies, at least, four

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1831) (1814) (discussing the weight of legal relations and the growth of law alongside the growth of the people it governs).

<sup>128</sup> See, e.g., Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 39, 40–42 (Michel Rosenfeld ed., 1994) (setting out the various demands of constitutionalism); see generally DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT AND FUTURE 472 (2016); N. W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM 7–8 (2018).

<sup>129</sup> Venter, *supra* note 112, at 20–22.

<sup>130</sup> Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1254 (2008).

<sup>131</sup> See Dante B. Gatmaytan, *Can Constitutionalism Constrain Constitutional Change?*, 3 NW. INTERDISC. L. REV. 22, 37 (2010) (suggesting that courts should “engage in defensive judicial activism” to ensure that constitutional amendments do not undermine the constitutions that they are amending).

<sup>132</sup> GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 7 (1997).

<sup>133</sup> Venter, *supra* note 112, at 28.

essential elements: the rule of law, the principle of the separation of powers, some sort of protection to individual rights or—at least—interests that are guaranteed by the Constitution or the legislation, and an entrenchment of the democratic idea that the legitimacy of government rests on the consent of its subjects.<sup>134</sup>

Nevertheless, since under the banner of constitutionalism there are numerous nuances of ideas—and each carries a myriad of different formal and substantive aspects, varied and contested meanings—it is very difficult to develop a comprehensive treatise on the precise meaning of constitutionalism: “the greatest crisis of constitutionalism is the absence of universal consensus on its nature and purpose.”<sup>135</sup> This is the main challenge for any theory of limitations on constitution-making powers deriving from basic principles of constitutionalism. However, I think that this challenge might be relaxed. While we perhaps cannot agree on a precise list of what the basic principles of constitutionalism are and what these principles exactly include,<sup>136</sup> we can agree, at the very minimum, on what are the essential principles of constitutionalism and what is the minimal core of these principles. This may be a useful starting point for understanding the essential characteristics of constitutionalism, and without which the exercise of constituent power would be illegitimate.

### C. *Limitations inherent to the concept of Constituent Power*

Finally, I wish to suggest that the very concept of constituent power may carry certain inherent limitations, by the fact that at the basis of the theory of constituent power is the power of the people to create and recreate their constitutional world. It must involve actual, deliberate, free choice by society’s members.<sup>137</sup> While it is preferable that the exercise of constituent power should be inclusive, participatory, and deliberative—after all, the word *constituere*, Andreas Kalyvas reminds us, marks the act

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<sup>134</sup> Carlos Bernal, *Constitution-Making (Without Constituent) Power: On the Conceptual Limits of the Power to Replace or Revise the Constitution*, in CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA, *supra* note 99, at 21, 34–35 (footnotes omitted).

<sup>135</sup> Venter, *supra* note 112, at 15.

<sup>136</sup> See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 138–39 (2002) (documenting the difficulty of developing a working definition of terms underlying democracy, such as the “Rule of Law”).

<sup>137</sup> Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15–16 INDIAN Y.B. INT’L. AFF. 375, 410 (1970). See also Kostas Chryssogonos, *Popular Involvement in Constitution-Making*, 20 REVUE EUROPÉENNE DE DROIT PUBLIC 1299, 1300 (2008) (describing constituent power as one of several possible events that involve “major institutional and social reconstruction”).



of founding together, jointly<sup>138</sup>—I do not claim that this is an inherent limitation on constituent power. Rather, I make two more modest claims.

First, an important aspect of the exercise of constituent power is the maintenance of the core of freedoms such as freedom of speech, free and fair elections, freedom from arbitrary arrest, and freedom of assembly and association, the absence of which “spell the death for the legal concept that is constituent power.”<sup>139</sup>

Walter Murphy contended that there are certain limitations even “on the constitutive power of the people as whole.”<sup>140</sup> Basing his argument on John Stuart Mill’s rejection of a person’s right to sell him to slavery, Murphy claims that even if the whole population agreed to destroy the democratic order and replace it with a new order that would deny them democracy’s basic values, this might be prohibited in order to protect themselves and future generations.<sup>141</sup> I wish to take this argument forward but in a narrower manner and from a different angle.

