
Is it time to abandon the theory of constituent power?

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A group of scholars has shown that the theory of constituent power—which seeks to describe and justify the dismantling of the constitutional order and its replacement with a new constitution—is flawed. The analytical tools the theory deploys fail to explain how constitution-making processes unfold. Also, the theory has been subject to normative challenges that question its democratic nature. However, the theory remains a mainstream idea in many countries, and some academics have attempted to defend its democratic nature. I claim that those attempts have rendered the theory meaningless or failed to address all of its problems. I then raise two objections. First, the constituent power theory cannot be used to justify most—if any—constitution-making processes without an excessive idealization of the founding moment, but we are yet to understand the actual costs of that idealization. Second, redeemers of the theory need to decide whether constitution-making can operate under reasonably favorable electoral and democratic conditions or not. Ideal conditions are improbable when constitutional change is carried out in response to a crisis. In the unlikely case that these conditions can be met, using an idea of constitutional change as radical as the constituent power theory is not warranted from a normative perspective. I call this the dilemma of constituent power redemption.

1. Introduction

The constituent power theory occupies a central place in constitutional thought.¹ Even though it has not achieved the status of a mainstream academic idea in the United States² or the United Kingdom,³ it forms part of the dominant academic discourse

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¹ See, e.g., Miguel Vatter, *Legality and Resistance: Arendt and Negri on Constituent Power*, 20 *KAIROS* 191 (2002); MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 13 (2014); RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* 72 (2019).

² See Stephen Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 49 (Martin Loughlin & Neil Walker eds., 2007). For the idea that the people can manifest themselves outside the amendment process, see, e.g., Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. CHI. L. REV.* 1043 (1988); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457 (1994).

³ See Martin Loughlin, *Constituent Power Subverted: From English Constitutional Arguments to British Constitutional Practice*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM*, *supra* note 2, at 27, 27.

in many countries that follow the continental European legal tradition. Important textbooks on comparative constitutional law discuss the theory of constituent power,⁴ and landmark works of constitutional theory dedicate several pages to discuss it, from older seminal pieces such as Carl Friedrich's book⁵ to influential contemporary works such as Martin Loughlin's *Foundations of Public Law*.⁶ The constituent power theory plays a relevant role in the debate on whether the European Union should have a written constitution,⁷ and in the political narratives associated with recent domestic constitution-making processes—I will provide some examples later. Many scholars tend to present the theory in uncritical or even laudatory ways. Dieter Grimm, for example, in his widely cited article on the "Achievement of Constitutionalism," claims that the function of constitutionalism can only be achieved if we maintain the distinction between constituent power and constituted power.⁸ Contemporary defenders of the constituent power theory include scholars such as Antonio Negri and Andreas Kalyvas.

The idea of the constituent power—typically associated with the work of Emmanuel-Joseph Sieyès and the Nazi scholar Carl Schmitt—has been widely used to describe and justify the supposedly unconstrained and absolute power to abolish a constitutional system and enact a new constitution. Even though the theory has many versions, according to the most influential account, which will be referred to as the conventional approach, the *constituent* power is different from the *constituted* powers because the latter necessarily include organs that derive their authority from a previously existing norm, while the former relates directly to a superior bearer that operates outside the legal system, even preceding it. The most extended interpretation of this view suggests that the bearer of the constituent power is *the people* acting with unlimited powers, while the constituted powers—such as judges, legislators, constitutional amenders, and administrative agencies—are mere institutional entities whose powers are necessarily constrained by the constitution.⁹ The theory has both descriptive and normative dimensions. The descriptive dimension tries to explain how constitutions are replaced or created with an absolute power, and the normative dimension attempts to justify

⁴ See, e.g., NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 116–18 (2d ed. 2010); Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 419, 422–5 (Michel Rosenfeld & András Sajó eds., 2012); TUSHNET, *supra* note 1, at 13–19.

⁵ CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 132–55 (rev'd ed. 1964).

⁶ MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 221–7 (2010).

⁷ See, e.g., MARKUS PATBERG, *CONSTITUENT POWER IN THE EUROPEAN UNION* (2020). On the debate of a possible global approach to constituent power, see Markus Patberg, *Against Democratic Intergovernmentalism: The Case for a Theory of Constituent Power in the Global Realm*, 14 *INT'L J. CONST. L.* 622 (2016); Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 *INT'L J. CONST. L.* 697 (2016); Neil Walker, *The Return of Constituent Power: A Reply to Mattias Kumm*, 14 *INT'L J. CONST. L.* 906 (2016); Chris Thornhill, *Rights and Constituent Power in the Global Constitution*, 10 *INT'L J. L. CONTEXT* 357 (2014); Geneviève Nootens, *Constituent Power and People-as-the-Governed: About the "Invisible" People of Political and Legal Theory*, 4 *GLOBAL CONST.* 137 (2015).

⁸ Dieter Grimm, *The Achievement of Constitutionalism and Its Prospects in a Changed World*, in *THE TWILIGHT OF CONSTITUTIONALISM?* 9 (Petra Dobner & Martin Loughlin eds., 2010).

⁹ See *infra* Section 2.

such power of replacement or creation, or to suggest the enactment of a new constitution based on the unlimited will of the people, or to justify the establishment of limits to the amending power. The argument claims that, if the people are to be free, then the power to resist an already established regime and replace it with a new order should not be constrained by the constituted powers. That way, popular emancipation can take place and the people can dismantle corrupt or authoritarian institutions without the influence or control of the previous authoritarian or corrupted ruler.

The conventional version of the constituent power theory is hard to resist for many constitutional theorists interested in the question of how to legitimize the constitutional order.¹⁰ According to them, the people is supposed to be the exclusive legitimate author of the constitution and every alternative notion should be rejected and considered antidemocratic.¹¹ As the editors of a recent edited volume on *Constituent Power* have pointed out, the notion “a rule ‘of the people, by the people, for the people’ is. . . not easy to let go of, bound up as it is with creative, egalitarian and participatory impulses that are proper to democracy itself.”¹² Even strong critics of the constituent power theory still defend a narrow use of the term. Examples include Zoran Oklopčič, who believes that the peoplehood rhetoric has pragmatic benefits;¹³ Mark Tushnet, who rejects a sociological approach to the constituent power theory and suggests that the idea is useful in “purely conceptual terms,” though it has a practical output for the unconstitutional constitutional amendment doctrine;¹⁴ and Giuseppe Martinico, who claims that constituent power is part of a populist narrative and then suggests that it is a “noble but ambiguous concept.”¹⁵ How would anyone dare to challenge the view that the people have—and should have—the exclusive and absolute power to shape the constitutional order?

This appeal sometimes reaches actors influencing constitution-making processes or seeking to legitimize established regimes that possess dubious democratic credentials, including authoritarian normative theories such as those that justify the authority of the Chinese Communist Party and its connection to the Chinese people.¹⁶ the

¹⁰ See, e.g., Yaniv Roznai, *The Boundaries of Constituent Authority*, 52 CONN. L. REV. 1381, 1406 (2021).

¹¹ See, e.g., DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT 74 (2009). See also Zoran Oklopčič, *Inter-venire, sed ubi ire? “Imposed” Constitutions, the “Will” of “the People,” and the Eye of the Beholder*, in *THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS* 139, 140 (Richard Albert, Xenophon Contiades, & Alkmene Fotiadou eds., 2019).

¹² Matilda Arvidsson, Leila Brannstrom, & Panu Minkkinen, *Editors’ Introduction to CONSTITUENT POWER: LAW, POPULAR RULE AND POLITICS* 1, 2 (Matilda Arvidsson, Leila Brannstrom, & Panu Minkkinen eds., 2020).

¹³ Zoran Oklopčič, *Three Arenas of Struggle: A Contextual Approach to the Constituent Power of “the People.”* 3 GLOBAL CONST. 200, 232 (2014).

¹⁴ Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13 INT’L J. CONST. L. 639 (2015).

¹⁵ GIUSEPPE MARTINICO, FILTERING POPULIST CLAIMS TO FIGHT POPULISM: THE ITALIAN CASE IN COMPARATIVE PERSPECTIVE 100 (2022).

¹⁶ Xie Libin & Haig Patapan, *Schmitt Fever: The use and abuse of Carl Schmitt in contemporary China*, 18 INT’L J. CONST. L. 130, 134 (2020) (explaining how Schmitt’s idea of the sovereign has helped to support the view that “the sovereign is the Chinese people under the leadership of the CCP [the Chinese Communist Party]”).

Schmittian justifications for a sort of “leader democracy” (sic) in Hungary,¹⁷ the use of the constituent power theory in the rise of the Pinochet Constitution in Chile,¹⁸ and Hugo Chávez’s constituent power narrative for developing his political project in Venezuela.¹⁹ The uses of the constituent power theory as a political narrative sometimes involve more credible democratic ideas which are situated in constitution-making processes that have not come to an end yet, or in those that have not even started. This was the case, for example, of the scholars and politicians that pushed for a constituent assembly in Chile using Schmittian-type arguments,²⁰ and of the courts that helped open the way to the (initially illegal) constituent assemblies of Venezuela and Colombia by explicitly appealing to the constituent power theory.²¹

Sometimes the constituent power rhetoric is used by political leaders that seek a political narrative to replace a constitutional order and invoke the power of the people as a justification to dismantle institutions and open a constitution-making process, often with dubious democratic results.²² Latin American presidents Rafael Correa, Evo Morales, and Hugo Chávez invoked the constituent power notion as a political narrative to justify the establishment of a constituent assembly, which partly relied on symbolic and descriptive notions of representation that connected to their personae as interpreters of the popular will.²³ Using Oklopcic’s words—and despite the criticisms we can articulate against the processes that took place in Bolivia, Ecuador, and Venezuela—the leaders of those processes succeeded to “shape folk imaginations of scenes that evoke the people as the author of its constitution and the source of its authority.”²⁴ This view is consistent with the Schmittian formulation of the theory, which arguably requires a leader that can embody the people in a sort of plebiscitary

¹⁷ Zoltán Balázs, *Political Theory in Hungary After the Regime Change*, 7 INT’L POL. ANTHROPOLOGY 22, 12, 16 (2014).

¹⁸ Renato Cristi, *The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile’s 1980 Constitution*, 21 CARDOZO L. REV. 1749 (2000); RENATO CRISTI, EL PENSAMIENTO POLÍTICO DE JAIME GUZMÁN: UNA BIOGRAFÍA INTELLECTUAL (2d ed. 2011).

¹⁹ See, e.g., Dario Azzellini, *Constituent Power in Motion: Ten Years of Transformation in Venezuela*, 24 SOCIALISM & DEMOCRACY 8, 19 (2010) (explaining how the constituent power narrative was a “key normative idea in the Bolivarian process,” showing evidence that Chávez read Antonio Negri’s book on constituent power and the way he used Negri’s ideas in his discourses).

²⁰ See, e.g., GABRIEL SALAZAR, EN EL NOMBRE DEL PODER POPULAR CONSTITUYENTE (CHILE, SIGLO XXI) (2011); FERNANDO ATRIA, LA CONSTITUCIÓN TRAMPOSA (2013); Fernando Muñoz León, “Chile es una República Democrática”: *La Asamblea Constituyente como Salida a la Cuestión Constitucional*, ANUARIO DERECHO PÚBLICO, no. 1, at 60 (2013); ERIC EDUARDO PALMA & MARÍA FRANCISCA ELGUETA, ¿QUIERE USTED UNA NUEVA CONSTITUCIÓN? (2020).

²¹ Joel I. Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, 18 CONSTELLATIONS 365 (2011). See also Jesús María Casal Hernández, *The Constitutional Chamber and the Erosion of Democracy in Venezuela*, 80 HEIDELBERG J. INT’L L. 913 (2020).

²² See, e.g., David Landau, *Constituent Power and Constitution-Making in Latin America*, in COMPARATIVE CONSTITUTION-MAKING 567 (Hanna Lerner & David Landau eds., 2019).

²³ See José M. Díaz de Valdés & Sergio Verdugo, *The ALBA Constitutional Project and Political Representation*, 17 INT’L J. CONST. L. 479 (2019). See an examination of the use of the constituent power theory in these cases in Nina Massúger, Sánchez Sandoval, & Yanina Welp, *Legality and Legitimacy. Constituent Power in Venezuela (1999), Bolivia (2006–2009) and Ecuador (2007–2008)*, in PATTERNS OF CONSTITUTIONAL DESIGN: THE ROLE OF CITIZENS AND ELITES IN CONSTITUTION-MAKING 103 (Fernando Méndez & Jonathan Wheatley eds., 2013).

²⁴ Oklopcic, *supra* note 11, at 140.

democracy.²⁵ It is not—as Dixon and Landau have suggested—that leaders that have pushed for agendas that involve the erosion of democracy have abused the theory.²⁶ On the contrary, those kinds of abuses are compatible with the conventional account of the theory. Whether this makes the theory less defensible or not is an entirely different question.

Despite its widely assumed appeal, the theory has met with strong criticisms that question both its descriptive and normative dimensions. The critics include a first generation of scholars such as Hans Kelsen and Hannah Arendt,²⁷ as well as contemporary scholars such as David Dyzenhaus, Vicky Jackson, Lars Vinx, Víctor Ferreres Comella, David Landau, Yasuo Hasebe, and George Duke.²⁸ As I will show, the criticisms vary. Some have accused the constituent power theory for failing to describe or explain historical founding moments.²⁹ Others have also questioned the theory’s normative appeal by claiming that it fails to justify legal norms from an internal legal perspective,³⁰ or that it is unnecessary to justify constitutions.³¹ Some claim that the theory can lead to authoritarian or populist outcomes and can challenge important liberal and democratic principles,³² while promoting institutional instability and unpredictable political processes. Others have gone beyond the criticisms and have offered alternative ways to explain and justify processes of constitution-making. Andrew Arato, for example, has suggested a “post-sovereign” paradigm that widens the sources of constitutional legitimation,³³ and Carlos Bernal has offered a conceptual account that uses the idea of constitution making “without constituent power.”³⁴

Reacting to these criticisms, and sometimes accepting some of the theories’ problems, a group of scholars have defended the constituent power theory—or a particular use of the theory—by trying to rework its concept, by theorizing on its limits, or by narrowing its applications. This group of theorists include people such as Joel

²⁵ See *infra* Sections 2 and 3.

²⁶ ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 116–18 (2021) (suggesting that the theory can be “turned toward anti-democratic ends.” However, they later add that “[t]he tension between constituent power theory and liberal democratic constitutionalism is deep and—perhaps—inevitable”).

²⁷ See Hans Kelsen, *On the Essence and Value of Democracy* [1927], in WEIMAR: A JURISPRUDENCE OF CRISIS 67 (Arthur Jacobson & Bernhard Schlink eds., 2000). See also Hanna Lukkari, *Hannah Arendt and the Glimmering Paradox of Constituent Power*, in CONSTITUENT POWER: LAW, POPULAR RULE AND POLITICS, *supra* note 12, at 97.

²⁸ See *infra* Section 3.

²⁹ See *infra* Sections 3.1 and 3.2.

³⁰ See David Dyzenhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 1 GLOBAL CONST. 229 (2012) [hereinafter Dyzenhaus, *Constitutionalism in an Old Key*]; David Dyzenhaus, *The Politics of the Question of Constituent Power*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 2, at 129.

³¹ See, e.g., Yasuo Hasebe, *On the Dispensability of the Concept of Constituent Power*, 3 INDIAN J. CONST. L. 39 (2009).

³² See *infra* Section 3.4.

³³ ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY (2016).

³⁴ 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 21 (Richard Albert, Carlos Bernal, & Juliano Zaiden Benvindo eds., 2019). See also Chris Thornhill, *Contemporary Constitutionalism and the Dialectic of Constituent Power*, 1 GLOBAL CONST. 369, 376 (2012).

Colón-Ríos,³⁵ Richard Stacey, Hans Lindahl, Yaniv Roznai, and Martin Loughlin, just to name a few.³⁶ The difference between these scholars and the promoters of the conventional account of the constituent power theory is that they have offered theoretical corrections or promoted the idea that the theory should be used in specific ways. They use different strategies. For example, some have attempted to rearticulate the idea by rejecting an ethnic-national or organic approach to the idea of the people;³⁷ by providing a dialogic or reflective conceptualization;³⁸ or by claiming that a targeted use of the constituent power theory is justifiable in the particular case of the unconstitutional constitutional amendment doctrine or of the preservation of eternity clauses.³⁹ Others have claimed that the concept of constituent power involves inherent democratic principles that ought to shape the way constitution-making processes take place or that could only serve to defend certain types of constitutional content.⁴⁰ They advocate the use of substantive and procedural limits to the concept of constituent power. For them, either constitution-making processes cannot infringe the limits or they infringe those limits only to become something other than a constituent power.

The redeemers seem to accept that, even though it is possible for a political process that infringed on their requirements to end up enacting a document formally called *constitution*, this document should not be conceived as a genuine constitution. This document would not be the true expression of the constituent power. For example, some authors have used democratic principles to criticize the constitution-making process that ended in the enactment of Hungary's Fundamental Law.⁴¹ Using the language of the constituent power, Andrew Arato and Gábor Halmai have claimed that the Fundamental Law "cannot be regarded as the expression of the democratic constituent power of Hungarian society."⁴² This example shows that the authors accept the use of the idea of constituent power, but they still deny that it can help legitimize the 2011 Hungarian Constitution. On their account, it is implicit in the idea that there

³⁵ It is possible to argue that Joel Colón-Ríos is not, after all, a redeemer of the theory because he had opposed the sovereign constitution-making paradigm, and seeks an understanding that builds on Rousseau's theory. See, e.g., Joel Colón-Ríos, *Arato's Adventures: Between Sovereignty and Constituent Power*, 41 *REVUS* 1 (2020). However, some of the arguments made by Colón-Ríos in other works offer corrections that seem to try to redeem the theory, at least in part. See *infra* Section 4.2.

³⁶ See *infra* Section 4.

³⁷ Although not precisely—or necessarily—a redeemer, it is useful to take into account Joseph Weiler's rejection of the Schmittian organic version of the "demos." See, e.g., Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 *EUR. L. J.* 219 (1995).

³⁸ See *infra* Section 4.4.

³⁹ See *infra* Section 4.5.

⁴⁰ See *infra* Section 4.2.

⁴¹ See, e.g., Kim Lane Scheppele, *Autocratic Legalism*, 85 *U. CHI. L. REV.* 545 (2018); Gábor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 243 (Mark A. Graber, Sanford Levinson, & Mark Tushnet eds., 2018). Compare with the narrower criticism of András Jakab & Pál Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, 9 *EUR. CONST. L. REV.* 102 (2013).

⁴² Andrew Arato & Gábor Halmai, *So that the Name Hungarian Regain Its Dignity: Strategy for the Making of a New Constitution*, *Verfassungsblog* (July 2, 2021), <https://verfassungsblog.de/so-that-the-name-hungarian-regain-its-dignity/>.

can be—and should be—a manifestation of the constituent power of the people in Hungary, but not through the Fidesz-controlled Parliament.

In contrast to the wide use of the constituent power theory, and against its defenders and redeemers, I argue that the attempts to recover the theory are problematic, and that the claim to abandon the theory should be seriously discussed. From a descriptive point of view, those attempts are not able to present an accurate picture of how constitution-making processes operate, unless they present a minimal definition of constituent power in terms of the power to create a constitution—but then, the main features of the theory and its normative appeal get lost.⁴³ The theory is historically irrelevant or misleading, as there is no such thing as a unified people acting with a single voice. Those attempts either fail to correct all the flaws that the critics have identified, or end up emptying the constituent power idea from its core elements.⁴⁴

However, it is still possible to use the theory on purely normative grounds, either retrospectively or prospectively. A retrospective use attempts to provide an interpretation or justification of past events. A prospective use of the theory tries to describe or justify ongoing and unfinished agendas of constitutional change, or future events. Using a prospective approach to interpret present or future political movements can be risky. The theory does not provide for precise categories to understand social and political movements that haven't yet finished. In particular, a political leader seeking to dismantle a constitutional order is likely to invoke the theory as a political narrative in a prospective way—i.e., to justify future changes claiming that *the people* is on their side.⁴⁵ Also, the inherent instability that the theory promotes can put at risk previously agreed rules that define a constitution-making procedure by questioning the authority of the so-called *constituted* powers—which are seen as inferior to the constituent power. Thus, invoking the constituent power theory during constitution-making procedures can trigger opportunistic behaviors by politicians seeking to circumvent procedures that do not favor them. Moreover, a prospective use of the theory has an important limitation: we cannot predict whether the future constitution will be accepted as a shared understanding of all relevant parts of the society.

Yet, a pure retrospective approach seeking to interpret history and even idealizing it is still possible. I claim that these later attempts to narrow down the theory can still be subject to two objections. First, idealized versions of history can end up invisibilizing or marginalizing important sectors of society in unequal ways, while trivializing historically existent but normatively undesirable ways to organize the society. In other words, it depends on a highly romanticized perception of the constitutional founding. Second, limiting the idea of the constituent power is an attempt that is still subject to what I call the dilemma of constituent power redemption.

This dilemma suggests that there are two alternative, but unfavorable, scenarios for the redeemers. The first choice consists of using the theory to approach a non-ideal

⁴³ I thank George Duke for suggesting this idea.

⁴⁴ See *infra* Section 2.

⁴⁵ On the risks of invoking the constituent power narrative in ongoing constitution-making processes, see Marcela Prieto & Sergio Verdugo, *How Political Narratives Affect the Self-Enforcing Nature of Interim Constitutions*, 13 HAGUE J. RULE L. 265 (2021).

scenario where the conditions for democratic procedures to operate reasonably well are non-existent. Most—if not all—constitutional moments present a damaged party system and electoral institutions that are unlikely to function in stable, impartial, and predictable ways. Peaceful deliberations among rival sections of society and effective political representation are unlikely in these conditions. Constituent assemblies can still exist, of course, but they are established and operate in conditions that are far from acceptable under ordinary circumstances. The second available choice is the use of the theory in an ideal context in which the conditions work reasonably well. A claim saying that electoral institutions can arguably present a fair representation of society is more persuasive while allowing for peaceful debates conducted in a predictable process.

The problem for the redeemers of the constituent power theory is that, if the first scenario takes place, then the appeals to the idea of *the people* will be unconvincing unless a populist or authoritarian approach to the people is endorsed. However, if the second scenario materializes—which is unlikely—then one may wonder whether invoking such a radical political narrative for constitutional change is warranted at all. If democratic institutions and procedures are working reasonably well, and if we accept the fact that those institutions and procedures depend on how well the constituted powers operate, then a radical call to dismantle the entire constitutional order and replace it with a new one, opening an omnibus-type of legislative discussion on every relevant aspect of the constitutional regime, is unjustified. If a formal constitution needs to be replaced in those conditions, then we will need a theory that can reconcile the need for continuity and change with the need to promote relevant changes in a better way than the constituent power theory.