In order to protect the very idea of constituent power; in order for constituent power to be exercised in the future and to allow and facilitate the people’s exercise of constituent power, those rights which form the basis of constituent power must be protected.<sup>142</sup> In other words, the exercise of constituent power cannot result in the abolition of rights such as freedom of expression and assembly, and political rights, which are necessary in order for constituent power to reappear in the future.<sup>143</sup> The exercise of constituent power must maintain its “capacity to rethink the constitutional order as a whole”<sup>144</sup> Minimum core of rights that are necessary for constituent power to be exercised and re-exercised must be kept.

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<sup>138</sup> Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTITUTIONS 223, 235–36 (2005).

<sup>139</sup> Shouvik Kumar Guha & Moiz Tundawalla, *Constitution: Amended It Stands?*, 1 NUJS L. REV. 533, 543 (2008). See also Dietrich Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6–7 DELHI L. REV. 1, 12 (1977–1978) (emphasizing the need for free debate, freedom from arbitrary arrest, and freely conducted elections in order for there to be a genuine exercise of constituent power).

<sup>140</sup> WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 516 (2007).

<sup>141</sup> *Id.* at 514–17; Walter F. Murphy, *Staggering Toward the New Jerusalem of Constitutional Theory: A Response to Ralph F. Gaebler*, 37 AM. J. JURIS. 337, 352 (1992); Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 163, 178–79 (Sanford Levinson ed., 1995).

<sup>142</sup> Satya Prateek, *Today’s Promise, Tomorrow’s Constitution: “Basic Structure”, Constitutional Transformations and the Future of Political Progress in India*, 1 NUJS L. REV. 417, 464 (2008).

<sup>143</sup> COLÓN-RÍOS, *supra* note 8, at 117–18.

<sup>144</sup> WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 203 (1993).

Second, the exercise of constituent power must be consistent with the idea of “the people.”<sup>145</sup> An exercise of constituent power that results in the alienation of groups in the society undermines the very *raison d'être* of constituent power. Constituent power must be committed to popular sovereignty.<sup>146</sup> If “the people” or some parts thereof are excluded from the polity and are no longer able to exercise constituent power, this should influence the legitimacy of the constitution-making process.<sup>147</sup> One cannot use “constituent power” in order to undermine the very notion of “constituent power.” This limitation is of course one of legitimacy, not of legality.

### CONCLUSION

David Dyzenhaus has recently argued that the question of constituent power exists outside of normative constitutional theory.<sup>148</sup> Dyzenhaus encouraged constitutional scholars to focus on the constitution’s authority as founded on the intrinsic morality of law rather than to concentrate their effort on the idea of constituent power, which is external to the legal order.<sup>149</sup> However, constituent power remains a central theme in constitutional theory. I agree with János Kis that there is no other satisfactory answer but “the power of the people” as the ultimate source of state power, and instead of abandoning constituent power, “[i]t should be given such an interpretation that . . . may not be mobilized for the purposes of totalitarian politics.”<sup>150</sup> This Article is a beginning of an attempt to reconceive constituent power, or perhaps to better understand its scope.

The conception underlying sovereign power is that it is unlimited and subject to no law.<sup>151</sup> Indeed, McIlwain writes, “[s]peaking generally, the power of the people can have no limits. It is idle to speak of it as either *de facto* or *de jure* if this implies a difference. . . .”<sup>152</sup> Certainly, according to

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<sup>145</sup> See Martin Loughlin, *The Concept of Constituent Power*, 31 EUR. J. POL. THEORY 218, 231 (2014) (“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*.”).

<sup>146</sup> *Id.* at 229.

<sup>147</sup> *Id.*

<sup>148</sup> David Dyzenhaus, *The Politics of the Question of Constituent Power*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 3, at 129, 143–45.

<sup>149</sup> David Dyzenhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 1 GLOBAL CONSTITUTIONALISM 229, 233–34 (2012); see also Yasuo Hasebe, *On the Dispensability of the Concept of Constituent Power*, 3 INDIAN J. CONST. L. 39, 47–49 (2009) (“Constituent power is thus necessary to the specification of the abstract principles of political morality prescribed by basic norms.”).