Responding to this type of criticism, Jacobsohn and Roznai, two authors who have defended the use of the constituent power theory, claim that the theory does not need to be abandoned because it is possible to achieve a balance between continuity and radical transformation within multistage processes, such as the South African constitution-making history.⁴⁶ In short, the idea of constitutional revolution can capture the idea of change within a process that had important degrees of legal continuity, even though, in the end, the legitimacy of the process still depends on the “people’s constituent power.”⁴⁷ However, it is unclear why the constituent power theory is needed, and what exactly the constituent power theory is helping to understand in these kinds of scenarios. If anything, the level of abstraction of the constituent power theory is making it impossible to identify moderating and consensual elements in a multistage constitution-making process.⁴⁸ The existence of alternative

⁴⁶ GARY JEFFREY JACOBSON & YANIV ROZNAI, CONSTITUTIONAL REVOLUTION 235–6 (2020).

⁴⁷ *Id.* at 14 (“the constitutional revolution may be brought about by constituted powers; yet to claim a mantle of legitimacy, the process that culminates in transformative constitutional change should aspire to approximate the people’s constituent power”).

⁴⁸ This is not to say, of course, that Jacobsohn and Roznai are wrong with their conceptualization of “constitutional revolution.” For a review of their constitutional revolution idea, see Erika Arban & Dinesha Samararatne, *What’s Constitutional about Revolutions?*, 42 OXFORD J. LEGAL STUD. 680 (2022). See also Stephen Gardbaum, *Revolutionary Constitutionalism*, 15 INT’L J. CONST. L. 173, 177 (2017).

theoretical frameworks—such as Arato’s post-sovereign idea to explain the South African process—seems to provide more accurate conceptual categories to understand the balance between change and continuity.⁴⁹

Either way, the attempt to redeem the theory is not persuasive from a normative point of view. Moreover, the constituent power theory inevitably tends to reject other sources of legitimacy too quickly.

All of these considerations make the question that motivates this article—is it time to abandon the constituent power theory?—more important. To be sure, I am not the first academic arguing that this question should be taken seriously. David Dyzenhaus has made an interesting argument that seeks to show how constituent power is not a helpful concept for normative constitutional theory, and how it can produce ambivalence as to whether authority is located within the legal system.⁵⁰ According to him, normative theories should focus on an internal approach to legal authority. Yasuo Hasebe makes a similar claim by arguing that the constituent power theory is not an independent normative theory because it needs additional principles of morality to justify the legitimacy of a constitution.⁵¹ Lars Vinx offers another critique by suggesting that the unbound nature of the constituent power prevents justifying the constitution on previously identified requirements of justice, harming the theory’s normative appeal.⁵² Though the arguments by Dyzenhaus, Hasebe, and Vinx should generate an important debate in constitutional theory,⁵³ the objections that I make in this article are of a different nature.

The next sections of this article proceed as follows. Section 2 briefly discusses the conventional account of the constituent power theory. Section 3 offers a typology of criticisms that suggest that the theory is flawed. Section 4 summarizes and discusses the attempts to redeem the theory. Section 5 explains how the romanticized version of the theory is problematic and, thus, even normative and retrospective attempts should be taken cautiously. Section 6 further develops the dilemma of constituent power redemption, and Section 7 comes back to the redeemers’ attempts and contrasts their views with the two objections presented in the previous sections.

2. The conventional approach to constituent power

There are different versions of the constituent power theory,⁵⁴ and, to some degree, the meaning of constituent power is contested.⁵⁵ Joel Colón-Ríos claims that there are five

⁴⁹ See ANDREW ARATO, *THE ADVENTURES OF THE CONSTITUENT POWER: BEYOND REVOLUTIONS?* (2017).

⁵⁰ See Dyzenhaus, *Constitutionalism in an Old Key*, *supra* note 30; Dyzenhaus, *The Politics of the Question of Constituent Power*, *supra* note 30.

⁵¹ Hasebe, *supra* note 31, at 47–9.

⁵² Lars Vinx, *Ernst-Wolfgang Böckenförde and the Politics of Constituent Power*, 10 *JURISPRUDENCE* 15 (2018).

⁵³ See Martin Loughlin, *The Concept of Constituent Power*, 13 *EUR. J. POL. THEORY* 218 (2014); Alexander Somek, *The Owl of Minerva: Constitutional Discourse Before Its Conclusion*, 71 *MOD. L. REV.* 473 (2008).

⁵⁴ There are alternative versions of the constituent power theory that I do not discuss in this article. See, e.g., Joel Colón-Ríos, *Rousseau, Theorist of Constituent Power*, 36 *OXFORD J. LEGAL STUD.* 885 (2016); Filippo Del Lucchese, *Machiavelli and Constituent Power: The Revolutionary Foundation of Modern Political Thought*, 16 *EUR. J. POL. THEORY* 3 (2017).

⁵⁵ MARTIN LOUGHLIN, *AGAINST CONSTITUTIONALISM* 82 (2022).

“conceptions,”⁵⁶ and Lucia Rubinelli has shown that the term “constituent power” has been redefined several times without much consistency.⁵⁷ Scholars typically offer extensive literature reviews showing how theorists such as Vedel, Donoso Cortés, Carré de Malberg, and Böckenförde have used the theory.⁵⁸ It is even possible to trace the idea to authors such as Jean Bodin and John Locke.⁵⁹ In this article, I focus on what Thornhill calls the “classical doctrine of constituent power”⁶⁰ and what Oran Doyle calls “the predominant account of constituent power.”⁶¹ I call this approach *conventional* because it is the most widely used version of the constituent power theory.⁶² They consider that the constituent power belongs to the people and that, in Bernal’s words, that power is “foundational, legally boundless and sovereign.”⁶³

The conventional approach can be built in three steps. It starts with Sieyès’s ideas on constituent power, then continues to examine the way Schmitt interpreted Sieyès, and concludes by trying to make sense of Schmitt’s theory through a democratic lens. As I will explain, the conventional approach is contradictory because Schmitt misinterpreted Sieyès.⁶⁴

Let us start with a brief description of Sieyès’s thought. According to Sieyès, popular sovereignty is executed through constituent power.⁶⁵ Once a constitution is enacted, constituent power disappears and only constituted powers can act, but always within the limits laid down by the constitution:⁶⁶

[The] nation exists prior to everything; it is the origin of everything. It is always legal. It is the law itself. Prior to the nation and above the nation there is only natural law. . . . In each of its parts a constitution is not the work of a constituted power but of a constituent power. No type of delegated power can modify the conditions of its delegation. It is in this sense, and in no other, that constitutional laws are *fundamental*. The first of these, those that establish the legislature, are *founded* by the national will prior to any constitution. They form its first level. The second should also be established correspondingly, by a special representative will. Thus all the parts of a government are answerable to and, in the last analysis, dependent upon the nation.⁶⁷

⁵⁶ The United Kingdom’s version of the sovereign Parliament, the discussion on the constituent subject of the British colonies, the idea of constituent power as including an imperative mandate, the right of resistance, and Sieyès-Schmitt’s ideas. This article addresses this last topic. See Joel Colón-Ríos, *Five Conceptions of Constituent Power*, 130 LAW Q. REV. 306 (2014).

⁵⁷ LUCIA RUBINELLI, *CONSTITUENT POWER: A HISTORY* (2020).

⁵⁸ See the useful literature reviews in ARATO, *supra* note 33, at 19–74; JOEL COLÓN-RÍOS, *CONSTITUENT POWER AND THE LAW* 3–17 (2020).

⁵⁹ To be sure, these authors do not use the term “constituent power” but they resemble some of the theory’s elements. In the case of John Locke, for example, scholars such as Martin Loughlin and Joel Colón-Ríos see a version of the constituent power theory in the way Locke conceived the right to overthrow the government. Colón-Ríos, *supra* note 56; LOUGHLIN, *supra* note 55, at 77–8, 84.

⁶⁰ Thornhill, *supra* note 34. The idea of a “classic” idea is also found in the work of David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859, 867 (2015).

⁶¹ Oran Doyle, *Populist Constitutionalism and Constituent Power*, 20 GER. L.J. 161 (2019).

⁶² See also ALBERT, *supra* note 1, at 72 (describing this approach as the “dominant view of the field”).

⁶³ Bernal, *supra* note 34, at 24.

⁶⁴ See RUBINELLI, *supra* note 57, at 109–40.

⁶⁵ GRIMM, *supra* note 11, at 73.

⁶⁶ See, e.g., *id.* at 40–1. See also Antonios Kouroutakis, *The Virtues of Sunset Clauses in Relation to Constitutional Authority*, 41 STATUTE L. REV. 16, 17 (2020).

⁶⁷ Emmanuel Joseph Sieyès, *What is the Third State*, in *THE ESSENTIAL POLITICAL WRITINGS* 43, 136 (Oliver W. Lembeck & Florian Weber eds., Michael Sonenscher trans., Brill 2014).

Constitutions are designed “only for the government,” and the nation is not “bound by the formalities or the constitution to which it had subjected those it had mandated. If a nation had to wait for a *positive* mode of being in order to become a nation, it would simply never have had any existence. A nation is formed solely by *natural law*. Government, on the other hand, is solely a product of positive law.”⁶⁸ Sieyès continues: “Government can exercise real power only insofar as it is constitutional. It is legal only insofar as it is faithful to the laws imposed upon it. The national will, on the other hand, simply needs the reality of its existence to be legal. It is the origin of all legality. Not only is a nation not subject to a constitution, it *cannot* and *should* not be.”⁶⁹

Note that, for Sieyès, natural law limits constituent power—even though scholars rarely attempt to identify ways in which the limits of natural law can be enforced.⁷⁰ Perhaps they assume that only positive law is binding or that natural law can only be politically enforceable.⁷¹ However, there are reasons to believe that Sieyès’s constitutional jury—another idea he promoted—intended to “tame constituent power.”⁷² Moreover, as Lucia Rubinelli’s research has shown, based on an examination of a series of documents that complement Sieyès’s famous pamphlet on *What Is the Third State?*, the idea of constituent power was initially conceived as a way to moderate the Jacobin approach to sovereignty.⁷³ Then, in the context of the French Revolution and despite its antimonarchical version, Sieyès’s account of the constituent power was originally conceived as a moderated theory that also relied on ideas such as political representation and basic constraints.⁷⁴

Schmitt developed his understanding of sovereignty in *Political Theology*. Even though his idea of sovereignty, as presented in that book, tends to differ from Schmitt’s later conceptualization of constituent power,⁷⁵ that book is important because this is where Schmitt famously suggested that “[a] sovereign is he who decides on the exception.”⁷⁶ His first explicit accounts on constituent power can be found in his works on dictatorship—where he starts discussing the idea of constituent power—as well as in *Constitutional Theory* and *Legality and Legitimacy*, and in his writings against parliamentary

⁶⁸ *Id.* at 136–7.

⁶⁹ *Id.* at 137.

⁷⁰ See, e.g., Roznai, *supra* note 10, at 1391–4 (noticing that natural law is controversial and its use can raise difficulties). See also Joel I. Colón-Ríos, *Constituent Power, the Rights of Nature, and Universal Jurisdiction*, 60 *MCGILL L.J.* 127, 133–4 (2014).

⁷¹ See, e.g., Michel Troper, *Sovereignty*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 350, 355–6 (Michel Rosenfeld & Andrés Sajó eds., 2017) (“This fundamental idea has two consequences. The first is the idea of the hierarchy of the norms, and the second is the absence of any substantial limits to the power of the state”).

⁷² Marco Goldoni, *At the Origins of Constitutional Review: Sieyès’ Constitutional Jury and the Taming of Constituent Power*, 32 *OXFORD J. LEGAL STUD.* 211 (2012).

⁷³ Lucia Rubinelli, *How to Think beyond Sovereignty: On Sieyès and Constituent Power*, 18 *EUR. J. POL. THEORY* 47 (2019).

⁷⁴ See also LOUGHLIN, *supra* note 55, at 79–80; Thornhill, *supra* note 34, at 383–4.

⁷⁵ See COLÓN-RÍOS, *supra* note 58, at 243–7.

⁷⁶ See also Renato Cristi, *Carl Schmitt on Sovereignty and Constituent Power*, 10 *CAN. J. L. & JURIS.* 189 (1997).

democracy.⁷⁷ Even though in his early works Schmitt did not consider that it was possible to conceive a democratic version of the constituent power—he seemed to believe, as Renato Cristi has argued interpreting Schmitt’s work, that constitutional democracy and sovereignty were not compatible—Schmitt still offered a democratic version of constituent power in his examination of the origin of the Weimar Constitution.⁷⁸

For Schmitt, 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”;⁷⁹ and he believed that the “concrete existence of the politically unified people is prior to every norm.”⁸⁰ He did not believe in a diverse and plural understanding of society, and developed a concept that could control the dangers of conflict.⁸¹ The people was supposed to be a cohesive subject (in singular) whose will could be unified. A shared identity and a degree of homogeneity were necessary “for political friendship to persist.”⁸² Someone needed to embody the idea of the people, and, unlike Sieyès (according to some commentators), Schmitt arguably claimed that constituent power should be exercised by the people in an inorganic form of acclamation. It was the executive branch that could interpret the people’s will and manifest its decision.⁸³ Consistent with this idea, Schmitt may also have supported a form of plebiscitary mechanism that a president can invoke.⁸⁴

Schmitt’s interpretation of Sieyès’s theory was wrong mainly because he did not consider the limits that Sieyès identified⁸⁵ and he did not advocate for a democratic constituent assembly.⁸⁶ He also emphasized the fact that the constituent power remained an external actor that could manifest itself and intervene at any time, even after the enactment of the constitution. In other words, constituent power does not vanish after a constitution is enacted,⁸⁷ and it continues to exist “alongside and above the constitution”⁸⁸ and beside the constitution.⁸⁹ Schmitt’s (wrong) interpretation of Sieyès allowed him to change the “principle of popular power to make it consistent with his understanding of sovereignty.”⁹⁰ Constituent power

⁷⁷ CARL SCHMITT, *DICTATORSHIP* (Michael Hoelzl & Graham Ward trans., Polity 2013); CARL SCHMITT, *CONSTITUTIONAL THEORY* 125 (Jeffrey Seitzer trans., Duke Univ. Press 2008); CARL SCHMITT, *LEGALITY AND LEGITIMACY* (Jeffrey Seitzer trans., Duke Univ. Press 2004).

⁷⁸ Cristi, *supra* note 76.

⁷⁹ SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 77, at 125.

⁸⁰ *Id.* at 166.

⁸¹ LOUGHLIN, *supra* note 6, at 221–4.

⁸² Leila Brännström, *The People: Ethnoracial Configurations, Old and New*, in *CONSTITUENT POWER: LAW, POPULAR RULE AND POLITICS*, *supra* note 12, at 79, 86.

⁸³ Compare, e.g., William E. Scheuerman, *Revolutions and Constitutions: Hannah Arendt’s Challenge to Carl Schmitt*, 10 *CAN. J. L. & JURIS.* 141, 146–7 (1997); LOUGHLIN, *supra* note 55, at 83, with Hasebe, *supra* note 31, at 40–1; HÉCTOR LÓPEZ BOFILL, *LAW, VIOLENCE AND CONSTITUENT POWER* 44 (2021).

⁸⁴ See RUBINELLI, *supra* note 57, at 103–35. See also JOSHUA BRAVER, *WE, THE MEDIATED PEOPLE: POPULAR CONSTITUTION-MAKING IN CONTEMPORARY SOUTH AMERICA* 63–6 (2022).

⁸⁵ See, e.g., SCHMITT, *supra* note 77, at 76.

⁸⁶ See, e.g., Jorge Tapia Valdés, *Poder constituyente irregular: Los límites metajurídicos del poder constituyente originario*, 6 *ESTUDIOS CONSTITUCIONALES* 137 (2008).

⁸⁷ See, e.g., Cristi, *supra* note 76, at 198.

⁸⁸ SCHMITT, *supra* note 77, at 125–6. See also D. J. Galligan, *The Paradox of Constitutionalism or the Potential of Constitutional Theory?*, 28 *OXFORD J. LEGAL STUD.* 343, 358–62 (2008).

⁸⁹ Jon Wittrock, *Constituent Power and Constitutive Exceptions: Carl Schmitt, Populism and the Consummation of Secularisation*, in *CONSTITUENT POWER: LAW, POPULAR RULE AND POLITICS*, *supra* note 12, at 199, 200.

⁹⁰ RUBINELLI, *supra* note 57, at 135. See also Scheuerman, *supra* note 83.

was not, then, a way of moderating a radical invocation to sovereignty. Rather, it was a radical invocation that could question any institution or political process.

The third step consists of democratic reconstructions of the Schmittian version of the constituent power theory, seeking to defend the power of the people while emphasizing a revolutionary and extra-constitutional reality,⁹¹ despite Schmitt's non-democratic agenda. This third step typically advocates a constituent assembly that can justify its action with a popular basis, and it accepts most of the elements of Schmitt's theory, such as the unbound nature of the constituent power.⁹²

Nonetheless, although inconsistencies can be identified in the three steps described above, the conventional approach to the constituent power theory remains mainstream in many countries. Although Sieyès's formulation had a more democratic language than Schmitt's, the conventional approach to constituent power tends to be more influenced by Schmitt than by Sieyès, understands Sieyès via Schmitt, or treats them together as if they held the same views.⁹³ Political leaders and constitutional judges have used the conventional theory,⁹⁴ and it is the starting point of the most visible defenders of the theory, such as Ernst-Wolfgang Böckenförde,⁹⁵ Antonio Negri,⁹⁶ Andreas Kalyvas,⁹⁷ and Fernando Atria.⁹⁸

⁹¹ Vatter, *supra* note 1, at 208.

⁹² See, e.g., JACOBSON & ROZNAI, *supra* note 46, at 233 (adding that the regulations of constitution-making procedures are not mere "decoration" but ways of "recognizing or declaring" the existence of the constituent power).

⁹³ Examples abound in Latin America. See, e.g., Humberto Nogueira Alcalá, *Consideraciones sobre Poder Constituyente y Reforma de la Constitución en la Teoría y la Práctica Constitucional*, 15 IUS ET PRAXIS 229 (2009); Willy Gutierrez Cabas, *El Poder Constituyente Frente al Poder Constituido en la Reforma y la Interpretación Constitucional Boliviana*, 6 REVISTA JURÍDICA DERECHO (2017); Jaime Bassa Mercado, *Notas para una Teoría Democrática del Poder Constituyente*, 1 NOMOS: UNIVERSIDAD VIÑA MAR 41 (2008); Eneida Desiree Salgado & Carolina Alves da Chagas, *The Judicial Review of Constitutional Amendments in Brazil and the Super-Countermajoritarian Role of the Brazilian Supreme Court: The Case of the "ADI 2017,"* in CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA, *supra* note 34, at 189; JAIME BASSA, *EL ESTADO CONSTITUCIONAL DE DERECHO: EFECTOS SOBRE LA CONSTITUCIÓN VIGENTE Y LOS DERECHOS SOCIALES* 20–36 (2008) (using the constituent power theory in an uncritical way).

⁹⁴ For Latin American supreme court decisions, see, e.g., Tribunal Constitucional [T.C.] [Constitutional Court] No. 15 of 1973 (Chile); Corte Suprema de Justicia [Supreme Court of Justice], Opinion No. 17 of 1999 (Venez.); Corte Constitucional [Constitutional Court], No. C-551 of 2003 (Colom.); Tribunal Constitucional [Constitutional Court], No. 008-07 of 2007 (Ecuador); Tribunal Constitucional [Constitutional Court], No. 0043-17-TC of 2008 (Ecuador); Tribunal Constitucional Plurinacional [T.C.P.] [Constitutional Court], Sentencia No. 0084 of 2017 (Bol.); Suprema Corte [Supreme Court], No. 1-2021 of 2021 (El Sal.); Tribunal Constitucional [Constitutional Court], No. 890 of 2021 (Peru).

⁹⁵ Ernst-Wolfgang Böckenförde, *The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory*, 10 CAN. J. L. & JURIS. 5 (1997); Ernst-Wolfgang Böckenförde, *The Constituent Power of the People: A Liminal Concept of Constitutional Law*, in CONSTITUTIONAL AND POLITICAL THEORY 169 (Mirjam Künkler & Tine Stein eds., Thomas Dunlap trans., Oxford Univ. Press 2017) [hereinafter Böckenförde, *Constituent Power of the People*].

⁹⁶ ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* (1999); ANTONIO NEGRI, *EL PODER CONSTITUYENTE: ENSAYO SOBRE LAS ALTERNATIVAS DE LA MODERNIDAD* (Simona Frabotta & Raúl Sánchez Cedillo trans., Traficantes de Sueños 2015).

⁹⁷ Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTELLATIONS 223 (2005).

⁹⁸ See, e.g., Fernando Atria, *Sobre la Soberanía y lo Político*, 12 DERECHO HUMANIDADES 47 (2006); ATRIA, *supra* note 20; Fernando Atria, *Constituent Moment, Constituted Powers in Chile*, 31 LAW & CRITIQUE 51 (2020). See also Pablo Marshall Barberán, *La soberanía popular como fundamento del orden estatal y como principio constitucional*, 35 REVISTA DERECHO VALPARAÍSO 245 (2010).

These proponents of the theory all accept its core elements: that the constitution is not based on some abstract norm, but on sovereign will; that sovereign will does not collapse after the enactment of the constitution; that there needs to be a distinction between constituent and constituted powers; that the constituent power of the people is the only and ultimate source of authority in the creation of a constitution; that the constituent power should not be—and/or that it cannot be—constrained by any positive norm;⁹⁹ and that the constituent power does not need to follow pre-established procedures.

According to the constituent power theory, the constitution can be legal or illegal, as its decision-making procedure does not need to follow pre-established institutional norms. However, it can still be legitimate if it is the genuine expression of the will of the people.¹⁰⁰ Constituent power is an external power to the legal system, and an internal perspective of the law cannot bound it. If the constituent power decides to follow a pre-established legal procedure, it is not because it is obliged to do so.¹⁰¹ Moreover, it has the capacity to operate via any procedure it wants. For this reason, scholars that require the constituent power theory to manifest itself in illegal ways,¹⁰² or empirical accounts endorsing a procedural distinction between constitutional replacement and constitutional amendment based on the claim that replacement does not claim to follow a pre-established procedure,¹⁰³ though helpful for some purposes, are unhelpful for understanding the nature of constituent power. The idea, in the end, is to defend the revolutionary power of the people to liberate themselves from the previous regime and emancipate,¹⁰⁴ and the legality of the procedure the people decide to follow becomes less relevant.

Logically, the conventional approach also assumes that constituent power involves a decision “to abolish the former constitutional order and the decision to create a new one,”¹⁰⁵ and it is often associated with the existence of an elected constituent assembly that can embody the idea of the people.¹⁰⁶ Jeffersonian approaches also suggest that

⁹⁹ See, e.g., Böckenförde, *The Constituent Power of the People*, *supra* note 95, at 169 (suggesting that the constitution’s claim to validity comes from a “preceding entity that presents itself as a special power of authority”).

¹⁰⁰ Hans Lindahl, *Constituent Power and the Constitution*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 141, 148 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

¹⁰¹ See JACOBSON & ROZNAI, *supra* note 46, at 231–2.

¹⁰² See, e.g., Juan F González-Bertomeu, *The Colombian Constitutional Court’s Doctrine on the Substitution of the Constitution*, in *CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA*, *supra* note 34, at 119, 136. See also Kalyvas, *supra* note 97 at 228.

¹⁰³ See, e.g., ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 55 (2009).

¹⁰⁴ See, e.g., Ari Hirvonen & Susanna Lindross-Hovineimo, *The Power of the People*, in *CONSTITUENT POWER: LAW, POPULAR RULE AND POLITICS*, *supra* note 12, at 166, 180.

¹⁰⁵ Klein & Sajó, *supra* note 4, at 423.

¹⁰⁶ Gabriel L. Negretto, *Democratic Constitution-Making Bodies: The Perils of a Partisan Convention*, 16 *INT’L J. CONST. L.* 254, 261 (2018). For examples, see GONZALO RAMÍREZ CLEVES, *LOS LÍMITES A LA REFORMA CONSTITUCIONAL Y LAS GARANTÍAS—LÍMITES DEL PODER CONSTITUYENTE: LOS DERECHOS FUNDAMENTALES COMO PARADIGMA* 454–5 (2003); JOEL I. COLÓN-RÍOS, *WEAK CONSTITUTIONALISM, DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER* (2012). See also Massúger & Welp, *supra* note 24. Moreover, see Guobin Zhu & Antonios Kouroutakis, *The Role of the Judiciary and the Supreme Court in the Constitution-Making Process: The Case of Nepal*, 55 *STANF. J. INT’L L.* 69, 80 (2019).

constituent power requires that constituent assemblies take place once in a generation so that the previous generations do not rule the present people.¹⁰⁷

The conventional idea of the constituent power is typically associated with the Weberian rationalist way of legitimizing authority¹⁰⁸ and the idea that the constitution results from a political *decision*.¹⁰⁹ It accepts that the constitution is *created* by the people understood as an *entity*. The people are the governed and bearers of the power to “make and re-make the institutional arrangements through which they are governed.”¹¹⁰ The constitution is an artifact created by constitutional writers.¹¹¹ Thus, the ideas of tradition as a source of constitutional law and natural law as a superior norm—despite Sieyès’s argument in favor of natural law—either become meaningless or need to be removed from the way we legitimize a constitution.

To sum up, the conventional constituent power theory operates on certain assumptions often implicit in the work of the scholars who use it. (1) The people is a unity that can be embedded by an institutional form that can grasp its will, (2) the people can have a unified and stable will that is susceptible to interpretation, and (3) the constitution is an artifact that a political decision can create. For these assumptions to operate, theorists of the constituent power need to assume either that the people is (in singular) a fictional—even mystical—idea or that it is possible to design an institutional form capable of embodying the idea of the people in the real world—e.g., usually a constituent assembly. I will come back to this idea in Sections 4.1 and 5.

As institutional forms need to be previously established so that the idea of the people can be made concrete, the constituent power theory, at least in its conventional account, cannot escape the paradox of needing to have an idea of the people preceding the procedures that need to be used to identify the people and channel their will. In other words, the constituent power needs to establish the constitution and identify who the people is simultaneously. Previous procedures cannot constrain it, but it needs some institutional form to operate.¹¹² Scholars typically call this problem the *paradox of constitutionalism*.¹¹³ Though it is logically hard to achieve, different versions of the paradox can be achieved—and sometimes explained—¹¹⁴ the conventional account

¹⁰⁷ See COLÓN-RÍOS, *supra* note 105; Joel I. Colón-Ríos & Allan C. Hutchinson, *Democracy and Revolution: An Enduring Relationship?*, 89 DENVER U. L. REV. 593 (2012). See a similar argument, though without the idea of the constituent power, in Jeff King, *The Democratic Case for a Written Constitution*, 72 CURRENT LEGAL PROBS. 1 (2019).

¹⁰⁸ Loughlin, *supra* note 53, at 219.

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 219.

¹¹¹ Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983, 1986 (2013). (“The constituent power sometimes is called into being by the very process of constitution-making that presupposes the existence of the constituent power”).

¹¹² IGNACIO DE OTTO, *DERECHO CONSTITUCIONAL: SISTEMA DE FUENTES* 55 (2008). (Explaining that, if the people has constituent power, then the constitution cannot constrain it, but if the constitution does not limit the power of the people, then the people lacks constituent power).

¹¹³ *See generally* THE PARADOX OF CONSTITUTIONALISM. CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 2. *See also* Lukkari, *supra* note 28.

¹¹⁴ *See* Galligan, *supra* note 88 (arguing that, in the end, the paradox has a limited use).

of constituent power assumes that the people are both the subject and the object of constituent power.¹¹⁵

As mentioned in Section 1, the constituent power theory's conventional account has descriptive and normative dimensions.¹¹⁶ However, even though it is sometimes unclear which dimension of the constituent power theory is being used,¹¹⁷ it is crucial to consider that some theorists have only used one or the other. Indeed, some have used the theory in a descriptive way by noticing how the bearer of the constituent power acts as an external and unconstrained actor that establishes a new constitutional order.¹¹⁸ They even use the theory in prospective ways, to describe the nature of an ongoing political and social development in the context of a political process that has not yet ended.¹¹⁹ Some, such as Böckenförde, aware of the empirical limitations of the theory, prefer to use the idea only from a normative point of view.¹²⁰ When presented as a normative theory, the constituent power theory is typically considered mutually exclusive with other types of normative justifications. As some scholars have suggested or implied—Dieter Grimm,¹²¹ Richard Albert,¹²² and Yaniv Roznai¹²³ are good examples—the only way to justify the power to create a constitution is by invoking the people as the sole constitution-maker.¹²⁴ Others, such as the courts cited above, have attempted to use the constituent power language to describe and evaluate

¹¹⁵ This paradox is also connected to the well-known problem in democratic theory, suggesting that elections do not take place in a legal vacuum. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1, 1 (1988) (“Before the first vote is cast or the first ballot counted, the possibilities for democratic politics are already constrained and channeled. . . the election process emerges from previously fixed—and often carefully orchestrated—institutional arrangements that influence the range of possible outcomes that formal elections and subsequent policymaking can achieve. Thus, a paradox rests at the core of democratic politics: this politics is in part a contest over the structure of state institutions, and yet those very institutions define the terms within which the contest of democratic politics proceeds”).

¹¹⁶ See, e.g., Galligan, *supra* note 88, at 344–6 (identifying conceptual, descriptive, and normative uses connecting to the paradox of constitutionalism).

¹¹⁷ See *contra*, e.g., George Duke & Elisa Arcioni, *Between Constituent Power and Constituent Authority*, 42 OXFORD J. LEGAL STUD. 345 (2022).

¹¹⁸ See, e.g., Atria, *Constituent Moment, Constituted Powers in Chile*, *supra* note 98.

¹¹⁹ See, e.g., Emiliós Christodoulidis & Marco Goldoni, *Introduction: Chile's “Constituent Moment,”* 31 LAW & CRITIQUE 1 (2020).

¹²⁰ Böckenförde, *The Constituent Power of the People*, *supra* note 95, at 172 (emphasizing the normative nature of the constituent power idea to advance the validity of the constitution, conceiving it as a concept of legitimation that separates from the descriptive aims that Schmitt originally assigned to the concept). See also Vinx, *supra* note 52.

¹²¹ Grimm, *supra* note 8, at 9 (“the people is the only legitimate source of power”).

¹²² Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations*, 50 CORNELL INT'L L.J. 169, 193 (2017) (“the valid exercise of the constituent power is the ultimate source of legitimacy for the choices that a people makes”).

¹²³ Roznai, *supra* note 10, at 1406 (“[T]here is no other satisfactory answer but ‘the power of the people’ as the ultimate source of state power”).

¹²⁴ See also Oklopčić, *supra* note 13, at 232 (claiming that the idea of peoplehood is “still probably the best way to package a set of normative benefits and implicit rhetorical invitations which have a comparatively better chance to overthrow an undemocratic regime, in contrast to the less emotively potent invocations of the ‘rule of law’ . . .”). See also Thomaz Pereira, *Constituting the Amendment Power: A Framework for Comparative Amendment Law*, in *THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT* 105, 115–17 (Richard Albert, Xenophon Contiades, & Alkmené Fotiadou eds., 2017).

constitution-making processes.¹²⁵ As I will show in the following sections, the types of challenges that each dimension of the theory faces can vary.

3. Challenges against the constituent power’s conventional approach

3.1. The people as an organic actor with a specific unified will

Kelsen’s original argument against Schmitt had different components, including the claim that the unity of the people requires normativity which the theory cannot provide.¹²⁶ Because the conventional account of the constituent power theory might require the existence of a unified account of a people with a unitary will capable of establishing a constitution while deciding on the form that the political community will adapt, denying the unity of the people is a robust line of attack. Kelsen’s point was connected to the paradox of constitutionalism described above: a people cannot have unity if there are no norms that can show how that unity can be achieved.¹²⁷ Even if we accept that the idea of the people can be used, it will be harder to accept that the people possess a unifying mind explaining the existence of a common intention.¹²⁸ Rival politicians frequently make competing statements on behalf of the people,¹²⁹ and there are good reasons to think that the people do not have a coherent will.¹³⁰ They also lack a single mind, and, therefore, it is a mistake to treat the people as the author of the constitution.¹³¹

Perhaps the people can act as an *ex-post* body authorizing (but not creating) the constitutional document via referendums or indirectly participating by electing an assembly. Thus, as Pasquale Pasquino has suggested, the people might be, in reality,

¹²⁵ See, e.g., Roznai, *supra* note 10 (acknowledging the limitations of the constituent power idea as an explanatory theory but defending its use on descriptive and normative reasons).

¹²⁶ Kelsen, *supra* note 27, at 89–90 (“Split by national, religious, and economic conflicts, that unity is—according to sociological findings—more a bundle of groups than a coherent mass of one and the same aggregate state. Only in a normative sense can one speak of a unity. For the unity of the people as a concord of thought, feeling, and desire, as a solidarity of interests, is an ethical political postulate declared to be real by the national or state ideology by means of a fiction that is generally used and therefore no longer thought about. Fundamentally, only a legal element can be conceived more or less precisely as the unity of the people: the unity of the state’s legal order, which rules the behavior of the human beings subject to its norms”).

¹²⁷ See also Hans Lindahl, *Constituent Power and Reflective Identity: Towards an Ontology of Collective Selfhood*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM*, *supra* note 2, at 1, 9–11 (claiming that Kelsen collapsed “constituent into constituted power and politics into law”).

¹²⁸ See Bernal, *supra* note 34, at 42.

¹²⁹ See, e.g., ZORAN OKLOPCIC, *BEYOND THE PEOPLE: SOCIAL IMAGINARY AND CONSTITUENT IMAGINATION* 135 (2018) (showing an example of competing appeals to the idea of the “people” in Egypt); Vicki C. Jackson, “Constituent Power” or *Degrees of Legitimacy?*, 12 *VIENNA J. ON INT’L CONST. L.* 319, 322–3 (2018) (explaining that “we the people” cannot be identified *ex-ante* but only after the political process is over).

¹³⁰ See, e.g., STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 148, 167 (1995).

¹³¹ Pasquale Pasquino, *Classifying Constitutions: Preliminary Conceptual Analysis*, 34 *CARDOZO L. REV.* 999, 1004–5 (2013).

a constituted power.¹³² Nevertheless, even in this scenario, the idea of the people presents problems. The claim that the people should accept the constitution because they have consented to it by means of a referendum needs to account for the fact that unanimity was not achieved, that future generations will not participate,¹³³ that a present majority is not a good proxy for a social consensus, and that majority rule can hardly be considered as the will of the people. Indeed, the referendum questions will need to be binary; there will be agenda-setting problems; there is a range of issues on which majorities will shift; there are deep disagreements as to what exactly a majority means; and, in many cases, it is unlikely that we will be able to actually identify an opinion that can be associated with a majority.¹³⁴ At best, then, a referendum can generate a symbolic—although necessarily incomplete—gesture of approval.

The conventional theory has a descriptive weakness when it assumes that the people is a unified body; this is because it tends to suppose an implausible reality: namely, a closely homogeneous society that shares political ideas that are stable and possible to grasp. Many constitution-making processes take place in divided or heterogeneous societies,¹³⁵ and we can find significant moral and social disagreements even in societies that have a shared history and identity.¹³⁶ Moreover, empirical evidence shows that constitutions do not reflect public opinion preferences. Mila Versteeg's work, examining data from ninety countries, shows that public opinion substantially diverges from what constitutional designers approve in issues such as family values, reproductive rights, and gender equality.¹³⁷ Every political project appealing to the people at large should consider that citizens may not think alike on specific subjects, do not have an opinion on all constitutional matters, and may change their views.¹³⁸ Understanding who is the genuine author of the constitution can be a challenging—if not impossible—task.¹³⁹

¹³² Pasquale Pasquino, *The Un-constituent Power of the People. Article 138 of the Italian Constitution and Popular Referendum*, ITAL. L.J. (Special Issue) 139, 143 (2017).

¹³³ See, e.g., Hasebe, *supra* note 31, at 45–6. See also ALBERT WEALE, *THE WILL OF THE PEOPLE: A MODERN MYTH* 94 (2018).

¹³⁴ The problems are well summarized in WEALE, *supra* note 133, at 50–66.

¹³⁵ See an examination of the challenges that these types of processes face, in HANNA LERNER, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* (2011) (discussing the relationship of “We the people” to the constitutions in divided societies).

¹³⁶ See, e.g., Klein & Sajó, *supra* note 4, at 93 (“[The] people is not sufficiently structured to develop a constitution, nor are empirical people very welcome by the actual constitution-making elite”). See also Tushnet, *supra* note 111, at 1987.

¹³⁷ Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133 (2014). For further examples, see Sergio Verdugo, *El Poder Constituyente Impopular*, 46 ACTUALIDAD JURÍDICA 207 (2022).

¹³⁸ See, e.g., CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* (2017) (gathering comprehensive evidence).

¹³⁹ Typical references to the framers only consider a small segment of the population. Constituent-power approaches tend to focus on those people who voted for the representatives, or those who accepted the constitution in a referendum, or the people that submitted proposals to the constitution-making body. Originalists tend to focus on the individuals that wrote the constitution or on the way the words those individuals used were understood by the public of that time. Historians tend to provide more nuanced approaches in emphasizing who was more influential during the process. See Mikolaj Barczentewicz, *I Am Not Your (Founding) Father*, in *FOUNDING MOMENTS IN CONSTITUTIONALISM* 73, 84 (Richard Albert, Menaka Guruswamy, & Nishchal Basnyat eds., 2019).

Certainly, as I have mentioned above, citing some commentators, Schmitt had arguably established that the unity of the people would be achieved by their embodiment in the hands of a powerful executive. However, his account of the people is based on an assumption that might serve to defend the political project of authoritarian or populist leaders.¹⁴⁰ In reality, constitution-making processes that attempt to use democratic means, such as binary questions made via a referendum mechanism, elected constituent assemblies, or other collective bodies, might either be the mere instruments of democratically undesirable political projects or be subject to a large degree of fragmentation. The first option should be avoided, and the second option makes the idea of unified people implausible and undesirable, because the relevant sectors of society should be represented and their interests be taken into account. Arato has focused on specific examples to show that, in the real world, constituent power can be—and should be—fragmented and channeled in a post-sovereign way.¹⁴¹ Arato's post-sovereign idea promotes a pluralistic and limited approach to constitution-making¹⁴² that is hardly compatible with the conventional account of constituent power.

Citizens and their representatives need to face the present hardships of polarization even in societies that are homogeneous—for example, in terms of religion and language—in order to build on a common political project. Under such conditions, asking different segments of society to participate in discussions about a new constitution, express opinions on multiple matters—contemporary constitutions might be omnibus bills, after all—and meet deadlines, will not ensure that the final product will be a unified political decision. It is more likely that the constitution will be a product formulated by winners against losers or, in the best case, the result of a number of political compromises. Furthermore, constituent assemblies can make divisions more visible while encouraging conflict.¹⁴³ As former Uruguayan President José Mujica said in an interview, there is a fear that constituent assemblies can turn into a “bag of cats [a Spanish expression suggesting a brewing conflict] aiming at trying to remedy all of the people's pains.”¹⁴⁴ Consensus decisions may be possible to a certain extent. But not because of the constituent power theory. Consensus decisions require procedural arrangements which are independent from that theory and which, moreover, can be put in tension with it.¹⁴⁵

However, the theory can survive a reality check if the defenders of the constituent power theory do not attempt to use it in descriptive or explanatory ways. They may

¹⁴⁰ See *infra* Section 3.4.

¹⁴¹ See one of his earlier articles claiming that constitution-making processes should follow the principles of constitutionalism: Andrew Arato, *Redeeming the Still Redeemable: Post Sovereign Constitution Making*, 22 INT'L J. POL., CULTURE & SOC'Y 427 (2009).

¹⁴² ARATO, *supra* note 33.

¹⁴³ See ROBERT B. TALISSE, *OVERDOING DEMOCRACY: WHY WE MUST PUT POLITICS IN ITS PLACE* (2021) (suggesting that polarization sometimes requires the society to be involved in fewer political activities).

¹⁴⁴ *Pepe Mujica, ex Presidente de Uruguay: “Tengo miedo de que la Convención Constitucional sea una bolsa de gatos,”* EMOL (July 8, 2021), www.emol.com/noticias/Nacional/2021/07/08/1026168/pepe-mujica-convencion-bolsa-gatos.html (translation by author).

¹⁴⁵ There is certainly no single way to achieve consensus, but this does not mean that the procedures are irrelevant. See DONALD L. HOROWITZ, *CONSTITUTIONAL PROCESSES AND DEMOCRATIC COMMITMENT* (2021) (discussing the importance and the ways to achieve consensus during constitution-making processes).

claim, as some redeemers have done, that their use of the theory is not historically driven. Instead, they may argue that the theory should be used for purely normative purposes. I will come back to this idea later.¹⁴⁶

3.2. Are constitution-making processes really the product of an unconstrained actor?

The fiction of the unity of the people and its pre-political nature typically comes accompanied by the assumption that the people cannot be, and should not be, limited by a constituted power. If the people is to be genuinely free, and if the goal is to dismantle the institutions of the previous regime, the argument goes, then that regime should not decide on the types of procedures and constraints meant to guide the constitution-making process. This was a powerful idea in Sieyès's thought, particularly in his attempt to build on political equality and voting rights in the assembly—"to vote by head and not by order"—and put an end to the privileges and veto power of the other states—i.e., the nobility and the clergy.¹⁴⁷ After all, had the French assembly followed the procedures of the former Estates General, no real constituent power would have been exercised.

From a normative perspective, this argument is more powerful when the existing regime is more tyrannical, and less persuasive when the attempt to change the constitution takes place in a country that already possesses democratic institutions. In other words, there are fewer reasons to invoke the unconstrained power of the people if the system that we are trying to change already has a reasonably well-functioning democracy. If the qualities of the political system of the previous constitutional regime are mixed, there will be more reasons to argue in favor of constraints affecting one part of the system but not others. Imagine, for example, that the judiciary is truly independent and reliable, but the congress is corrupt. Should the constituent power theory, with its radical approach calling to revise all the institutions and open a debate on any matter, be used with respect to both the judiciary and the congress? Why not constrain the constituent body and give it a mandate to focus only on what is wrong, and even allow it to use the courts to guarantee that the agreed procedure will be followed?¹⁴⁸

This later possibility seems harder to achieve with the conventional account of the constituent power theory, because that version does not allow for subject-matter distinctions. This opens the possibility to revise any issue and regulate any item ties in with the emancipatory account to the theory. Any constraint is seen as suspicious, and it is often agreed that the people should not be bound by it. This is the reason why randomly selected citizens' assemblies discussing specific constitutional items mandated by a constituted power, such as a parliament, cannot be justified by the conventional version of the constituent power theory.¹⁴⁹ Even if we accept that the

¹⁴⁶ See *infra* Section 4.1.

¹⁴⁷ Sieyès, *supra* note 67, at 115–16.

¹⁴⁸ See an alternative answer to this question in COLÓN-RÍOS, *supra* note 58.

¹⁴⁹ I will come back on this idea in Section 6.4 below.

randomly selected citizens represent the people fairly, under this mechanism they are not allowed to set their agenda, they have a specific mandate, and that mandate typically consists in making non-binding recommendations. In other words, these types of citizens assemblies do not act in a sovereign way.

From a descriptive perspective, the suggestion that constituent power is unconstrained is dubious in many, if not most, cases. It is just not true that constitution-making processes lack constraints. Constraints always exist since constitutions are not created in a vacuum,¹⁵⁰ they require a regulated procedure including electoral rules,¹⁵¹ and there are institutions, factions, officers, and sectors of society trying to influence the process.¹⁵² These elements are necessary to respond to the paradox of constitutionalism.

Also, if we consider that the core idea behind the suggestion that the constituent power is—or should be—unconstrained and is connected with the importance of preventing the *constituted* powers from influencing the constitution-making process or conditioning its outcome in meaningful ways, then the facts of many constitution-making processes show that constituted powers are relevant and even necessary. It is common for constitution-making processes to be influenced by elements of the previous regime. For example, Communist leaders participated in the democratic transition negotiations in Central and Eastern European countries, and the white National Party played an important role in the South African process of desegregation.¹⁵³ Even the Japanese postwar Constitution was enacted with a limited influence by Japanese leaders.¹⁵⁴

Following Jon Elster, constituent assemblies typically have upstream and downstream constraints. Upstream constraints are imposed before the organ starts discussing the content of a new constitution; while downstream constraints are related to ratification procedures, such as a confirming plebiscite or the confirmation of state bodies in federal contexts.¹⁵⁵ True, the constituent power of the people does not need to respect these constraints, and many processes have been considered illegal as a result,¹⁵⁶ but it is precisely for that reason that the constituent power theory can promote instability and make the processes leading to the enactment of a new

¹⁵⁰ I borrow the expression from Eugene D. Mazo, *Path-Dependency in Soviet and Russian Constitution-Making*, in *FOUNDING MOMENTS IN CONSTITUTIONALISM*, *supra* note 139, at 133, 135.

¹⁵¹ De Otto, *supra* note 112, at 54 (describing how a previous stage is required to set up the process).

¹⁵² See Donald Horowitz, *Constitution-Making: A Process Filled with Constraint*, 12 *REV. CONST. STUD.* 1 (2006).

¹⁵³ Tushnet, *supra* note 111, at 1991–2.

¹⁵⁴ Compare David S. Law, *The Myth of the Imposed Constitution*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 239 (Denis J. Galligan & Mila Versteeg eds., 2013) (explaining how the Japanese conservative politicians supported the proposed constitution insofar as it secured the Emperor's survival, how they managed to introduce modifications to the constitutional draft, and how the public welcomed the constitutional changes) with Yota Negishi, *The Constituent Power of the "Imposed" Constitution of Japan: An Amalgam of Internationalised Revolutionary Power and Nationalist Devolutionary Power*, in *THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS*, *supra* note 11, at 34.