<sup>150</sup> JÁNOS KIS, CONSTITUTIONAL DEMOCRACY 137 (Zoltán Miklósi trans., 2003).

<sup>151</sup> C. H. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD: COLLECTED PAPERS 29 (1939).

<sup>152</sup> *Id.* at 37.

the traditional conception of *constituent power*, it is original, inherent and unlimited power.<sup>153</sup> However, McIlwain also argued:

I want to plead here against any weakening of our constitutional limitations of power, even the power of the people themselves; in the interest of individuals or minorities among the people. For the people have now succeeded to the power of the benevolent despots of the eighteenth century, and in the exercise of it they are often swayed by special interests or crafty demagogues as their predecessors were by favourites. I frankly want to rely on the earlier, the sounder, yes the medieval principle, that there are some individual rights that even a people's government can never touch.<sup>154</sup>

Long ago, Benjamin Constant, who feared the danger posed to liberty by revolutionaries like Robespierre and his fellow Jacobins, cautioned against the danger of unlimited popular sovereignty.<sup>155</sup> While embracing the principle of popular sovereignty, Constant claimed that neither the people as a whole nor their representatives possess total authority over the lives of individuals: "Sovereignty of the people is not unlimited."<sup>156</sup>

Indeed, constituent power is not unlimited. True, it is unconstrained by existing (or prior) constitutional norms but it is not omnipotent. Constituent power, I claimed, was never considered to be totally without bounds, as scholars regarded it as restricted by notions of natural law or natural rights.

Returning to Richard Kay's article on constituent authority, the concluding words are fascinating. Constituent authority, Kay writes, is a fact.<sup>157</sup> "Since it is a fact that principally concerns how people regard constituent events, however, it can and does change over time."<sup>158</sup> I argue that regardless of how constituent power was traditionally understood in the past (although I tried to show why such readings were not always accurate), nowadays, constituent authority has changed. It should no longer be considered as a boundless power. At present time, one may sketch three routes of boundaries on constitution-making powers: boundaries deriving from international and supra-national law; boundaries deriving from basic principles (either determined prior to constitution-making process or deriving from basic understanding of constitutionalism); and boundaries inherent in the very concept of constituent power. Of course, a related but

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<sup>153</sup> Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983, 1988–89 (2013).

<sup>154</sup> McILWAIN, *supra* note 151, at 263.

<sup>155</sup> Benjamin Constant, *On the Sovereignty of the People*, in 2 SOLONIAN REPRINTS 1, 2 (Casey Bowman trans., 1996) (1815).

<sup>156</sup> *Id.* at 5.

<sup>157</sup> Kay, *supra* note 13, at 761.

<sup>158</sup> *Id.*

different question to any internal or external constraints on constitution-making power is their enforcement. Even if such limitations exist, as I claim, it is questionable how likely they are to work in practice.<sup>159</sup> I leave this question for another time.

In a recent conference, Ignacio Gutierrez argued that the constituent power cannot do everything it wishes; it needs to “create a constitution.”<sup>160</sup> Can we, he asked, by exercising constituent power, select the song to the Eurovision?<sup>161</sup> “The constituent authority may be many things[,]” Kay writes, “but it is not anything we want it to be.”<sup>162</sup> In this Article, I claim that constituent authority may be many things, but it not unlimited.

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<sup>159</sup> See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 373–75 (1995) (explaining the upstream and downstream constraints on the constitution-making process).

<sup>160</sup> Ignacio Gutiérrez, Conference on Constitutional Amendments and Protection of Democracy in Oviedo, Spain (May 29, 2019). See Ignacio Gutiérrez, *Intangible Democracy: On the Interpretation of Art. 79.3 of the German Basic Law*, 7 INT’L J. HUM. RTS. & CONST. STUD. 356–72 (2020).

<sup>161</sup> *Id.*

<sup>162</sup> Kay, *supra* note 13, at 761.