¹⁵⁵ Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 373 (1995).

¹⁵⁶ See Negretto, *supra* note 106 (showing that constituent assemblies often "transgress their mandate" compared to constituent legislatures). See also Landau, *supra* note 22.

constitution unpredictable. If the processes are unpredictable, then the conditions for democratic deliberation will be far from ideal.

3.3. Legitimacy over legality in the constituent power theory

Related to the idea of respecting constraints is the question of whether the constituent power theory is compatible with the law. The constituent power theory claims that legality is irrelevant to these types of constitution-making processes, and that the question that remains open is one of legitimacy, not of legality. However, despite the possibility of constitution-making processes being illegal, saying that the processes lack a legal regulation is wrong. Colón-Ríos has shown that the constituent power is a juridical concept,¹⁵⁷ and Joshua Braver has argued—comparing the cases of Colombia, Venezuela, and Bolivia—that processes can be illegal, but they are not “lawless.”¹⁵⁸ They can follow the law, and even the most radical processes need some sort of regulation.¹⁵⁹ There are good reasons to have the law shape the constitution-making processes in some way: the law can help to promote a degree of legal continuity, encourage constitution-making procedures to work in predictable ways, give the process of constitution-making a sense of legal legitimacy,¹⁶⁰ and build trust in the process by ensuring that the agreements reached by rival factions will be honored. Unfortunately, when the conventional constituent power theory argues that the law is irrelevant, it neglects the valuable role that legal institutions can provide or strengthen by securing rules that can then help achieve consensus and compromises by lowering transaction costs among constitution-makers; encouraging predictable, fair, and civilized procedures among politicians and social movements that distrust each other; and setting the conditions for a peaceful, organized, and perhaps deeper deliberation. It also neglects the valuable role that courts can perform during the constitution-making processes. Courts may certainly be criticized for intervening on different grounds—and the constituent power theory might be used to strengthen those criticisms—but courts can also help advancing the constitution-making process by providing a sense of legal legitimacy, making the constitution-makers accountable, when appropriate, and enforcing pre-established procedures and multiparty agreements.

Examples can be found of surprising judicial interventions in some constitution-making processes. I have already cited examples of courts using the idea of the constituent power in their decisions.¹⁶¹ I will now show how courts can intervene in actual constitution-making processes. I distinguish three types of interventions.

¹⁵⁷ COLÓN-RÍOS, *supra* note 58.

¹⁵⁸ Joshua Braver, *Constituent Power as Extraordinary Adaptation* 48 (June 30, 2018), <https://ssrn.com/abstract=3022221>. See also BRAVER, *supra* note 84.

¹⁵⁹ COLÓN-RÍOS, *supra* note 58 (showing how Rousseau’s version of the constituent power requires the existence of norms).

¹⁶⁰ See Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

¹⁶¹ See Tribunal Constitucional [T.C.] [Constitutional Court] No. 15 of 1973 (Chile); Corte Suprema de Justicia [Supreme Court of Justice], Opinion No. 17 of 1999 (Venez.); Corte Constitucional [Constitutional Court], No. C-551 of 2003 (Colom.); Tribunal Constitucional [Constitutional Court], No. 008-07 of 2007 (Ecuador); Tribunal Constitucional [Constitutional Court], No. 0043-17-TC of 2008 (Ecuador); Tribunal Constitucional Plurinacional [T.C.P.] [Constitutional Court], Sentencia No. 0084 of 2017 (Bol.); Suprema Corte [Supreme Court], No. 1-2021 of 2021 (El Sal.); Tribunal Constitucional [Constitutional Court], No. 890 of 2021 (Peru).

First, courts can help open the constitution-making processes in adverse conditions, as happened in Colombia in 1990. The Colombian Supreme Court provided a legal ground to the otherwise illegal referendum that took place after the *Movimiento de la Séptima Papeleta* had added an unlawful ballot to the electoral process of 1990, which aimed at calling a constituent assembly to replace the 1886 Constitution. The government had enacted an executive order to legalize the referendum and facilitate the call for a constituent assembly, but that order was put into question and the Court declared constituted institutions should not prevent the constituent power from manifesting, while also checking the limitations that the decree tried to impose on the constitution-making process.¹⁶² This type of intervention does not require explicit powers. Even though it could be argued that the case shows how an unconstrained people can manifest itself, with constituted actors becoming irrelevant in their attempts to control the constituent power, the judicial decision transforms the idea of the constituent power into a legal argument that helps shape the process in a legal way, even constraining actors such as presidents. The process is not lawless, as it requires the legal rubber-stamp of the court. The theory thus becomes a judicial doctrine that is able to constraint those who will later draft the constitutional proposal. This is not to say, of course, that the constituent power should be used as a doctrine. I am merely stating the fact that courts can play a useful role that can facilitate and stabilize a constitution-making process that is warranted and driven by consensual politics. Of course, courts can also use the constituent power theory to advance authoritarian aims, as I have also showed.

Second, courts can act when receiving an explicit mandate to do so, often given by an interim constitution that empowers judges to supervise the constitution-making process. This second variation has two subtypes. First, there are courts that have only limited power to intervene in cases of procedural irregularities. This is the case of the powers that the 2019 reform gave to the Chilean Supreme Court. This has helped to build trust in a polarized process, and supplied skeptical rightwing politicians with added reasons to approve the rules regulating the process.¹⁶³ Second, courts can receive an explicit mandate to revise the substantive outcome of a constitution-making process. The South African interim constitution gave the Constitutional Court the power to protect key principles should the new constitution infringe them. That way, the court can operate as a sort of double-sided insurance¹⁶⁴ to restrict the power of the constituent body. True, it might be claimed that the constituent power was really in the hands of those who negotiated the interim constitution—and, therefore,

¹⁶² Corte Constitucional [Constitutional Court], No. 138 of 1990 (Colom.). See also Colón-Ríos, *supra* note 21.

¹⁶³ See Prieto & Verdugo, *supra* note 45. On the incentives that each political coalition had during the negotiations and the reasons for shifting views, see María Cristina Escudero, *Making a Constituent Assembly in Chile: The Shifting Costs of Opposing Change*, 41 BULL. LAT. AM. RES. 641 (2022).

¹⁶⁴ Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as “Insurance Swaps,”* 4 CONST. CT. REV. 1 (2011); Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 INT’L J. CONST. L. 988 (2018).

the new constitution was not the expression of an unconstrained political power.¹⁶⁵ Nonetheless, if the constituent power were truly unconstrained, the vast majority that supported the first draft of the constitution could have broken the rules and disobeyed the court. Instead, they decided to follow the court's ruling.

The third type of judicial intervention operates when a court acts without an explicit mandate. In Tunisia, administrative courts intervened to decide matters that were not considered to be "constitutive," such as issues of the Assembly members' salaries and the powers of the electoral commission.¹⁶⁶ In Egypt, the Administrative Court invalidated a constituent assembly by preventing members of parliament from also being members of the assembly, and a second assembly would be formed later.¹⁶⁷ In Nepal, there was no specific mandate given to the Supreme Court to ensure that the interim constitution was respected. However, the Court still played a relevant role in the making of the 2015 Constitution. As Zhu and Kouroutakis's article reports, after the mandate of the constituent assembly had expired, and had been renewed four times because of intense gridlock preventing the necessary consensus from happening, the Supreme Court intervened by ruling that the extensions violated the periodic election principles, which were included in the interim constitution's preamble.¹⁶⁸ This ruling eventually led to the election of a second constituent assembly, which succeeded in approving the new Constitution. In justifying this decision, Zhu and Kouroutakis argue that constitution-making processes maintain a *legal* dimension that can be addressed through the guidance of the courts, helping to avoid conflicts.¹⁶⁹

To justify these types of judicial intervention, scholars need to look for arguments outside the constituent power theory. But the search for an alternative theory might possess a challenge to the conventional approach to constituent power, as that approach demands an exclusive argument based on the power of the people. As the South African case reveals, judicial review can sometimes serve the purpose of building trust in the process, so that, even when competing parties can abide, it is possible to build an interim constitution as a self-enforcing norm that is useful for rival factions because it can lower political stakes, reduce transaction costs among them, and increase the costs of reversal.¹⁷⁰ In that way, judicial review can help boost some procedural certainty to the process and secure crucial interests for the negotiating parties.¹⁷¹ Unfortunately, there is nothing in the conventional account of the constituent power theory that can help justify these inclusive aims.

¹⁶⁵ I have explained this perspective elsewhere. Sergio Verdugo, *The Value of the Concept of Unconstitutional Constitutions*, 50 CORNELL INT'L L.J. 39, 45 (2017).

¹⁶⁶ NIMER SULTANY, LAW AND REVOLUTION. LEGITIMACY AND CONSTITUTIONALISM AFTER THE ARAB SPRING 317 (2017).

¹⁶⁷ *Id.* at 309–11.

¹⁶⁸ Zhu & Kouroutakis, *supra* note 106, at 78–9.

¹⁶⁹ *Id.* at 81–2.

¹⁷⁰ On this idea, see Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636, 665 (2011).

¹⁷¹ See Prieto & Verdugo, *supra* note 45.

3.4. Is the constituent power theory a fertile ground for populist and authoritarian political narratives?

Hannah Arendt accused the constituent power theory of possessing arbitrary, unstable, and unconstrained dimensions that could encourage permanent revolutions and repeated challenges to the institutional order.¹⁷² Instead, she offered an alternative account that some scholars still employ in their theoretical frameworks.¹⁷³ The conventional theory of constituent power emphasizes the idea of the people deciding a new constitution, regardless of its content. The content can be arbitrary, because it is the result either of an unconstrained decision made by a politician claiming to embody a fictitious version of the people, or of an undemocratic notion of the people as an organ,¹⁷⁴ which is necessarily a non-inclusive notion that tends to discriminate large swaths of society. Who belongs to the people? The Catholics? The nationals? The poor? The majority? The members of the Tea Party? An indigenous minority? The “true Argentinians,” in Perón’s language? Those who are of the same ethnicity? The marginalized? Sometimes the vagueness of the idea of the people allows for a mythical narrative reconstructing an arbitrary approach,¹⁷⁵ such as Viktor Orbán’s discourse tracing the idea of the Hungarian people back to events that happened more than 1,000 years ago, or Jean-Marie Le Pen’s idea that the French people come from a long “line” to suggest that newly naturalized citizens need to have particular merits.¹⁷⁶ Even parties that use a liberal narrative can use a “culturally defined people” narrative,¹⁷⁷ that is, one that is exclusive and discriminatory, as some right-wing parties in Northern and Western Europe have done.¹⁷⁸ The problems with these types of characterization can become even more pronounced if we take Schmitt seriously, since he advocated for an exclusive, ethnic concept of the people that could also be radically different from the people’s enemies.¹⁷⁹

The idea of constituent power can lead to arbitrary decisions that go against segments of the society which lack sufficient political influence but which should nonetheless be considered as part of the political community. The electoral mechanisms that the constituent power theory tends to connect to, such as referendums, can promote the use of an all-or-nothing, or a winners-versus-losers, criterion without enough nuance to try to identify the median voter, which is probably why many authoritarian and populist leaders promote the use of these types of instruments.¹⁸⁰ Scholars often consider

¹⁷² HANNAH ARENDT, *ON REVOLUTION* (Penguin Books 2006). See also Scheuerman, *supra* note 83.

¹⁷³ See, e.g., Joshua Braver, *Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez over the Creation of the 1999 Constitution*, 14 INT’L J. CONST. L. 555 (2016); Braver, *supra* note 158.

¹⁷⁴ See Weiler, *supra* note 37.

¹⁷⁵ See WEALE, *supra* note 133, at 3 (“There is no such thing as the will of the people, as there are no such things as unicorns, flying horses or lost continents called Atlantis”).

¹⁷⁶ I borrow the examples from Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 EUR. CONST. L. REV. 6, 13 (2016).

¹⁷⁷ Brännström, *supra* note 82, at 94.

¹⁷⁸ *Id.* at 91 (explaining how the narrative of “our liberal values” aims to exclude important groups).

¹⁷⁹ Scheuerman, *supra* note 83, at 143–4.

¹⁸⁰ See, e.g., Anna Fruhstorfer, *Referendums and Autocratization: Explaining Constitutional Referendums in the Post-Soviet Space*, in *THE LIMITS AND LEGITIMACY OF REFERENDUMS* 157 (Richard Albert & Richard Stacey eds., 2022).

referendums to be a flawed tool for decision-making in many situations.¹⁸¹ This is not to say, of course, that the use of referendums is always unjustified.¹⁸² But normative theories justifying referendums should attempt to use voters not to replace representative institutions, but rather, as a tool that citizens have to veto proposals coming from those institutions¹⁸³—making those institutions more responsive to what voters want in the first place.¹⁸⁴ Collective constituent bodies working with supermajority rules may be better placed to avoid the problem of a winners-versus-losers logic. However, those assemblies are still subject to the influence of authoritarian leaders and may enact a constitution that will serve those leaders' agendas—for example, the Hungarian Fundamental Law and the Venezuelan Constitution.¹⁸⁵ As András Sajó has recently claimed, the constituent power has “remained at the service of the freshly elected, popularly endorsed governments” of Hungary, Bolivia, Ecuador, Turkey, and Venezuela.¹⁸⁶ In these types of contexts, the people's will is a myth invented by ruling elites advancing their agendas of unlimited power.¹⁸⁷

The connection between populist leaders claiming to have a monopoly on the antipluralist representation of the people, such that it delegitimizes the opposition or the elites and the narrative of constituent power, has been explored by contemporary scholars.¹⁸⁸ Some claim that populism might be, after all, a form of identity politics that is both exclusionary and antipluralistic.¹⁸⁹ Even though we know that the relationship between populism and constitutionalism is problematic,¹⁹⁰ if we follow mainstream accounts of populism, constituent power and populism fit very well together.¹⁹¹ Indeed, populists typically use constitutional language to gain credibility;¹⁹² they support their claim that a unified people with a single voice can operate as superior to the constitution¹⁹³ and have a tendency to try to use the space of the constituent power

¹⁸¹ See, e.g., ROBERTO GARGARELLA, *THE LAW AS A CONVERSATION AMONG EQUALS* (2022).

¹⁸² Normative contemporary scholarship tends to limit the scope of application of referendums. See a useful and important example in STEPHEN TIERNEY, *CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION* (2012). See also DAVID ALTMAN, *DIRECT DEMOCRACY WORLDWIDE* (2011).

¹⁸³ Leah Trueblood, *Brexit and Two Roles for Referendums in the United Kingdom*, in *THE LIMITS AND LEGITIMACY OF REFERENDUMS*, *supra* note 180, at 183.

¹⁸⁴ I have defended this position elsewhere. See Sergio Verdugo, *Referéndum y Proceso Constituyente: ¿Extorsión Electoral o Veto Ciudadano?*, 47 *ACTUALIDAD JURÍDICA* (forthcoming 2023).

¹⁸⁵ The idea of constituent power was central to the Bolivarian revolution and was even explicitly recognized by the 1999 Venezuelan Constitution. Azzellini, *supra* note 20. See also Rafael Macía Briedis, *Constitutional Self-Negation in Venezuela: Problematizing Constitutionalism's Internalization of the Theory of Constituent Power*, 19 *INT'L J. CONST. L.* 943 (2021).

¹⁸⁶ ANDRÁS SAJÓ, *RULING BY CHEATING: GOVERNANCE IN ILLIBERAL DEMOCRACY* 65 (2021). See also *id.* at 61–6.

¹⁸⁷ *Id.* at 121–2.

¹⁸⁸ See, e.g., SULTANY, *supra* note 166, at 289. See also Arvidsson, Brannstrom, & Minkinen, *supra* note 12, at 4.

¹⁸⁹ See JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016).

¹⁹⁰ Cas Mudde, Policy Brief, *Are Populists Friends or Foes of Constitutionalism?*, FOUND. FOR L., JUSTICE & SOC'Y (2013), www.fljs.org/are-populists-friends-or-foes-constitutionalism.

¹⁹¹ Different conceptualizations of populism can easily confirm that the constituent power narrative fits well. See, e.g., ERIC A. POSNER, *THE DEMAGOGUE'S PLAYBOOK: THE BATTLE FOR AMERICAN DEMOCRACY FROM THE FOUNDERS TO TRUMP* 8 (2020).

¹⁹² Corrias, *supra* note 176, at 8.

¹⁹³ Doyle, *supra* note 61.

and take advantage of its supposedly unbound nature to claim that their source of legitimacy is superior to legal constraints, which are seen as obstacles to reinstating the power of the people.¹⁹⁴ Unfortunately, there is little in the conventional constituent power theory that can help break the connection between populism and the political narrative that the theory serves. Moreover, as Luigi Corrias has argued, constituent power is contained in the idea of populism.¹⁹⁵ This problem makes the theory dangerous, especially if we consider that constitution-making is vulnerable to a faction managing to avoid negotiating with the opposition and succeeding to unilaterally remake the constitution.¹⁹⁶

An extreme example of the danger is illustrated by the constituent assembly established by President Maduro by invoking the people's power over the constituted organs such as the legislative assembly,¹⁹⁷ after he had lost his congressional majority.¹⁹⁸ The assembly was elected after intense gerrymandering and with a partly corporatist composition; it acted with absolute power and took over legislative and even judicial functions.¹⁹⁹ During the three years of its functioning (2017–20), it did not enact a new constitution. Instead, it removed and appointed officers, such as the general criminal prosecutor, the ombudsman, and the comptroller general,²⁰⁰ it dictated laws regulating freedom of speech, taxes, the armed forces, the power to set prices;²⁰¹ it allowed Maduro to rule by decree on many matters; and threatened to cut Congress's funding. That assembly was placed above all the constituted powers, and it dissolved itself after Maduro got a congressional majority in the legislative assembly.²⁰² Other—perhaps less extreme—examples can be found in Ecuador and Fiji. As Rosalind Dixon has shown using these cases, the rhetoric of peoplehood can be used to recognize a long list of rights in exchange for the establishment of procedures and rules that can pave the way for a dominant party regime.²⁰³ The constitution-making procedure can have the appearance of a bottom-up, popular process, but the recognition of rights ends up becoming a sort of “bribe” in exchange for the establishment of non-competitive democratic regimes. All of these examples suggest that the constituent power narrative—which was present in Ecuador and Venezuela—can help to bring a sense of popular legitimacy in flawed and even deceptive ways.

¹⁹⁴ MARTINICO, *supra* note 15, at 20. *See also* Corrias, *supra* note 176, at 9 (“the populist will always value the will of the people above constitutional rules and procedures and will actively search for ways to overcome or avoid these”).

¹⁹⁵ Corrias, *supra* note 176, at 8.

¹⁹⁶ *See* Landau, *supra* note 22.

¹⁹⁷ David Landau, *Constitution-Making and Authoritarianism in Venezuela*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 41, at 161.

¹⁹⁸ RAFAEL BADELL MADRID, ASALTO AL PARLAMENTO 79–81 (2021).

¹⁹⁹ *See, e.g.*, Casal Hernández, *supra* note 22 at 956–7.

²⁰⁰ BADELL MADRID, *supra* note 198, at 155–7, 163–5.

²⁰¹ *Id.* at 149–54.

²⁰² *Id.* at 26.

²⁰³ *See* Rosalind Dixon, *Constitutional Rights as Bribes*, 50 CONN. L. REV. 767 (2018) (describing the “trade” between the society and the politicians).

3.5. The forgotten sources of legitimacy

As I explained above, the conventional constituent power theory suggests that the source of legitimacy, using the Weberian language, was *rational*.²⁰⁴ The constituent power assumes that the people make a decision and that the constitution is an artifact.²⁰⁵ Even though this assumption fits well with the conventional approach, it is important to note that there are two other sources of legitimacy similarly derived from Weber's typology, which may be relevant for understanding and justifying a constitution, but which tend to be neglected by the rational and decisionist approach to the constituent power theory. The first source is charisma. As the people is arguably embodied in the executive branch, or in a particular political actor who can push and lead the political coalition that controls the constituent assembly, it is important to note that the leader's charisma plays a relevant role in the social acceptance of the constitution. As Bruce Ackerman has shown, many constitutional arrangements enjoy the particular charismatic legitimacy of leaders such as Charles de Gaulle in France and Nelson Mandela in South Africa.²⁰⁶ I can add the cases of Hugo Chávez in Venezuela and Evo Morales in Bolivia.²⁰⁷ Charisma as a source of legitimacy is not always desirable in the context of constitution making because it is vulnerable to populists that seek to use the language of the people. Still, the idea of charisma can connect well with Schmitt's idea of manifesting the constituent power of the people via the executive branch.

The second source of legitimacy that the constituent power theory tends to neglect by its exclusive claim that the people can be the only author or authorizing body that legitimizes the constitution, is tradition. As a source of law, tradition has played a relevant role in many parts of the world: from constitutional conventions to important political achievements, to other types of practices and customs that political communities accept—for example, *mutaciones* in the Iberoamerican tradition. This is not an exclusive feature of common law countries.²⁰⁸ True, there are reasons to oppose these ideas as undemocratic—traditions often lack accountability and transparency, for example—but traditions can also be defended on other grounds.²⁰⁹ Moreover, tradition can be presented in a Burkean fashion as

²⁰⁴ This is not to say, of course, that Weber was arguing in favor of a specific type of legitimacy. His typology rests on ideal models of legitimacy, and he did not, to my knowledge, connect them with the constituent power theory. The point is that others have connected Weber's rational ideal type with constituent power. See, e.g., Loughlin, *supra* note 53.

²⁰⁵ See Pasquino, *supra* note 131, at 1004.

²⁰⁶ BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* (2019).

²⁰⁷ Díaz de Valdés & Verdugo, *supra* note 24.

²⁰⁸ See, e.g., PATRICIO ZAPATA LARRAÍN, *JUSTICIA CONSTITUCIONAL* (2008); Sebastián Soto Velasco, *Costumbres y Prácticas Legislativas en el Derecho Constitucional*, in *ESTUDIOS CONSTITUCIONALES Y PARLAMENTARIOS EN HOMENAJE AL PROFESOR JORGE TAPIA VALDÉZ 127* (Iván Obando Camino ed., 2017).

²⁰⁹ For an examination of the way constitutional conventions can be defended from a normative perspective, see Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 *DUBLIN U. L.J.* 387 (2015); Farrah Ahmed, Richard Albert, & Adam Perry, *Enforcing Constitutional Conventions*, 17 *INT'L J. CONST. L.* 1146 (2019); Farrah Ahmed, Richard Albert, & Adam Perry, *Judging Constitutional Conventions*, 17 *INT'L J. CONST. L.* 787 (2019).

representing gradual change and skepticism toward the idea of immediate, wholesale constitutional change.²¹⁰ Hanna Lerner has shown how deeply divided societies can benefit from an incremental approach to constitution-making which will postpone solving controversial issues, in a departure from “revolutionary” perspectives on constitution-making.²¹¹

Regrettably, the conventional approach to the constituent power theory tends to emphasize the revolutionary nature of constitutional change without paying attention to—or even considering—the “evolutionary approach” that theories such as Burke’s can provide.²¹² However, these types of approaches emphasize legal continuity, and push for gradual and relatively minor changes that can take small incremental steps,²¹³ avoiding the costs of error and seeking for shared understandings that are built over time. This last tradition is important for constitutional law in jurisdictions such as Germany.²¹⁴ Tradition calls for taming politics with the law, while the point of the constituent power theory is exactly the opposite—i.e., taming the law with politics.²¹⁵

Neglecting tradition is not only a normatively sensitive point, but it is also descriptively inaccurate. Constitutional designers often identify and write the traditions or historical legacies of their countries and explicitly recognize them in the constitutions they write.²¹⁶ A similar thing happens with the recognition of universal principles of constitutionalism.²¹⁷ There is a sort of unwritten universal template that constitution-makers tend to use—incorporating basic rights and judicial independence, for example—which connects constitutional writing with a non-domestic tradition of constitutionalism.²¹⁸

²¹⁰ A Burkean approach is even possible in the idea of the unconstitutional constitutional amendment doctrine, which is often grounded on the constituent power theory. See, e.g., Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460 (2006).

²¹¹ LERNER, *supra* note 135.

²¹² On a general defense of the use of tradition and the Burkean framework in philosophical questions about the law, see Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990). See also Cass Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

²¹³ These types of approaches are frequently contrasted with revolutionary agendas. See, e.g., Gardbaum, *supra* note 48, at 176.

²¹⁴ See Christoph Möllers, *Pouvoir Constituant—Constitution—Constitutionalisation*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 169 (Armin von Bogdandy & Jürgen Bast eds., 2009).

²¹⁵ See Corrias, *supra* note 176, at 14–16.

²¹⁶ For examples, see Ozan O. Varol, *Constitutional Stickiness*, 49 UC DAVIS L. REV. 899 (2016); Mazo, *supra* note 150. On the Chilean case, see also JAIME ARANCIBIA MATTAR, *CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE: EDICIÓN HISTÓRICA: ORIGEN Y TRAZABILIDAD DE SUS NORMAS DESDE 1812 HASTA HOY* (2020). See also Zhu & Kouroutakis, *supra* note 106, at 72–3 (“The drafters of the new Constitution took into account the quite successful institutional role of the preexisting Supreme Court, which was first established by the Supreme Court Act of 1.956 under the Interim Constitution of 1951. Thus, path dependence can explain why the drafters would not experiment and introduce a constitutional court that would function along with a supreme administrative court or a supreme private law court”).

²¹⁷ Versteeg, *supra* note 137 (suggesting that her findings show that constitutional designers tend to favor “ready-made constitutional models”).

²¹⁸ David Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153 (2016) (discussing basic linguistic molds).

Partly for these reasons, constitutional content is highly predictable,²¹⁹ even in authoritarian constitutions.²²⁰

Moreover, there are many examples that show that path dependence can explain the constitutional content. Some examples from Latin America in the 1980s and the 1990s show that redemocratization processes have triggered little institutional change and that previous rules, although sometimes temporarily removed from the system, may then be “simply revived.”²²¹ Other examples include constitutional choices in post-Soviet countries which adopted semi-presidential regimes and a separation-of-powers model not because of a popular choice, but because those institutions had already existed shortly before the post-Soviet states gained their independence.²²² A possible explanation for this lies in the fact that parties might favor institutions that benefit them, and they may find that they can adapt better to institutions they know well and in which they are used to operate.²²³ Thus, even though path dependency may not necessarily be a signal of how a constitutional tradition can survive formal constitutional changes, it is still useful to notice it because the constituent power theory cannot account for it. Thus, constituent power theory is, at best, incomplete. Perhaps it is unnecessary for a constitutional theory to focus on all of the possible dimensions or sources of legitimacy that exist and explain or describe all of the possible nuances of constitutional change. However, we should not accept, then, that the theory and its democratic justification can provide for the only desirable way to legitimize a constitutional norm.

A third source of legitimacy that the theory of constituent power overlooks is the protection of rights. As Thornhill has claimed, modern political systems have replaced constituent power with a narrative that emphasizes the protection of rights.²²⁴ Even though scholars of transnational order frequently make such a claim, there is no reason to think that using the idea of rights protection as a justification for a constitutional order is necessarily connected to a supranational approach. It would be strange to find a constitution-making process that was not driven, at least in part, by a political discourse protecting the rights of the members of the political community. It is certainly conceivable that both the rights narrative and the constituent-power-of-the-people discourse can operate simultaneously, but they can also be in tension. And where there is tension, the constituent power theory should prevail over rights protections because it claims to be the sole and exclusive source of constitutional legitimacy. But this scenario would be highly criticized as self-defeating: if the idea of the people is genuinely present, we should not assume that the people aim at violating its own rights. The possibility of a people infringing rights becomes more plausible when we connect that idea with a Schmittian theory-based

²¹⁹ David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011).

²²⁰ Mila Versteeg & David S. Law, *Constitutional Variation Among Strains of Authoritarianism*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 165 (Tom Ginsburg & Alberto Simpser eds., 2014).

²²¹ Barbara Geddes, *Initiation of New Democratic Institutions in Eastern Europe and Latin America*, in INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA 15, 30 (Arend Lijphart & Carlos H. Waisman eds., 1996).

²²² Mazo, *supra* note 150.

²²³ See Geddes, *supra* note 220, at 31.

²²⁴ Thornhill, *supra* note 7, at 375.

concept of the people or one that identifies the people with a contingent majority insensitive to the demands and interests of minorities. Replacing the idea of the constituent power with the idea of rights protection is not necessarily desirable: recent research has shown that the language of rights can also be used to advance a non-democratic agenda.²²⁵ However, the role that rights protection can play in justifying new constitutional content aiming at protecting vulnerable groups is a normatively important idea that should not be overlooked by those that seek a theory that would justify a constitutional norm. This idea should, at least, should serve to show how “the assertion of constituent power as the primary source of legitimacy is curtailed. . . .”²²⁶

A fourth possible source of legitimacy that the constituent power theory fails to account for is the need to enact a new constitution following consensus-building mechanisms that can encourage constitutional designers to approve liberal-oriented constitutional norms. There is a connection between procedure and constitutional outcomes that the constituent power theory tends to overlook. Procedures are never neutral, and their design influences the outcome. It is not the same to allow a president to offer a constitution to the citizens in a yes-or-no referendum as to convoke a representative constituent assembly. Mechanisms of public participation may generate more inclusive documents,²²⁷ and the electoral mechanisms that are designed to elect the delegates of the constitution-making body are also relevant.²²⁸ After all, in Venezuela, Chávez’s coalition obtained nearly 90% of the seats with less than 60% of the votes. In Chile, the rules that allowed the candidates to run in electoral pacts among themselves and compete against the parties’s electoral alliances in equal conditions, along with a proportional formula, contributed to the fragmentation of the constitutional convention into multiple groups that had severe difficulties in reaching agreements.

Unfortunately, the constituent power theory says little about the design choices of constitution-makers. If we go back to Sieyès, then it is possible to claim that the theory encourages a group of elected representatives to operate with majority rule. If we go back to Schmitt, then the theory might empower a president. Regrettably, any version of the conventional constituent power theory—whether Sieyès’s or Schmitt’s—ultimately assumes that it is possible to identify a single will. Therefore, the theory does not help to acknowledge the fact that society is divided, that accommodation of competing interests is sometimes warranted, that inclusive mechanisms are desirable, and that we need those mechanisms to achieve a consensus that is sufficiently large to make most of the society feel represented by the constitution, at the same time that it can guarantee pacts among rival elites.

²²⁵ Dixon, *supra* note 203.

²²⁶ Thornhill, *supra* note 34, at 392.

²²⁷ See Tom Ginsburg, Zachary Elkins, & Justin Blount, *Does the Constitution-Making Process Matter?*, 5 ANNU. REV. L. & SOC. SCI. 1 (2009); Zachary Elkins, Tom Ginsburg, & Justin Blount, *The Citizens as Founder: Public Participation in Constitutional Approval*, 81 TEMPLE L. REV. 361 (2008).

²²⁸ See, e.g., Ana María Bejarano & Renata Segura, *The Difference Power Diffusion Makes*, in REDRAFTING CONSTITUTIONS IN DEMOCRATIC REGIMES 131 (Gabriel Negretto ed., 2020).

Those pacts are important for the outcome of the process. The empirical literature on constitution-making shows, for example, that negotiated processes are more likely to protect the independence of judges and criminal prosecutors than unilateral processes.²²⁹ Insurance-based theories show that agreements among opposed groups in conditions of electoral uncertainty are more inclined to protect the rights of electoral losers and political minorities, and are thus more likely to create constitutional courts.²³⁰ Case studies have shown that the insurance theory is plausible, at least in Asian and Latin American cases.²³¹ The insurance theory is applicable not only to constitutional courts, of course, but also to other forms that can preserve the interests of prospective electoral losers.²³² The same logic can be applied to contractual approaches to the enforcement of interim constitutions²³³ and to deals that are achieved in the process of constitution-making.²³⁴ These examples suggest that pacts between elites might shape not only the content of the new constitution, by promoting the recognition of significant liberal ideas, such as a bill of rights that limits the government action, but that they might also build trust in the process. Gabriel Negretto's research has shown that bargains between elites have deepened liberal principles associated with democracy by establishing constraints to state action and recognizing civil liberties,²³⁵ and that power diffusion during the constitution-making procedure induces the adoption of institutional arrangements that protect the opposition, despite the fact that incumbents may force future negotiations in the future.²³⁶

If we seriously consider the empirical constitution-making studies cited here, and agree that a liberal-democratic outcome is desirable and relevant, then our normative theories about constitutional change should be sensitive to the types of procedures that they tend to encourage and to the outcomes they are likely to produce. The constituent power theory permits any procedure empowering the *Third State* emphasizing the lack of legally binding and previously established steps, and it is blind to the outcome of the process.²³⁷ It can even be used to justify unilateral constitution-making processes.²³⁸ This is an important—though pragmatic—reason to be skeptical of it.

²²⁹ Julio Ríos-Figueroa & Andrea Pozas-Loyo, *Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America*, 42 *COMP. POL.* 293 (2010).

²³⁰ Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 *THEORETICAL INQUIRIES IN L.* 49 (2002); Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 *J. L., ECON. & ORG.* 587 (2013).

²³¹ TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003); JODI FINKEL, *JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S* (2008). For a critical examination of this idea through the case-studies, see *THE POLITICAL ORIGINS OF CONSTITUTIONAL COURTS. ITALY, GERMANY, FRANCE, POLAND, CANADA, UNITED KINGDOM* (Pasquale Pasquino & Francesca Billi eds., 2009).

²³² Dixon & Ginsburg, *supra* note 164.

²³³ Prieto & Verdugo, *supra* note 45.

²³⁴ Dixon & Ginsburg, *supra* note 164.

²³⁵ Gabriel Negretto, *Constitution-Making and Liberal Democracy: The Role of Citizens and Representative Elites*, 18 *INT'L J. CONST. L.* 206 (2020).

²³⁶ Gabriel Negretto & Mariano Sánchez-Talanquer, *Constitutional Origins and Liberal Democracy: A Global Analysis, 1900–2015*, 115 *AM. POLIT. SCI. REV.* 522 (2021).

²³⁷ See Vinx, *supra* note 52 (“What is more, such a theory denies that authentic exercises of constituent power must result in certain substantive outcomes predetermined by normative reasoning. Any outcome is to be regarded as legitimate, given only that it results from the will of the people”).

²³⁸ Landau, *supra* note 22.

Of course, one way to respond to the mutually exclusive ways in which the constituent power theory sets the problem of legitimacy is to argue that constitutions have many complementary sources. The people is one of them, but not the only one. However, even if this type of account were to be possible, it would be faced with at least two problems: first, it still needs to offer a way of grasping the idea of the people, and, second, it still needs to justify the claim that the decisionist view of the people as a source of legitimacy is superior to other sources.

4. Can the constituent power theory be redeemed?

Despite the criticisms outlined in the previous section, some scholars insist on using the constituent power theory and offering a narrower application of the theory. They are typically aware of some of the theory's problems, but they also believe either that those problems are unimportant or that they are not applicable to the narrow uses of the theory that they defend. As these scholars somehow advocate—sometimes implicitly—that the theory is still useful, I call these authors *redeemers*.

4.1. Towards a purely normative and retrospective approach deliberately based on the fiction of the people's will?

As the challenges described in the previous sections are major threats to the conventional version of the constituent power theory, abandoning or reducing the importance of its descriptive dimension seems to be a necessity. The theory should thus only focus on its normative dimension.²³⁹ This is how Böckenförde tried to redeem the theory, for example.²⁴⁰ From a normative point of view, and contrary to the way theorists such as Antonio Negri present it,²⁴¹ it is also possible to claim that the theory should not be used in a prospective way—i.e., it should not try to argue that a present movement is a manifestation of the constituent power. It is probably better not to answer the question of the difficulty of identifying the types of instances that can express the constituent power *ex ante*—for example, civil disobedience, rioting, coups? What are the requirements for constituent power to happen?²⁴² We are in a more advantageous position following John Locke's advice: ideas about the people and the founders can only be examined once the past has been left behind, perhaps even once

²³⁹ See, e.g., Pasquino, *supra* note 132, at 143 (“So, the constituent power of the people is no more but also no less than a principle of legitimacy, authorizing and limiting the exercise of public authority”). See also Galligan, *supra* note 88, at 355 (“Constituent power can be defined as a people; but it is then a normative stipulation as to what should be the case rather than what is.” Emphasis in original).

²⁴⁰ Böckenförde, *The Constituent Power of the People*, *supra* note 95.

²⁴¹ ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* 12 (Maurizia Boscagli trans., Minnesota Univ. Press 1999). See also SULTANY, *supra* note 166, at 294 (explaining Negri's “forward looking approach” associating the idea of the constituent power with possibilities related to a sort of permanent revolution).

²⁴² Ming-Sung Kuo, *Between Fact and Norm. Narrative and Constitutionalisation of Founding Moments*, in *FOUNDING MOMENTS IN CONSTITUTIONALISM*, *supra* note 139, at 11, 28. See also Arvidsson, Brannstrom, & Minkinen, *supra* note 12, at 5 (“Populist Mobilisations may, however, not be easily distinguishable from the desire for mob rule”).

the founding history has been forgotten.²⁴³ In Nootens words, the constituent power of the people can be “a symbolic reconstruction of a multitude as a collective political agent that is crystallized a posteriori in distinctive representations of ‘the people’ (in a kind of ‘back-to-the-future’ move) that build on the empirical and discursive significance of specific interests yet whose function is to represent the *whole* body politics.”²⁴⁴

Using the theory for a purely normative purpose—to legitimize constitutional norms and support the legal hierarchy of norms—with a retrospective and interpretative approach makes some sense. Indeed, the prospective or present use of the theory is vulnerable to populist takeovers; it can promote instability; it says little about the procedure; and it is unable to predict the outcome nor to explain the content of the new constitutional norms. In other words, the prospective use of the theory as a political narrative cannot guarantee that it will ultimately lead to a genuinely democratic outcome.²⁴⁵

Some scholars like Dieter Grimm have also argued that the people is a concept that should not be approached in a realistic manner.²⁴⁶ Rather, and despite Schmitt’s attempt to provide a concrete idea of the people,²⁴⁷ we should embrace its fictional nature.²⁴⁸ Even though constitutions are “human-made” and the processes are not conducted by “abstract ideas or amorphous organic pressures,”²⁴⁹ treating the idea of the people as a hypothetical concept that is assumed, rather than demonstrated, may offer a normative advantage. Richard Kay also offers a similar approach, as he prefers to use the idea of constituent authority instead of constituent power to account for the fact that the people is an artificial entity that requires reconstruction.²⁵⁰

Responding to this kind of criticism, one may think that what counts here is not a historically accurate version of the founding moment, but the perception that the people has in the present over the constitution-makers of the past. It is, then, a problem of popular imagination.²⁵¹ In South Africa, for example, the people did not act in unison when deciding on a norm;²⁵² however, according to Kay, the people of South Africa is still able to reconstruct the constitutional moment and renew its

²⁴³ Simon Gilhooley, “*And Then They Begin to Look After the History of Their Founders*”: (Re)configurations of the Founding in the Early Republic, in *FOUNDING MOMENTS IN CONSTITUTIONALISM*, *supra* note 139, at 93, 96.

²⁴⁴ Nootens, *supra* note 7, at 138.

²⁴⁵ Luckily, for example, the prospective use of the theory seemed to have had a positive expression in the Colombian 1991 constitution-making process, but not in the Venezuelan 1999 Constitution. See Ana María Bejarano & Renata Segura, *Reforma constitucional en tiempos de crisis: Lecciones de Colombia y Venezuela*, 1 *REVISTA LATINOAMERICANA DE POLÍTICA COMPARADA* 155 (2008).

²⁴⁶ GRIMM, *supra* note 11, at 73 (“Popular sovereignty is not a reality, but an ascription. The sovereign remains only an abstract subject for the ascription of acts of public authority”).

²⁴⁷ See Scheuerman, *supra* note 83.

²⁴⁸ See also JACOBSON & ROZNAI, *supra* note 46, at 253.

²⁴⁹ Ran Hirschl, *The Strategic Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 154, at 157, 165.

²⁵⁰ Richard Kay, *Constituent Authority*, 59 *AM. J. COMP. L.* 715 (2011).

²⁵¹ Kuo, *supra* note 242, at 21 (“[The] collective constitutional imagination that extends beyond specialists in constitutional interpretation, the constitutional order and its interpretation are seen as constantly seeking to approach the authenticity or identity of constitutional authorship”).

²⁵² Kay, *supra* note 250, at 755 (“[W]e end up in a back room with fundamental decisions brokered by individuals answerable to something quite different from a unitary *people*. It was only that distinctly non-popular process that was, to use Sieyes’ expression, ‘completely untrammelled’”).

constituent authority with a sort of daily plebiscite—paraphrasing Renan’s famous expression.²⁵³ Then, the true test of the narrative of the legitimization of constituent power is the story about the founding moment that we agree on. If the story is good enough, and shared by enough members of the political community, then the historical reconstruction of the founding myth may offer a potential to legitimize the constitution. This seems to connect to Kay’s description of the South African case. This is also what Ackerman has done when describing the founding of the American Constitution as an event in which “We the People” spoke.²⁵⁴

Grimm argues that, by assuming the theory’s fictional nature, its use views the language of the people as central to the political narratives, and as such having “real consequences that account for the differences between political regimes.”²⁵⁵ Nevertheless, the fiction of the people can be employed by political actors in any type of regime—such as the Chinese and Iranian regimes—so it is unclear whether the fiction can be useful in the terms described by Grimm.

Perhaps the main benefit of assuming the people’s fictional nature is a pragmatic legitimization of the constitution based on the perception that it was created by “We the people” and capturing the necessity of the people’s consent.²⁵⁶ What matters is not the people at the time the constitution was enacted, but the current people and the way it reconstructs the moment. That way, the mode of remembering the founding moment by the current people has the potential of transforming that moment into a symbol of freedom and liberation.²⁵⁷ A possible objection to this way of assuming the idea of the people is its non-institutional nature. This way of approaching the people can hardly connect with transparent, accountable democratic procedures. Defenders of the theory might respond by saying that their fiction is more of a sociological approach that does not need institutional mechanisms. However, it is hard for a purely fictitious idea, which attempts to grasp a social understanding, to succeed in going beyond a merely conceptual idea with little normative practical output.²⁵⁸ Mere concepts are not sufficient to justify political practices, and it is unclear how that approach can be helpful in either the normative or descriptive dimensions of the theory.²⁵⁹

Nevertheless, even if one is able to accept that mere concepts can provide a basis for legitimacy, the idea that constituent power is based on an abstract notion of the people assuming a fiction can trigger another problem. Morgan’s classic understanding of the fiction of representation, according to which the idea of fiction is aimed at legitimizing a constitution,²⁶⁰ needs to resemble the facts in order to be credible because, if “it strays

²⁵³ *Id.* at 757.

²⁵⁴ On the way the Federalists used the constituent power theory, though perhaps not literally, see Jason Frank, “Unauthorized Propositions”: *The Federalist Papers and Constituent Power*, 37 *DIACRITICS* 103 (2007).

²⁵⁵ GRIMM, *supra* note 11, at 74.

²⁵⁶ See Jackson, *supra* note 129, at 322 (explaining the idea, although she does not agree with it).

²⁵⁷ Kuo, *supra* note 242, at 29 (“Narratives about the founding moment are stories about the invocation of the constituent power too”).

²⁵⁸ See TUSHNET, *supra* note 1, at 15 (suggesting that the constituent power’s conceptual use involves a small “practical payoff”).

²⁵⁹ Adrienne Stone has used this argument to criticize Yaniv Roznai’s book. Adrienne Stone, *Unconstitutional Constitutional Amendments: Between Contradiction and Necessity*, 12 *VIENNA J. ON INT’L CONST. L.* 357 (2018).

²⁶⁰ EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1989).

too far from the fact, the willing suspension of disbelief collapses.”²⁶¹ In other words, a purely fictional reconstruction of the people can become too vague to be credible.²⁶² Important examples suggest that the facts of constitution-making processes are not close to the myth—see Section 5—and that constitution-making processes typically take place in non-ideal conditions—see Section 6. The gap between reality and imagination can become too large to ignore. However, ultimately, this empirical question requires more attention.²⁶³ I do think, however, that the arguments of Sections 5 and 6 are sufficient to suggest that the constituent power theory should not be used as a one-size-fits-all type of concept.²⁶⁴

Moreover, it is unlikely that, understood as a fiction, constituent power theory will succeed to hide the conflicts and disagreements of the founding moment for too long while preventing the costs identified in Section 5 of this article from emerging.²⁶⁵ As I will show in that section, contemporary agendas that seek to give more visibility to those that were excluded during constitution-making processes—sometimes but not always connected to decolonial and egalitarian demands—make it hard to defend the maintenance of the fiction. Contemporary constitutional discourse is better off showing awareness of the problems connected to the founding moment.

4.2. The case for inherent limits to the idea of constituent power

Some modifications seeking to redeem the theory have suggested that the constituent power has inherent qualities that come from sources such as natural law and democracy. The idea of assigning inherent limits to the constituent power, though incompatible with the conventional theory, is historically defensible. Sieyès favored natural law; the French Declaration of the Rights of Man and the Citizen stated that without the separation of powers a society “has no constitution at all”; and the American Declaration of Independence holds that “self-evident” truths exist and that the government’s powers derive “from the consent of the governed.” If constituent power is to be validated, then the constitution it enacts should not infringe on those limits. In the words of Richard Stacey, “the very nature of popular sovereignty imposes restraints on those who claim its authority in enacting a new constitution.”²⁶⁶ Even though it is possible to claim that that idea was present before Schmitt’s articulation of

²⁶¹ *Id.* See also JACOBSON & ROZNAI, *supra* note 46, at 256.

²⁶² For a similar criticism in reference to the fictional nature of sovereign, see DON HERZOG, *SOVEREIGNTY, R.I.P.* 15 (2020) (“You can treat sovereignty as a catch-all category for all kinds of competing conceptions of political authority. But then you have an invidiously flabby concept on your hands.” He further suggests that “if you renounce *all* the criteria of the classic concept and put nothing in their place, it becomes entirely mysterious what you could be talking about.” *Id.* at 24).

²⁶³ This is not to say, of course, that there are no other problems associated with the idea of the myth. Weale, for example, has suggested that, when politicians use the idea of the people as a myth, they are typically avoiding a debate on the arguments that can justify their policies. WEALE, *supra* note 133, at 114.

²⁶⁴ It is possible that a one-size-fits-all perspective to legitimize constitutional reforms is unlikely even from a liberal perspective. See Scheppele, *supra* note 41, at 564.

²⁶⁵ For a critical discussion of this idea, see Marco Goldoni & Christopher McCorkindale, *Why We (Still) Need a Revolution*, 14 *GER. L.J.* 2197 (2013).

²⁶⁶ Richard Stacey, *Popular Sovereignty and Revolutionary Constitution-Making*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW*, *supra* note 99, at 162, 162.

the constituent power,²⁶⁷ it is not a part of the conventional account of the constituent power theory. If those limits are going to be identified by contemporary scholars—as I will show in a moment—then we need to understand them as offering modifications to the theory.

For example, Bernal claims that constitution-making processes should respect the requirements of constitutionalism—such as separation of powers, the rule of law, and the protection of fundamental rights—but he thinks that constitutions that lack those requirements should not be called constitutions.²⁶⁸ Instead of modifying the constituent power theory, Bernal substitutes constituent power by “constitution-making (without constituent) power.” Andrew Arato also claims that constitution-making processes should follow procedures built on ideas of constitutionalism.²⁶⁹ He calls that paradigm a post-sovereign exercise of power. His theory is a deliberate alternative to the constituent power theory. Other examples include Amal Sethi’s “equitable elite bargaining theory,” which attempts to offer a way of understanding the legal legitimacy of constitutions,²⁷⁰ and Braver’s argument about the idea of “extraordinary adaptation,” which emphasizes how legal means can help to assess a plural understanding of the people.²⁷¹ None of these authors are, in the end, redeemers of the theory of constituent power, because they offer alternative accounts to avoid the idea of constituent power or argue against it. However, there are other authors who have insisted on using the language of the constituent power theory and keeping most of its elements—at least descriptively—while making normative modifications as to how the constituent power should manifest itself.

These scholars find it useful to justify constitution-making exercises by the idea of the people, but try to attenuate possible risks by discovering or identifying limits that they believe should be *inherent* to the concept of constituent power. The limits can be of, at least, two kinds. The first kind includes procedural conditions that can account for who the people is and what the people’s will is. The second kind of limits consists of substantive outcomes that the constitution-making process must accept or respect. Typically, those outcomes connect to assumed interests of the people and some core political principles or fundamental rights. After all, the argument goes, if the constitution is a genuine product of the people’s constituent power, then the constitution should not go against the people’s interests.

Even though examples abound, I will refer to just three authors who are important in the field.²⁷² The first is Joel Colón-Ríos, who has suggested that a democratic

²⁶⁷ See also Colón-Ríos, *supra* note 35.

²⁶⁸ Bernal, *supra* note 34, at 34–5.

²⁶⁹ Arato, *supra* note 140.

²⁷⁰ Amal Sethi, *Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining* (2022) (unpublished manuscript) (on file with author).

²⁷¹ BRAVER, *supra* note 84.

²⁷² For other examples, see Rafael Oyarte Martínez, *Limite y Limitaciones al Poder Constituyente*, REVISTA CHILENA DE DERECHO (Special Issue) 65 (1998). I have also discussed this item in Sergio Verdugo, *The Role of the Chilean Constitutional Court in times of Change*, in CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA, *supra* note 34, at 203 (identifying examples of Chilean scholars seeking this line of reasoning).

version of the constituent power theory requires upholding democratic principles.²⁷³ Advocating for a “weak” model of constitutionalism, Colón-Ríos suggests that democratic constitutionalism requires frequent invocations of the power of the people to remake the constitution, and that the procedure of constitution re-making should account for the values of democratic openness and popular participation.²⁷⁴ The idea is to observe a process that can get close to the will of the people while guaranteeing the future exercise of constituent power by recognizing rights such as freedom of voting and speech.²⁷⁵ Colón-Ríos thus promotes both substantive and procedural limits with an explicit normative purpose. His ideas are connected to his larger project showing that the law plays a relevant role in theories of constituent power—contrary to the conventional version of the theory that many have assumed—and in his Jeffersonian proposal of reading the constituent power theory as requiring the creation of a constituent power from time to time. The idea is to have the people manifesting itself not only in extraordinary moments, but regularly through an elected convention or assembly that respects its single mandate of enacting a new constitution.²⁷⁶

The second example can be found in Yaniv Roznai’s work. Roznai argues in favor of limiting the constitution-making process by introducing pre-established principles such as those that can be inserted in an interim constitution.²⁷⁷ He suggests, for example, that the process must respect “the core of freedoms such as freedom of speech, free and fair elections, freedom from arbitrary arrest, and freedom of assembly and association,”²⁷⁸ and that the process itself should not exclude parts of the people.²⁷⁹ Another example that connects well with Roznai’s account—though Roznai is not cited—can be found in Jaime Bassa’s work—a scholar who later became the Vice-President of Chile’s Constitutional Convention. Bassa argues that the constituent power has at least two inherent limits. First, it should not backtrack the recognition of fundamental rights, but rather the new constitution should improve the situation of the political community. Second, the new constitution should not prevent future exercise of the constituent power.²⁸⁰

A final example can be found in Richard Stacey’s work. According to Stacey, constituent power should be committed to liberal rule-of-law principles,²⁸¹ an argument that applies to constituent assemblies and that seeks to challenge the unconstrained sovereign model of constituent power.²⁸² Stacey’s work is interesting partly because it is an interpretation of Schmitt’s theory presented with the illustration of the

²⁷³ *But see* Colón-Ríos, *supra* note 35; Colón-Ríos, *supra* note 54; Colón-Ríos, *supra* note 58.

²⁷⁴ Colón-Ríos, *supra* note 105.

²⁷⁵ *See also* Joel I. Colón-Ríos, *Notes on Democracy and Constitution-Making*, 9 N.Z. J. PUB. INT’L L. 17 (2011); Joel I. Colón-Ríos, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 OSGOODE HALL L.J. 199 (2010).

²⁷⁶ *See also* Section 4.3.

²⁷⁷ Roznai, *supra* note 10, at 1399–406.

²⁷⁸ *Id.* at 1405.

²⁷⁹ *Id.* at 1406.

²⁸⁰ Bassa Mercado, *supra* note 93.

²⁸¹ *See also* Stacey, *supra* note 266, at 170–2.

²⁸² Richard Stacey, *Constituent Power and Carl Schmitt’s Theory of Constitution in Kenya’s Constitution-Making Process*, 9 INT’L J. CONST. L. 587 (2011).

constitution-making process that took place in Kenya. The Kenyan Parliament tried to establish substantive limits that constitutional designers were not supposed to infringe, and Stacey argued that there was a tension between Schmitt's separate ideas that can be used to justify those limits. He examines Schmitt's writings on democracy and the *Rechtsstaat* to emphasize that some kind of identity and representation is necessary in Schmitt's theory, and that, as a result, the democratic principle of identity must be limited in its implementation,²⁸³ and the law presupposes some inherent qualities such as equality before the law and the independence of the judiciary.²⁸⁴ The constraints on constituent power are inferred from rule-of-law requirements that demand the protection of some basic rights, which makes Schmitt's theory not very different from the conclusions of the legal theories of scholars such as Fuller and Dworkin.²⁸⁵

Of course, these ideas do not work well with the descriptive dimension of the constituent power theory. Nevertheless, the feasibility of these ideas is still important. George Duke, for example, questions whether Colón-Ríos's proposal can actually domesticate the Schmittian conception of the constituent power, and whether constituent assemblies are true expressions of the people as opposed to elites controlling them—a fact that Colón-Ríos seems to accept.²⁸⁶ If the answer to Duke's question is that it is unlikely for Colón-Ríos's conception to actually tame constitutional replacement procedures and for those constituent bodies to represent the people, then the use of the theory may become of little practical importance. The best version of these arguments is normative and even prescriptive. They reinterpret what the constituent power theory requires for a constitution-making process, and then deny the use of the theory for justifying processes that infringe those requirements.

At first glance, it is hard to resist the temptation of agreeing that constitution-making requires certain conditions for it to be considered democratic. Nevertheless, these theories have three kinds of risks that need to be taken into account. First, the prescriptive side of the suggestions tends to have a forward-looking dimension aimed at influencing present or future constitution-making processes. I have already explained the problem of prospective uses of the theory. Second, constitution-making procedures that use a radical narrative such as the constituent power theory are unlikely to work in conditions that secure the appropriate normative requirements—I will come back to this idea in Section 6.

The third risk is that the requirements often involve open-textured ideas that are easy to formally implement by leaders seeking democratic erosion. For example, the Bolivian Constitutional Court used the language of discrimination and political rights to remove the term limits of the incumbent president from the constitutional provision that the president's opponents had previously pushed the regime to adopt during the constitution-making process.²⁸⁷ The constituent power was only one, and it was

²⁸³ *Id.* at 608.

²⁸⁴ Stacey, *supra* note 282, at 609. See also Stacey, *supra* note 266, at 173–8.

²⁸⁵ Stacey, *supra* note 282, at 610–12.

²⁸⁶ George Duke, *Inherent Constraints on Constituent Power*, 40 OXFORD J. LEGAL STUD. 795, 810 (2020).

²⁸⁷ See Sergio Verdugo, *The Fall of the Constitution's Political Insurance. How the Morales Regime Broke the Insurance of the 2009 Bolivian Constitution*, 17 INT'L J. CONST. L. 1098 (2019).

associated to the regime, and not to the opposition. In this case, constituent power was connected to originalism, and originalism was one-sided. We should expect most original understandings of the constituent power to be one-sided because constitutional replacements and new constitutions typically come from political processes that divide the society.²⁸⁸ In the example of Bolivia, how can we identify whether the true version of the constituent power was respectful of some sort of inherent limitations if those limitations are also used by those seeking to establish a dominant party regime? In addition, the constitutions of countries such as Iran, China, Cuba, Venezuela, and Hungary all include rights provisions and most of them are the result of constitution-making processes that could arguably be considered to stem from the people's constituent power. Therefore, using the requirements to assess whether a norm enacted by a constituent assembly is a true constitution might be subject to rival interpretations.

These three risks do not succeed at completely removing the modifications made by redeemers such as those cited in this section. However, they significantly reduce the political feasibility of their academic projects and show a complication that is not easy to remove.

Regarding the corrections to the outcome of the process, rather than to the procedure itself, Duke has responded that, if the problem is one of normative legitimization, then it is unclear how the constituent power theory is needed at all.²⁸⁹ According to Duke, the inherent-limitations thesis becomes irrelevant because the constituent power is not used, after all, as a true principle of legitimization.²⁹⁰ If this is true, then the redeemers cited in this section are not genuine defenders of the conventional account of the constituent power theory.

Procedural accounts may face a similar objection. Because the idea of the people cannot be divided, as it is one of the core elements of the theory, they all embodied the people in institutions that excluded important sectors of society. The redeemers can certainly say that they are against the exclusion. However, if they seriously consider the idea that the people is not an organic entity or that it lacks a unified will, then one wonders why they insist on using the constituent power theory if they have just emptied it from its essential element.

4.3. The double differentiation model

Some suggest that a specific model of constitution-making should channel the constituent power theory: the double differentiation model.²⁹¹ The model, supported by

²⁸⁸ This is also true of recent and modern constituent assemblies that use democratic means in countries with a reasonable democratic culture. For evidence suggesting that the Chilean Constitutional Convention produced a constitutional draft that is not widely shared by the public opinion, see, e.g., Verdugo, *supra* note 137.

²⁸⁹ Duke, *supra* note 286, at 807.

²⁹⁰ *Id.* at 808 (also adding that the "fact that constitution makers *can be* subject to liberal constraints does not mean that the very idea of constituent power embeds those constraints as inherent principles. And the most obvious reason for this move from possibility to necessity. . . is that the favoured liberal *Rechtstaat* constitutional form is simply presupposed." *Id.*).

²⁹¹ For a description of this model, see Andrew Arato, *Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making*, 1 *GLOBAL CONST.* 173, 179 (2012).

theorists like Condorcet and Carré de Malberg,²⁹² assumes that constituent assemblies are autonomous from other institutions, that their only purpose is to enact a constitution, and that they should dissolve after achieving this purpose. That way, constitution-makers are prevented from intervening in any branch of government, they should not enact norms outside their exclusive authority, and they need to disappear from the political arena. They have a limited type of sovereignty in proposing a new constitution, but they cannot extend that sovereignty to other functions that exceed their mandate.

In the words of Colón-Ríos, the double limitation involves a “negation of the ordinary legislature’s power of constitutional change and a negation of the power of constituent assemblies to produce ordinary governmental acts.”²⁹³ Constituent bodies are expected to have a single purpose, achieve it, and then disappear. Although constitution-makers are somehow constrained and cannot be considered sovereign in the traditional way, except for the content they decide to add to the new constitution, as long as they respect the procedure, they are *sovereign* when deciding the content of constitutions.²⁹⁴ This claim may connect to the idea that Bernal calls “the argument from competence.” According to Bernal, assemblies should limit themselves to enacting a constitution and avoid developing other functions, which facilitates the accountability of the assemblies’ members.²⁹⁵

The advantages of this model seem obvious. If the model works, then the constituent body will have, in theory, fewer chances to intervene in functioning institutions, it may be less tempted to push for a dominant party regime, and constitutional designers will not be motivated by reelection. Had this model been dominant in Venezuela, the three-year nightmare of the Maduro-friendly constituent assembly (2017–20) would have been prevented.²⁹⁶ According to this model, constituent power is not equivalent to sovereignty, and the distinction should be made clear. Constituent power is merely a particular expression of sovereign power which should remain constrained by its exclusive goal. Constitutional designers are free to decide what matters to regulate and how to regulate them, but they should do so in the form of a constitution, and they should not do anything else besides discussing, bargaining, and enacting the norms that will be part of that constitution. As William Partlett has shown in his examination of the American tradition of the constituent power, this model might prevent constitutional designers from unilaterally changing the rules of constitution-making and controlling—with relative success, to be sure—the possibility of a runaway convention, while still seeing the people as sovereign.²⁹⁷ The core idea is that the people can only remain sovereign if there are limits in the way the people’s will is institutionalized through a convention, that the people does not delegate unlimited power to the convention while keeping their authority to ratify or reject the constitutional draft

²⁹² *Id.* at 181, 184.

²⁹³ COLÓN-RÍOS, *supra* note 58, at 160.

²⁹⁴ Colón-Ríos also distinguishes between constituent power and sovereignty. Both a constituent assembly and an ordinary legislator have a popular mandate, but the popular mandates vary. The popular mandate of the legislator connects to the constitution itself. *See id.* at 289.

²⁹⁵ Bernal, *supra* note 34, at 40.

²⁹⁶ *See supra* Section 3.4.

²⁹⁷ *See* William Partlett, *The American Tradition of Constituent Power*, 15 INT’L J. CONST. L. 955 (2017).

later proposed by the constituent body—perhaps this makes the model different from Arato’s post-sovereign model, as it still uses the language of sovereignty.²⁹⁸

According to Arato, however, the double differentiation model is weak because (i) it can still be “vulnerable to revolutionary populist ideas of popular sovereignty”;²⁹⁹ (ii) it may involve a “destructive political competition” between the assembly and other bodies;³⁰⁰ and (iii) it may entail an “implicit hierarchy” benefiting the assembly because it is typically elected after the other bodies.³⁰¹ Assuming that a competition between the assembly and other organs can be completely separate is possibly a naive statement. Advocates of the double differentiation model might rightly claim that there are advantages to preventing a runaway convention, and it might be useful to prohibit an assembly from intervening in *constituted* organs and require that it limit the scope of its power to enacting a constitution. However, as the assembly can still decide what matters it will regulate, and how those regulations will impact the future functioning of institutions such as the presidency, the judiciary, the Congress, and fourth-branch institutions, it is still empowered to, for example, pack courts, remove a hostile group of legislators from Congress, or shorten the term of a recently elected or appointed public officer. These types of powers can be even more politically salient and controversial if there is another organ that is elected after the constitutional assembly, as it happened in Chile, where the Congress and the President were elected after the assembly started to operate.³⁰²

The Chilean example is useful because it illustrates how a constitution-making procedure that was designed to follow the double-differentiation model after a multipartisan agreement that resulted in a highly regulated process³⁰³ can still become vulnerable to the risks of the constituent power narrative and the pressure to turn the convention into a sovereign assembly.³⁰⁴ The calls to turn the constitutional convention into a sovereign assembly, even if they fail, result in sensitive political

²⁹⁸ I am grateful to William Partlett for this useful suggestion.

²⁹⁹ ARATO, *supra* note 49, at 328.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Constitution-makers in Chile have proposed to shorten term limits and to remove the Senate. See *Unicameral o bicameral, he ahí el dilema: Convencionales divididos ante composición del Congreso en nueva Carta Magna*, EL MOSTRADOR (Jan. 31, 2022), www.elmostrador.cl/nueva-constitucion/2022/01/31/unicameral-o-bicameral-he-ahi-el-dilema-convencionales-divididos-ante-composicion-del-congreso-en-nueva-carta-magna/; *Corte Suprema emite comunicado por iniciativa de la Convención que busca limitar duración de jueces: independencia judicial “se podría ver afectada,”* EL MOSTRADOR (Jan. 25, 2022), www.elmostrador.cl/dia/2022/01/25/corte-suprema-emite-comunicado-por-iniciativa-de-la-convencion-busca-limitar-duracion-de-jueces-independencia-judicial-se-podria-ver-afectada/.

³⁰³ See Javier Couso, *Chile’s “Procedurally Regulated” Constitution-Making Process*, 13 HAGUE J. RULE L. 235 (2021). See also Carlos García Soto, Miguel Martínez Meucci, & Raúl Sánchez Urribarri, *Winds of Change: Comparing the Early Phases of Constitutional Redrafting in Chile and Venezuela*, 13 HAGUE J. RULE L. 315 (2021) (comparing the Chilean and Venezuelan early stages of constitution-making and arguing that Chile implemented a moderated, rule-bounded, and consensual procedure).

³⁰⁴ Elsewhere I have explained how the constituent power narrative has shaken the multipartisan agreement that set the rules of the process. Prieto & Verdugo, *supra* note 45.

tensions and legal infringements that harm the trust that rival factions have in the process,³⁰⁵ despite the existence of an otherwise reasonable regulation.³⁰⁶

There is another argument that makes the double differentiation model weak: it does not prevent the assembly from interpreting its own powers in an excessive way, as it fails to offer a clear-cut theory of how to distinguish what is a constitutional matter and what is not a constitutional issue.³⁰⁷ There is an enormous variation in the kinds of themes that can and should be included in a constitution, and there are no shared guidelines on what counts as constitutional and what does not. In the French constitution-making process, constituent and legislative functions constantly overlapped.³⁰⁸ The same happened in Tunisia in 1959, where the constituent assembly “performed both constitutive and legislative/parliamentary functions”; and in Algeria after the assembly extended its mandate.³⁰⁹ When assemblies wear “two hats,” they are likely to prevent other bodies, such as judges or congresses, from limiting their power.³¹⁰

If a group of delegates of an assembly wants to interfere with the Congress, they can threaten legislators by, for example, proposing to shut down one chamber of Congress or by changing the electoral formula for electing legislators, or by preventing legislators from running for reelection in the future. All of these types of interference can be included in the text of a new constitution. As a result, tensions between constituent assemblies and the branches of government that operate simultaneously with the assembly should be expected.

4.4. What can we learn from the reflexive version of the constituent power theory?

Sometimes constitution-making involves the creation of a demos, or nation-building. Tushnet suggests the US Constitution and the constitutional Federation of Malaysia as examples of this.³¹¹ How can the pre-political character of the people be assumed if the constitution is what constitutes the demos? The paradox of constitutionalism, as explained above, is more widespread than the cases of the United States and Malaysia,

³⁰⁵ See Benjamin Alemparte & Joshua Braver, *Constitutional Boot-strapping in Chile?*, I•CONNECT Blog (Nov. 2, 2021), www.iconnectblog.com/2021/10/constitutional-boot-strapping-in-chile/.

³⁰⁶ See Gabriel L. Negretto, *Deepening Democracy? Promises and challenges of Chile's Road to a New Constitution*, 13 HAGUE J. RULE L. 335 (2021) (discussing the advantages of Chile's highly regulated constitution-making process).

³⁰⁷ It is common that constitutions regulate matters considered exotic by constitutional scholars. Just to give a few examples, a quick search in the database of the Constitute Project shows that fifty-two constitutions have provisions regulating drugs, alcohol, and illegal substances, twenty-seven constitutions regulate the right to enjoy the benefits of science, and fifty-nine constitutions regulate restrictions on entry or exit to the country. See CONSTITUTE PROJECT, www.constituteproject.org/ (search terms: “drugs, alcohol, and illegal substances,” “right to enjoy the benefits of science,” “restrictions on entry or exit”) (last visited Jan. 29, 2022).

³⁰⁸ Lucien Jaume, *Constituent Power in France: The Revolution and Its Consequences*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 2, at 67.

³⁰⁹ SULTANY, *supra* note 166, at 316.

³¹⁰ *Id.*

³¹¹ TUSHNET, *supra* note 1, at 13.

because the people need an institutional form to act, but constituent power operates outside those institutional forms. In attempting to respond to this paradox and offer a more nuanced approach to how the constituent power is actually exercised, some scholars have defended a *reflexive* and *relational* theory aimed at modifying the way the conventional approach presents the relationship between the constituent and the constituted powers. In their attempt not to abandon the idea of the people, the normative implications of their idea are evident.

Hans Lindahl starts by claiming that constituent power is a form of “authoritative collective action” of the “we” and, as such, their acts need to be “ascribed to a collective” that needs to find its voice by “spokespersons that speak in its name and represent it as a whole” with a conditional “if it succeeds.”³¹² Lindahl assumes that these types of acts can fail because the “initiative of a would-be constituent power [that] will be carried forward by its addressees cannot be taken for granted.”³¹³ Thus, it is wrong to say that constituent power can operate in a void and any prospective exercise to identify such a power—as I have explained in Section 4.1—is risky.³¹⁴ Nevertheless, if we are to insist on using the idea of “the people” as the author of the constitution, and we know that constitutions are not created in a vacuum and that constraints are inevitable, how to grasp the idea of constituent power?

Reflecting on this question, Lindahl argues that both Schmitt and Kelsen are wrong. The key to understanding constituent power is not by assuming or rejecting the existence of a pre-legal notion of the people, but by assuming that constituent power is about the “self-constitution of a polity” based on a reflective identity, the idea of identity as a collective self-hood as opposed as the identity as sameness.³¹⁵ By doing that, Lindahl tries to recover the collective “We” subject of the constituent power, which Kelsen had collapsed by saying that collective action required the law. Following Lindahl’s approach, Eduardo Gill-Pedro argues that, for the constituent power to work, someone must use the constituted powers and claim to act on behalf of the people. If successful, the people will reveal itself retroactively and symbolically, and the reflexive identity will be born as the result of the questioning and responsiveness of the collective self.³¹⁶ Gill-Pedro’s argument can be connected to the scholars claiming that the constituent power has inherent limitations, as he also suggests that the process requires human rights recognitions and equality.³¹⁷

Also starting from Lindahl’s idea, Loughlin argues that constituent power is relational in nature. The people’s will is channeled via institutions and builds the idea of

³¹² Lindahl, *supra* note 127, at 151–2.

³¹³ *Id.* at 152.

³¹⁴ It is perhaps better to follow Stacey and speak of a “constitutional interregnum” in the extreme cases. Stacey, *supra* note 266.

³¹⁵ Hans Lindahl, *Constituent Power and Reflective Identity: Towards an Ontology of Collective Selfhood*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 2, at 9.

³¹⁶ Eduardo Gill-Pedro, *Claimins Human Rights: The Reflective Identity of the People*, in CONSTITUENT POWER. LAW, POPULAR RULE AND POLITICS, *supra* note 12, at 132.

³¹⁷ *Id.* at 146.

the people and the institutions that recognize them. Constituent power involves both the people exercising the power and the simultaneous constitution of the people.³¹⁸ Even if they have constituent power, they need to “act as an already constituted power.”³¹⁹ Thus, constituent 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.”³²⁰ The constitutional ordering can be ambiguous, dynamic, and provisional. People act and react confronting the question of “who are we?,” and constituent power needs constituted powers because it creates structures and continues to rework them.³²¹

These attempts to redeem the constituent power theory seem plausible at first sight, because they nuance the way the people constitutes itself, they are compatible with a multistage process of institution-building, and they appear to provide a persuasive answer to the paradox of constitutionalism. The demos is created in a progressive or incremental way, starting with something like a social movement or a claim by the political leader, and continuing with other steps that, over time, constitute both the people and the institutional forms that allow for its expression. However, this account still assumes that the people does exist and that it is possible to identify its will, but modifies the theory by nuancing the timetable of the constitution-making moment and the responses it gets. From a descriptive perspective, the reflexive theory—used in retrospective—seems better equipped than the conventional approach to constituent power to interpret historical moments accurately. Nevertheless, it remains vague as to what the nature of the people is and it is unclear whether the people maintains or creates a unity, or whether the constituent power can allow for the recognition of fragmentation, pluralism, and diversity.³²² Therefore, the theory can still be subject to normative challenges, it may still be vulnerable to the idea of building a romantic narrative—see Section 5 below—and it is unclear how it can avoid being used in undesirable ways by populist leaders. As I will explain below, the reflexive theory does not escape the dilemma of the constituent power redemption.

4.5. The unconstitutional constitutional amendment doctrine

It is possible to claim that the constituent power theory has a helpful application in justifying the power of courts to enforce the limits of the amending power. The possibility of courts striking down constitutional amendments to protect an original constitutional norm, and the existence of actual cases developing judicial doctrines, has

³¹⁸ LOUGHLIN, *supra* note 7, at 227.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 227–8.

³²² See SULTANY, *supra* note 166, at 295 (suggesting that the dialectical idea is used too “loosely in this debate and the scholarly tradition on which this usage draws is unclear.” Sultany then continues by saying that the approach “deploys a simplistic dialectics in which constituent power collapses into constituted power because it becomes synonymous with constitutionally mediated sovereignty.” *Id.* at 296).

stimulated important debates in the constitutional literature.³²³ A popular way the unconstitutional constitutional amendment has been justified is by appealing to the constituent power theory.³²⁴ This is the case, for example, of the arguments that support the Colombian “substitution” doctrine³²⁵ and of the Indian “basic structure” doctrine.³²⁶ It is also the argument used in the infamous Turkish case striking down an amendment to allow the use of the headscarf³²⁷ or the decisions of courts in Bolivia and Honduras.³²⁸ Even though the theory has been rejected by courts using a more formalist approach,³²⁹ and some scholars have criticized the theory both on formalistic and democratic grounds,³³⁰ the unconstitutional constitutional amendment doctrine is still growing in popularity.³³¹

The argument claims that courts are—or should be—empowered to enforce the limits set by the people’s constituent power, even against the will of constitutional amenders, because an act of the constituent power can only be abolished or modified

³²³ See, e.g., Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010); Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013); Michael Hein, *The Least Dangerous Branch? Constitutional Review of Constitutional Amendments in Europe*, in COURTS AND POLITICS 187 (Martin Belov ed., 2020); Sabrina Ragone, EL CONTROL JUDICIAL DE LA REFORMA CONSTITUCIONAL: ASPECTOS TEÓRICOS Y COMPARATIVOS (2012); Sabrina Ragone, *El Control Material de las Reformas Constitucionales en Perspectiva Comparada*, 13 TEORÍA Y REALIDAD CONSTITUCIONAL 385 (2013).

³²⁴ See, e.g., Richard Albert, *The State of the Art in Constitutional Amendment*, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT, *supra* note 124, at 1.

³²⁵ See, e.g., RAMÍREZ CLEVES, *supra* note 106; Samuel Issacharoff, Santiago García-Jaramillo, & Vicente F. Benítez-Rojas, *Judicial Review of Presidential Re-Election Amendments in Colombia*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW 13 (Editors eds., 2020); Luis Alejandro Silva & Fernando Contreras, *La doctrina de la sustitución de la Constitución en Colombia*, 18 ESTUDIOS CONSTITUCIONALES 395 (2020); González-Bertomeu, *supra* note 102; Mario Alberto Cajas-Sarria, *Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016*, 5 THEORY & PRACTICE LEGIS. 245 (2017); Vicente F Benítez-R., “With a Little Help from the People”: Actio Popularis and the Politics of Judicial Review of Constitutional Amendments in Colombia 1955–90, 19 INT’L J. CONST. L. 1020 (2021).

³²⁶ Monika Polzin, *The Basic-Structure Doctrine and Its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting*, 5 IND. L. REV. 45 (2021) (explaining how Schmitt’s theory of the constituent power ended up influencing the Indian doctrine via the work of another German scholar called Dietrich Conrad).

³²⁷ See Seven Gülşen & Lars Vinx, *The Hegemonic Preservation Thesis Revisited: The Example of Turkey*, 9 HAGUE J. RULE L. 45 (2017); Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment: The Turkish Perspective. A Comment on the Turkish Constitutional Court’s Headscarf Decision*, 10 INT’L J. CONST. L. 175 (2012).

³²⁸ Verdugo, *supra* note 287; Rosalind Dixon, David Landau, & Yaniv Roznai, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 8 GLOBAL CONST. 40 (2018).

³²⁹ Richard Albert, Malkhaz Nakashide, & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 HASTINGS L.J. 639 (2019).

³³⁰ See, e.g., Santiago García-Jaramillo & Francisco Gnecco-Estrada, *La teoría de la sustitución: de la protección de la supremacía e integridad de la constitución, a la aniquilación de la titularidad del poder de reforma constitucional en el órgano legislativo*, 65 VNIVERSITAS 59 (2016); Sergio Verdugo, *La objeción democrática a los límites materiales de la reforma constitucional*, 28 ACTUAL. JURÍD. 229 (2013). Vinx has suggested that scholars should not read limitations to amendments without a “textual basis.” Lars Vinx, *Are There Inherent Limits to Constitutional Amendment? An Analysis of Carl Schmitt’s argument*, in CONSTITUENT POWER: LAW, POPULAR RULE AND POLITICS, *supra* note 12, 61, 66.

³³¹ Roznai, *supra* note 323.

by an emanation of the people's constituent power. As constitutional amendments are typically the act of constituted powers, and the amending power is, therefore, a limited power, the courts should be able to stop them when those limits are exceeded.³³² If politicians or legislators aim to modify the constituent power's decision, the argument goes, they should follow a procedure that can invoke the "primary constituent power."³³³ This primary constituent power enables the expression of the will of the people, and it typically manifests in extraordinary moments.³³⁴ Only a procedure that can resemble the original constituent power of the people can be defended from a normative perspective.³³⁵ Constitutional amendments are a "secondary constituent power" because they are delegated.³³⁶ However, reforms to an existing constitution may also modify a core decision made by the primary constituent power. Are those reforms legitimate? According to Roznai, constitutional amendments should be considered within a spectrum of legitimacy. The more plausible it is that the people can "awake" within the procedure—i.e., with referendums or constituent assemblies—the more legitimate the amendments will be, and the closer they will be to invoking the constituent authority of the people.³³⁷ This is one of the reasons that can be used to justify why some constitutions include a tiered way for modifying it, including the possibility of calling for an elected constituent assembly or of a referendum.³³⁸ The argument is helpful to argue that the secondary power should not "destroy" the constitution³³⁹—even implicit limits that can be found in a structural interpretation of the constitution—and that courts should review whether constitutional amenders have trespassed the limits.

The theory is clearly built on the conventional version of the constituent power theory. Even though it is hard to imagine how Schmitt could have accepted empowering constitutional courts to enforce constitutional limits against constitutional amendments,³⁴⁰ Roznai's idea seems coherent with the way courts have used his theory to justify the unconstitutional constitutional amendment doctrine.³⁴¹ Unlike Schmitt's theory, the unconstitutional constitutional amendment theory, in Roznai's approach, works better as a normative theory rather than as a descriptive or

³³² For the most popular version of this argument is presented, see YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* (2017).

³³³ Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty*, in *THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT*, *supra* note 124, at 23, 38.

³³⁴ ROZNAI, *supra* note 332, at 229.

³³⁵ Roznai, *supra* note 333, at 39.

³³⁶ ROZNAI, *supra* note 332, at 126.

³³⁷ *Id.* at 157; JACOBSON & ROZNAI, *supra* note 46, at 232.

³³⁸ *See, e.g.*, Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 *Geo. Wash. Int'l L. Rev.* 438, 501 (2018) ("This requirement seems to correspond to a logic that is consistent with the general contours of constituent power theory—more fundamental political decisions such as those involving the higher tier should be made with input from the people").

³³⁹ ROZNAI, *supra* note 332, at 141.

³⁴⁰ *See generally* LARS VINX, *THE GUARDIAN OF THE CONSTITUTION: HANS Kelsen AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW* (2015).

³⁴¹ *See* Vinx, *supra* note 330 (explaining how Schmitt's theory can be used to justify the limits of the amending power).

explanatory attempt—which seems to be Roznai’s genuine intention.³⁴² True, many courts have invoked an idea similar to Roznai’s accounts, but this fact is insufficient to defend the theory from a descriptive point of view. The theory fails descriptively, because many formal constitutional amendments following the regular amendment procedure,³⁴³ and many informal episodes of constitutional change³⁴⁴ have indeed “destroyed” the core of an existing constitution.³⁴⁵

I argue that, even though there is a value to the theory of unconstitutional constitutional amendments, the use of the constituent power theory in justifying it is unwarranted for at least three reasons.³⁴⁶ Justifying the unconstitutional constitutional amendment doctrine with the help of constituent power theory makes the doctrine (i) *arbitrary* and (ii) *dangerous*. It is also (iii) *unnecessary* to invoke the constituent power theory because the unconstitutional constitutional amendment doctrine can be grounded on independent justifications that, compared to the constituent power theory, are less arbitrary and dangerous.³⁴⁷

The first argument is that the constituent power can make the unconstitutional constitutional amendment doctrine arbitrary because the justification and decisions of the constituent power are too vague to generate a shared interpretation. Consequently, judges do not have a clear guidance on how to use the doctrine, and they can be selective in which parts of the constitution are core.³⁴⁸ In other words, the constituent power theory does not provide a clear-cut criterion to decide which part of the constitution should be protected and, with similar arguments, opposing outcomes can be justified.³⁴⁹ The theory can also lead to selective uses

³⁴² See, e.g., ROZNAI, *supra* note 332, at 220–1.

³⁴³ Commenting these examples, Garlicky and Garlicka-Sowers state that, after all, “in some situations, the primary constituent power did find its manifestation in constitutional amendments.” Lech Garlicki & Zofia A. Garlicka-Sowers, *Unconstitutional Constitutional Amendments*, 12 VIENNA J. ON INT’L CONST. L. 307, 312 (2018). On the Chilean case, see Verdugo, *supra* note 272.

³⁴⁴ On informal constitutional change, see, e.g., Carlos Bernal, *Cambio Constitucional Informal: Una Introducción Crítica*, in CAMBIO CONSTITUCIONAL INFORMAL 9 (Richard Albert & Carlos Bernal eds., 2016).

³⁴⁵ For a useful theorization of this problem, see Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1 (2018).

³⁴⁶ These arguments are not exhaustive. For a critique, see, e.g., Stone, *supra* note 259.

³⁴⁷ The theory is also subject to legal challenges that focus on a literal reading of the constitutional text. Those challenges are more common against implicit limits to constitutional amendments rather than against eternity clauses authorizing judges to constrain constitutional reforms. Even though I do not develop those criticisms in this article, it is important to take into account that the formalist resistance against judicial review of constitutional amendments can lead into accusations of judicial activism. This is not necessarily undesirable. After all, the unconstitutional constitutional amendment doctrine is expected to take place in a scenario where the political stakes are high. See Yaniv Roznai, *Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy*, 29 WM. & MARY BILL RTS. J. (2020).

³⁴⁸ Moreover, *ex-ante* distinctions such as formal or substantive vices, which abound in the case law related to the unconstitutional constitutional amendment doctrine, are of “little use.” See Sabrina Ragone, *The Limits of Amendment Powers*, 12 VIENNA J. ON INT’L CONST. L. 345, 353–354 (2018).

³⁴⁹ See, for example, the way constituent power has served to enable constitutional amenders and also to restrain them, to prevent constitutional modifications, and to remove clauses from a constitution. For examples, see Sergio Verdugo, *Global Canons, Term Limits, and the Constituent Power Theory*, in CANONS IN GLOBAL CONSTITUTIONAL LAW (Mattias Kumm, Michaela Hailbronner, & Sujit Choudhry eds., forthcoming).

of originalism³⁵⁰ or of how to identify the content of a constitution in the context of a constitutional moment.³⁵¹ In extreme situations, the unconstitutional constitutional amendment doctrine has also led to judges influencing the initiation of amendments and defining their content.³⁵² Of course, this is a criticism that can be made against many judicial doctrines, such as the non-delegation doctrine in the United States and the possibility of finding manageable standards. The arbitrariness of the constituent power theory is still important because the theory is likely to take place in cases where the stakes are high and pressure to release a decision that infringes important democratic values exists.

It could be argued that there is a mechanism that can narrow down the judicial doctrine and make it less arbitrary: using eternity clauses. The use of eternity clauses may make the theory more appealing, even though most eternity clauses are still drafted in abstract and open-ended ways giving broad discretion to the interpreter. If those clauses succeed in disciplining the interpretation and produce a shared understanding that does not bring the problems of originalism, the theory may be more defensible on the ground of an eternity clause, despite the problems that unamendability possesses for democratic constitutionalism.³⁵³ As Silvia Suteu has argued, eternity clauses typically have a contested and fraught origin, their judicial enforcement is oftentimes problematic from a democratic perspective, they are not necessarily committed to liberal principles, and they are many times incapable of serving as a speedbump against instances of democratic erosion.³⁵⁴ The constituent power theory tends to oversimplify the interpretation of eternity clauses. It is unclear, then, why the eternity clause needs to be justified on the constituent power theory.

The second argument against using the constituent power theory to justify the unconstitutional constitutional amendment doctrine is that the constituent power theory can lead to dangerous outcomes. As it does not need to be grounded in a genuinely democratic rationale and can be used arbitrarily, judges can invoke the theory for undesirable purposes. Section 3.4 above showed that the constituent power theory

³⁵⁰ See, e.g., the criticisms against the Bolivian Constitutional Court decision that removed the term limits of the President in 2017. David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 UC DAVIS L. REV. 1313 (2020); Sergio Verdugo, *Limited Democracy and Great Distrust. John Hart Ely in Chile and Bolivia*, 19 INT'L J. CONST. L. (2021); Laura Alessandra Nocera, *Contradicciones constitucionales: El Tribunal Constitucional Plurinacional boliviano y la reelección de morales: ¿Una práctica de abusivismo?*, 23 ANU. IBEROAM. JUSTICIA CONST. 491 (2019). See also a critique against the Chilean Constitutional Court decisions on the unconstitutional constitutional amendment doctrine in Marianne Poehls & Sergio Verdugo, *Auge y Caída de las Reformas Constitucionales Inconstitucionales en Chile. Comentario a las Sentencias del Tribunal Constitucional roles 9797-2020 y 10.774-2021*, 2022 ANUARIO DERECHO PÚBLICO 263.

³⁵¹ See, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STANF. L. REV. 759 (1992) (critiquing Ackerman's theory on similar grounds).

³⁵² For the example of Colombia, see Vicente F. Benítez-R., *Beyond Invalidation: Unorthodox Forms of Judicial Review of Constitutional Amendments and Constitution-Amending Case Law in Colombia*, 9 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS 269 (2022).

³⁵³ Sabrina Ragone has shown that the existence of eternity clauses does not make a big difference in the way courts behave. See RAGONE, *supra* note 323.

³⁵⁴ See especially SILVIA SUTEU, *ETERNITY CLAUSES IN DEMOCRATIC CONSTITUTIONALISM* (2021).

can serve authoritarian and populist aims. Following that rationale, the unconstitutional constitutional amendment doctrine can serve to justify judicial abuses and justify authoritarian purposes.³⁵⁵ Sometimes those abuses involve supporting an authoritarian agenda, such as enabling a takeover of the political system via a constituent assembly;³⁵⁶ other times, the abuses can be helpful to remove term limits³⁵⁷ or to protect an undesirable, ethnocentric version of the people,³⁵⁸ it can help to preserve the core of an authoritarian constitution,³⁵⁹ and it can lead judges to use it as a selective and discretionary tool for political purposes,³⁶⁰ even blocking reasonable changes supported by legislative majorities.

The defenders of the unconstitutional constitutional amendment doctrine can react against these arguments by showing cases where the doctrine has served democratic purposes and arguing that the constituent power theory was useful to prevent a democratic decay agenda. After all, Landau has used the Uribe case of the Colombian Constitutional Court as an example of how to avoid an instance of constitutional abuse,³⁶¹ and Sam Issacharoff has used the same example to show how a constitutional court can help to stabilize a constitution in fragile institutional contexts.³⁶²

However, it is possible to justify those types of judicial decisions with independent reasons that do not need to connect to the constituent power theory. Bernal, who is a skeptic of the unconstitutional constitutional amendment doctrine, has used the case to show that, even though the Colombian Constitutional Court's justifications cannot overcome the democratic criticism, the doctrine can be justified by the dangers that a hyper-presidential regime—such as Colombia's political system—can posit for democracy. Bernal's argument should not surprise us. At least since Guillermo O'Donnell's idea of "delegative democracy," we know that hyper-presidential regimes can become a fertile ground for authoritarian agendas.³⁶³

³⁵⁵ See, e.g., Ignatius Yordan Nugraha, *Abusive Unconstitutional Constitutional Amendments: Indonesia, the Pancasila and the Spectre of Authoritarianism*, OXFORD J. LEGAL STUD. (2023), <https://doi.org/10.1093/ojls/ggad002> (writing about Indonesia).

³⁵⁶ See, e.g., Allan R. Brewer-Carías, *El Juez Constitucional vs. el Pueblo como Poder Constituyente Originario*, in ESTUDIOS SOBRE LA ASAMBLEA NACIONAL CONSTITUYENTE Y SU INCONSTITUCIONAL CONVOCATORIA EN 2017 at 481 (Allan R. Brewer-Carías & Carlos García Soto eds., 2017).

³⁵⁷ See, e.g., Yaniv Roznai, *Constitutional Unamendability in Latin America Gone Wrong?*, in CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA, *supra* note 34, at 93; Rosalind Dixon, David Landau, & Yaniv Roznai, *Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America*, in THE POLITICS OF PRESIDENTIAL TERM LIMITS 53 (Alexander Baturó & Robert Elgie eds., 2019).

³⁵⁸ See, e.g., L. Vinx, *The Incoherence of Strong Popular Sovereignty*, 11 INT'L J. CONST. L. 101 (2013); Weiler, *supra* note 37.

³⁵⁹ This is why the unconstitutional constitutional amendment should not be used in countries where the constitution has an authoritarian origin. I have made this argument elsewhere in Verdugo, *supra* note 272.

³⁶⁰ See, e.g., Salgado & Alves da Chagas, *supra* note 93.

³⁶¹ David Landau, *Abusive Constitutionalism*, 47 UC DAVIS L. REV. 189 (2013).

³⁶² Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 AM. J. COMP. L. 585 (2014); SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015). I have also used that case as a positive example of how to prevent democratic erosion. Sergio Verdugo, *How Judges Can Challenge Dictators and Get Away with It*, 59 COLUM. J. TRANSNAT'L L. 554 (2021).

³⁶³ See, e.g., Guillermo A O'Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55 (1994).

Using the core elements of a democratic regime seems to be a reasonable way to justify the unconstitutional constitutional amendment doctrine, as it can help guide the judges in the right direction and with fewer risks. For this reason, scholars like Landau and Dixon have argued that the doctrine requires a narrow version that can resemble something like the minimum core of democracy.³⁶⁴ This is not to say that these alternatives come without risks. After all, democracy has elements that can also be contested, and there can still be a degree of vagueness. However, demanding that judges elaborate democratic-oriented arguments provides a narrower field for challenging constitutional amendments and gives good reasons to reject Schmittian-type ideas about the people's will.

Other justifications of the unconstitutional constitutional amendment doctrine do not need to go back to the constituent power theory. As Yasuo Hasebe and Víctor Ferreres Comella have separately argued, finding independent justifications for the doctrine makes constituent power unnecessary,³⁶⁵ even if those reasons are instrumental.³⁶⁶ The constituent power theory should die, but “the institutions that were historically associated with it can survive that death.”³⁶⁷ Those justifications can come from different sources. Examples from democracy, such as those of Bernal and Dixon and Landau, are important but not unique. Other justifications are found in supranational instruments,³⁶⁸ constitutional traditions,³⁶⁹ Hartian approaches,³⁷⁰ or theoretical concepts such as the dismemberment theory.³⁷¹

5. The problems of romanticized constitutions

The idea that the people are the ultimate source of legitimacy when drafting a constitution assumes that a unified political community can freely enact a constitution. I have already explained how difficult it is to accept the people's unity without recurring to a normatively undesirable idea of the people. Constitutions should be the product of an overlapping consensus of large sectors of society,³⁷² and recognizing the

³⁶⁴ Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015); Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, in ASSESSING CONSTITUTIONAL PERFORMANCE 268 (Tom Ginsburg & Aziz Z. Huq eds., 2016).

³⁶⁵ See Hasebe, *supra* note 31, at 49; Víctor Ferreres Comella, *The Death of the Constituent Power* (forthcoming).

³⁶⁶ Ferreres Comella, *supra* note 365 (“We do not need to postulate the existence of a legally omnipotent people in the background, as the fountain of all laws, in order to shield those arrangements against democratic censure”).

³⁶⁷ *Id.*

³⁶⁸ Garlicki & Garlicka-Sowers, *supra* note 343.

³⁶⁹ Jacobsohn, *supra* note 210.

³⁷⁰ Hasebe, *supra* note 31, at 49.

³⁷¹ See, e.g., Laura-Stella Enonchong, *Unconstitutional Constitutional Amendment or Constitutional Dismemberment? A Reappraisal of the Presidential Term Limit Amendment in Cameroon*, GLOBAL CONST. 1 (2022) (using Richard Albert's dismemberment theory to argue that an unconstitutional constitutional amendment doctrine was justified in Cameroon).

³⁷² I am of course borrowing Rawls's language. However, one does not need to agree on Rawls's idea of the “overlapping consensus” to assign a particular value to decisions made by consensus during constitution-making processes. See HOROWITZ, *supra* note 145. On Rawls's overlapping consensus idea, see, e.g., John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y. U. L. REV. 233 (1989); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

differences among these sectors is crucial. However, if we look at historical examples of constitution-making processes, even “democratic” ones, it is not easy to find a procedure that was not (at least partially) imposed by some against the will of others. When it exposes the fiction, history shows that dominant groups draft constitutions, popular approval may not be immediate, and typically, only a fraction of the population is involved in the process.³⁷³ Assuming a fictional unity of the people is possible, as I showed in Section 4.1, but, as I will argue in this section, it comes at a cost. What do we lose by building a legitimation narrative that assumes the people created the constitution?

5.1. From imposed to romantic constitutions

To grasp the idea of a romanticized constitution, it is helpful to start reflecting on a related and important concept: the idea of an “imposed” constitution. An imposed constitution is contrary to a constitutional order freely established by a political community operating autonomously. However, whether a constitution can be imposed on others or not is a question not of kind, but of degree.³⁷⁴ Historically, all constitutions are imposed in some way.³⁷⁵ The argument I am defending here is not that the idea of imposition is overinclusive—in fact, it may be. My argument is that, (i) historically, constitution-making processes are not, and cannot be, perfect attempts to identify the single will of the people, (ii) pretending the opposite will trigger costs by minimizing the problems that constitution-making processes had, and (iii) valuable historical lessons can be lost as a result.

Romanticized approaches to the founding moment that identify a single popular will in a constitution are typically grounded on selective and inaccurate narratives. Even different generations at different times are sometimes called to “adjudicate between distinct candidates for the title of a founding moment in the past.”³⁷⁶ However, if we are serious about exploring the history of the founding moment, “no narrative of this kind can be trusted because no constitution can live up to such a narrative.”³⁷⁷ Cases of “impositions” are sufficient to illustrate this point, and those cases are frequent. Examples include foreign intervention, monarchical octroyed constitutions, majoritarian constitution-making processes generating winners and losers,³⁷⁸ and constitutions resulting from national narratives that emphasize the hegemony of

³⁷³ This is a well-known problem with the idea of using a fiction in constitutional theory. See, e.g., Galligan, *supra* note 88, at 356.

³⁷⁴ Yaniv Roznai, *Internally Imposed Constitutions*, in *THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS*, *supra* note 11, at 58, 60 (“Thus, the basic argument of this chapter is that there are many ways and degrees of imposition and *all constitutions can be considered as imposed* to some extent, i.e., have some characteristics of imposition”).

³⁷⁵ David Law, *Imposed Constitutions and Romantic Constitutions*, in *THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS*, *supra* note 11, at 34.

³⁷⁶ Gilhooley, *supra* note 243, at 97.

³⁷⁷ Law, *supra* note 375 at 38 (adding “But the point of constitutional narrative. . . is not descriptive accuracy, but rather something more like myth-making or political persuasion”).

³⁷⁸ Roznai, *supra* note 374, at 69; Landau, *supra* note 22.

a specific group over the other.³⁷⁹ Most of the time, constitutions are the imposition of an elite over the rest.³⁸⁰ Even though those elites may claim representation over the people, representation is not a feature that tends to work particularly well during moments of crisis where the party system is not performing its functions well.³⁸¹

From the fact that constitutions are somehow imposed, we should not conclude that their content is necessarily unacceptable. Most constitutions do have liberal and democratic provisions, including constitutions that are “drafted and adopted in the shadow of a gun.”³⁸² Even monarchical constitutions recognize liberal principles.³⁸³ Some of them were not mere concessions by the monarchs, as they are typically presented, but attempts to restrict the political power of the monarch in ways that have advanced political liberalism despite the use of a monarchical language.³⁸⁴ If these liberal and democratic provisions cannot be connected to the will of the people, and we attempt to defend a theory of legitimation that can account for those provisions, then the constituent power theory will be insufficient to justify them.

Moreover, we should not infer that imposed constitutions necessarily lack a degree of social acceptance. There are many examples of “imposed” constitutions that different generations of the same jurisdiction have socially accepted. Examples often include the case of the Japanese Kenpo Constitution, which was enacted by a forced constitution-making process pushed by General Douglas MacArthur after the Second World War,³⁸⁵ as well as the German Basic Law, which was initiated by the allied forces after the fall of Nazi Germany. Examples abound of other constitutions that could not be enacted with the use of the people’s constituent power.³⁸⁶ Despite the imposed way in which the constitution-making process was initiated in those countries, those processes had some participation from local leaders, and the documents were socially accepted or—at least—acquiesced to a considerable part of the population. In the case of Germany, acceptance seems to have been broad.³⁸⁷ In Japan, acceptance was stronger in the case of the left and weaker in the case of the right.³⁸⁸ Other examples include Britain’s Parliament authorizing and enacting the constitutions and constitutional modifications of the former colonies, such as the case of Canada, Grenada,

³⁷⁹ Roznai, *supra* note 374, at 72 (discussing the case of Nepal and citing Mara Malagodi’s work, which demonstrate the country’s Hinduist and Nepali hegemony).

³⁸⁰ Albert, *supra* note 345.

³⁸¹ See *infra* Section 6.

³⁸² Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 858–9 (2005).

³⁸³ Jörg Gerkrath, *Are “Octroyed Constitutions” of the 19th Century to Be Considered as Imposed Constitutions?*, in THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS, *supra* note 11, at 120.

³⁸⁴ *Id.*

³⁸⁵ Law, *supra* note 154.

³⁸⁶ See, for example, the cases of Ireland and Taiwan in Doyle, *supra* note 61. For a nuanced account of the founding of Korea and Japan, see also Chaihark Hahm & Sung Ho Kim, *To Make “We the People”:* *Constitutional Founding in Postwar Japan and South Korea*, 8 INT’L J. CONST. L. 800 (2010) (discussing the problems of identifying “we the people”).

³⁸⁷ GRIMM, *supra* note 11, at 73 (“In Germany no constitution has enjoyed greater legitimacy than the Basic Law, which was never directly sanctioned by the people, whereas the Weimar Constitution, drafted by a National Assembly elected solely for this purpose, quickly lost its legitimacy”).

³⁸⁸ Law, *supra* note 375, at 40 (“For the left, by contrast, the *Kenpo* symbolizes Japan’s post-war pacifism, commitment to internationalism, and repudiation of militarism and ultra-nationalism”).

and many constitutions of the Commonwealth Caribbean.³⁸⁹ The Canadian constitutional regime is not free from criticisms—think of Quebecois resistance against the unified federal constitutional order—but a widespread demand for a total constitutional replacement invoking the constituent power seems unlikely and probably unwarranted.³⁹⁰ Nevertheless, to say that these types of constitutions enjoy a degree of social acceptance does not mean that the constituent power theory has a space to justify them from a descriptive point of view.

5.2. The hidden voices of constitution-making

Suppose a constituent power theory can be used as a legitimation narrative, as shown in Section 4.1. In that case, it should take examples like those of this section and claim that what ultimately matters is how the future political narrative about the constitution and its founding helps legitimize the constitution, and focus on the stories we tell about the founding moment. For David Law, constitutions are romantic when “their origin stories paint a fantastical picture of consent and autochthony.”³⁹¹ Then, these stories will need to highlight, for example, the people’s acceptance of the pacifist clause in Japan while minimizing the interests of the American armed forces in Japan. If the stories romanticizing those founding moments are aimed at legitimizing current constitutional structures, then they might also serve the purpose of invisibilizing the genuine undesirable goals that had originally motivated constitution-makers and self-interested politicians.

Thus, they also need to hide or minimize the voices of those that were not sufficiently represented during the constitution-making process. That way, romantic narratives need, if they are to succeed, to diminish the imposed nature of the British Parliament in the case of Britain’s former colonies by overlooking or neglecting the interests of British legislators. They might also need to minimize how women were excluded from most constitution-making processes,³⁹² including progressive-oriented procedures such as the Colombian process.³⁹³ They may need to forget that French constitutions have historically built on the idea of the French people and the French Republic, ideas that could be achieved after cultural instruction against linguistic minorities such as

³⁸⁹ Richard Albert, *Imposed Constitutions with Consent?*, in *THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS*, *supra* note 11, at 103.

³⁹⁰ See Barczentewicz, *supra* note 139.

³⁹¹ He continues: “The operative distinction is not between imposed and unimposed constitutions, but rather between constitutions that benefit from a romanticizing narrative and those that do not.” Law, *supra* note 375, at 38.

³⁹² For an overview of evidence and examples, see Ruth Rubio-Marín & Helen Irving, *Women as Constitution-Makers: The Promises and the Challenges of Participation*, in *WOMEN AS CONSTITUTION-MAKERS: CASE STUDIES FROM THE NEW DEMOCRATIC ERA 1* (Ruth Rubio-Marín & Helen Irving eds., 2019). See also Susan Williams, *Dialogic Democracy, Feminist Theory and Women’s Participation in Constitution-Making*, in *WOMEN AS CONSTITUTION-MAKERS: CASE STUDIES FROM THE NEW DEMOCRATIC ERA 351* (Ruth Rubio-Marín & Helen Irving eds., 2019) (suggesting that traditional forms of representation might be insufficient to meet women’s demands).

³⁹³ See Julieta Lemaitre, *Feminist Legalism: Colombian Constitution-Making in the 1990s*, in *WOMEN AS CONSTITUTION-MAKERS: CASE STUDIES FROM THE NEW DEMOCRATIC ERA 234* (Ruth Rubio-Marín & Helen Irving eds., 2019) (discussing the small participation of indigenous peoples and women in the constituent assembly but suggesting that feminist organizations still succeeded to lobby).

the Occitan, the Alsatian, and the French Flemish.³⁹⁴ Romantic notions on the idea of the people will also need to diminish how indigenous peoples in Latin America and Australia were excluded and their interests ignored during founding moments,³⁹⁵ at least in a way that prevents undermining the narrative of the constitution-making process. Even in the original French political process that accompanied the building of a unified and equal nation that presented itself as expressing the “general will” and “preserving the imprescriptible rights of man,” the attempt to build a nation excluded underprivileged groups such as women, servants and homeless people.³⁹⁶

The example of the American Constitution is useful for understanding the costs of a romanticized constitution by invisibilizing or even trivializing perspectives that scholars and political actors should take seriously.³⁹⁷ Contrary to the idealized versions of the American constitutional founding that tend to oversimplify the process,³⁹⁸ the American Constitution was enacted by a small white and male elite that owned slaves, which operated under closed doors, and broke with the previously established mechanisms to modify the Articles of the Confederation. They established an illegal constitution and claimed to speak on behalf of “We the people” even if it was enacted with strong opposition after a turbulent process that had high chances of failure.³⁹⁹ As Michael Klarman has suggested, despite the fact that Americans revere their Constitution, the process was tumultuous and the outcome was unlikely.⁴⁰⁰ In his criticisms against Ackerman’s “We the People” theory—which claims that the people can “speak” in extraordinary moments such as the founding of the United States—Klarman had already suggested that the founding was not free from self-interested decision-making by politicians.⁴⁰¹

5.3. On the lessons that we lose

Diminishing or concealing the stories of exclusion is morally dubious and can promote inaccurate storytelling. It can also trigger consequences for the future by removing the opportunity to learn from historically accurate narratives. If we neglect historically informed stories, such as Klarman’s account of the American founding, it cannot be

³⁹⁴ See WEALE, *supra* note 133, at 37.

³⁹⁵ See Stone, *supra* note 259, at 366 (explaining that the Australian highly participatory constitution-making processes of the 1890s excluded the “First Peoples”).

³⁹⁶ See LOUGHLIN, *supra* note 56, at 80 (“Having excluded the nobility from the political nation, Sieyès goes on to exclude women, beggars, vagabonds, domestic servants, and anyone dependent on a master”).

³⁹⁷ The idealization of the American constitutional founding is so widespread that even Hannah Arendt, one of the fiercest critics of the constituent power theory, looked at the American history with exaggeration. The idea was consistent for her point, in which she attempted at differentiating the American founding from the French revolution. See Scheuerman, *supra* note 83, at 154–6.

³⁹⁸ David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 924 (2013) (discussing how Ackerman’s notion of the American founding can turn into an “overly optimistic way to conceptualize constitution-making”).

³⁹⁹ On the illegality of the American Constitution, see Richard S Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57 (1987) (concluding that the legal system cannot be governed “by principles show authority cannot be found in law”).

⁴⁰⁰ MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016).

⁴⁰¹ Klarman, *supra* note 351.

emphasized enough how fragile constitution-making moments are in reality. Future generations of constitution-makers and constitutional judges could use the lessons of past constitutional experiences. Moreover, citizens can be better informed as to what to realistically expect from processes of constitutional change and become more conscious of the risks involved. That way, they do not need to be impressed by those public intellectuals citing authors like Ackerman to emphasize the importance of a higher form of lawmaking. They can learn that constitution-making processes do not take place in an Ulysses-and-the-sirens-type moment of rationality and that opportunities for undemocratic agendas exist. They can learn that these processes are generally driven by self-interested politicians who tend to prioritize short-term goals.⁴⁰² They can demand that those politicians do not exclude the views of the relevant sectors of the society and make those politicians accountable for their decisions. They can require the establishment of inclusive procedures and support specific constitutional content that seems desirable.

In some cases, showing that the people was divided during the founding moments can be helpful to address the problems of societies that are highly fragmented.⁴⁰³ Think, for example, of the exclusion of African Americans and women from the drafting of the US Constitution,⁴⁰⁴ and the way stories about the founding have neglected a serious examination of issues such as slavery. Even the US Supreme Court has deployed an idealized approach to the founding that has neglected slavery and discrimination against African Americans.⁴⁰⁵ Similar accounts can be told about how the constitution facilitated a colonial political project.⁴⁰⁶ Another useful example comes from Brazil, where the fiction of a unified and racially mixed nation was functional to building a narrative that only protected formal equality.⁴⁰⁷ That narrative was blind to

⁴⁰² See, e.g., Geddes, *supra* note 221, at 18–19 (discussing how constitutional drafters may favor some institutional arrangements over others, such as determining particular electoral procedures, to improve their chances of winning elections and of accomplishing policy goals).

⁴⁰³ For an argument, see LERNER, *supra* note 135.

⁴⁰⁴ See, e.g., Benjamin Arditi, *Politics, Shamelessness and the People*, in *CONSTITUENT POWER: LAW, POPULAR RULE AND POLITICS*, *supra* note 12, at 8, 18 (“Slaves didn’t count in that founding ‘We’ of 1787—they were someone’s property, not deliberating agents—and neither did native Americans, who were considered savages, or women, at least not with their own voices and rights of citizenship”).

⁴⁰⁵ See Aderson Bellegarde François, *A Lost World: Sallie Robinson, the Civil Rights Cases, and Missing Narratives of Slavery in the Supreme Court’s Reconstruction Jurisprudence*, 109 *Geo. L.J.* 1015 (2021) (explaining how the Supreme Court typically tells “stories” about different parts of the American Constitution while ignoring the status and problems of Black people in the United States, describing it as an “act of willful forgetting”).

⁴⁰⁶ See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 *HARV. L. REV.* 1787, 1801 (2019) (“The issue of American colonialism was born into the Constitution at the Founding with a compromise between those who aimed to constitutionalize colonialism and those who saw colonialism as an abomination and incompatible with constitutional democracy. The battle between these two perspectives took shape over the long nineteenth century, as the practices of American colonialism and its opponents helped structure executive, legislative, and judicial power vis-à-vis each other and the states”).

⁴⁰⁷ Adilson José Moreira, *Discourses of Citizenship in American and Brazilian Affirmative Action Court Decisions*, 64 *AM. J. COMP. L.* 455, 473 (2016) (claiming that the narrative “reinterprets the past as a linear development towards racial assimilation, it advocates an image of the country as the society in which racial amalgamation expresses the historical irrelevance of race and also its moral superiority in relation to other societies that have failed to integrate racial minorities”).

the problems of race, even to the point of hiding deep problems of racial oppression and allowing strong discrimination.⁴⁰⁸ Even though the problems in Brazil were not connected to literal theory of constituent power, the elements of the political myth are still there, and that narrative has been used as an argument to challenge affirmative action programs.⁴⁰⁹ Just like the United States, Brazil is an example of the political myth of a unified people triggering undesirable legal consequences.

Examples of excluded sectors of society and other problems abound in constitution-making experiences, and there are good reasons to think that societies could learn from their mistakes to be more inclusive and pluralistic. But for the learning process to happen, a widespread idealization of the historical founding is bad news. Constitutional scholars and political theorists should reject them. Of course, one could claim that not idealizing founding moments could harm the legitimacy of the constitution because constitutions could become a legal recognition of the violence that was present during the constitution-making process.⁴¹⁰ Nevertheless, if a vacuum of legitimacy is identified because of this reason, we need to discuss other sources of constitutional legitimacy. Alternatives exist: appealing directly to principles of morality⁴¹¹ and discussing process-based theories⁴¹² are plausible alternative paths, and the conventional version of the constituent power theory, unfortunately, has helped to hide those alternative sources.

6. The dilemma of the redemption of constituent power

6.1. On crises and the Elster paradox

Since myths need to resemble reality to remain or become powerful, the redeemers face a difficult dilemma. If they take the value of the myth seriously, then they need to assume that certain conditions will allow the constitution-making process to operate reasonably well. Otherwise, the theory can risk losing even its normative appeal. Jon Elster briefly announced the problem of the non-ideal conditions for constitutional change in his landmark article of 1995:

[T]he task of constitution-making generally emerges in conditions that are likely to work against good constitution-making. Being written for the indefinite future, constitutions ought to be adopted in maximally calm and undisturbed conditions. Also, the intrinsic importance of constitution-making requires that procedures be based on rational, impartial argument. . . . At the same time, the call for a new constitution usually arises in turbulent circumstances, which

⁴⁰⁸ Further, the narrative seems to be changing. See *id.* at 491–503.

⁴⁰⁹ *Id.* at 479–87.

⁴¹⁰ See, e.g., LÓPEZ BOFILL, *supra* note 83, at 16 (“My initial position is that no constitutional system escapes from this dark side; that when examining the history of creation of public authority, it is easy to find deaths and all sorts of bloodbaths and, in the same way, constitutional supremacy is a device to ensure (and to remember) those deaths, coercions, and bloodbaths that occurred as events of genesis of the new political order”).

⁴¹¹ See, e.g., HASEBE, *supra* note 31; DYZENHAUS, *Constitutionalism in an Old Key*, *supra* note 30.

⁴¹² See, e.g., ARATO, *supra* note 33; BRAVER, *supra* note 84; SETHI, *supra* note 270; NEGRETTO, *supra* note 235; Roberto Gargarella, *Constituent Power in a “Community of Equals,”* 41 *REVUS* 1 (2020).

tend to foster passion rather than reason. Also, the external circumstances of constitution-making invite procedures based on threat-based bargaining... the public will to make major constitutional change is unlikely to be present unless a crisis is impending.⁴¹³

If the Elster paradox is correct, then the crises that typically accompany constitution-making processes create opportunities that politicians with authoritarian or populist inclinations can take advantage of.⁴¹⁴ Thus, it is better to assume that political risks threatening the stability and the democratic nature of the constitution-making processes will exist, so that the designers of those processes can try to identify strategies to overcome them. Because the constituent power theory does not offer a justification for respecting previous agreements amongst rival political groups, and it gives an argument against any rule decided by the incumbents or the *constituted* powers, then the theory might not help to stabilize the procedures and the institutional channels that can provide a framework for a peaceful deliberation with predictable rules. On the contrary, the theory might help to argue against the authority that created those rules and, rather than supporting a way to alleviate the risks of the crisis, the theory can become another source of procedural destabilization.⁴¹⁵ Uncertainty about the rules of procedure can create opportunities for strategic politicians to circumvent the agreements, appeal directly to the people, and elevate the stakes of the political negotiations.

6.2. The non-ideal conditions of constitution-making

Even though most scholars engaging with the constituent power theory typically use the normative political theory lens, namely jurisprudence and legal doctrine, the problems and crises associated with constitution-making processes are tackled in the empirical and theoretical literature explaining those processes.⁴¹⁶ Thanks to the literature, we know that the politics of structural choice can be harsh. Constituent bodies are typically more polarized than ordinary legislatures,⁴¹⁷ and constitutional moments are dominated not only by reason but also passions, interests,⁴¹⁸ and biases.⁴¹⁹ The constitution-making processes frequently emerge in contexts of deep division,⁴²⁰ rupture, crisis, regime change,⁴²¹ or bankrupt political

⁴¹³ Elster, *supra* note 155, at 394.

⁴¹⁴ See, e.g., Landau, *supra* note 398; Bernal, *supra* note 34, at 31.

⁴¹⁵ See, e.g., Negretto, *supra* note 306 (arguing that using the procedures of the old constitution might help generating stability and safeguards for all the parties involved in a constitution-making process, but also recognizing that this approach contradicts the constituent power idea).

⁴¹⁶ Of course, not all constitution-making processes have taken place in times of crises and not all constitutions are aimed at changing an institutional order, even though those cases are rare and they are hardly defined within the scope of a theory as radical as the constituent power theory. See Garlicki & Garlicka-Sowers, *supra* note 343, at 310; LÓPEZ BOFILL, *supra* note 83, at 197 (citing the cases of Switzerland and Finland as examples of atypical scenarios).

⁴¹⁷ Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 348 (2000).

⁴¹⁸ Elster, *supra* note 155, at 376–86.

⁴¹⁹ Jon Elster, *Clearing and Strengthening the Channels of Constitution Making*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 15 (Tom Ginsburg ed., 2012).

⁴²⁰ ISSACHAROFF, *supra* note 362, at 217.

⁴²¹ Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 296, 300 (2003).

systems.⁴²² All of these events are conflictual and traumatic,⁴²³ and they often involve the risk of violence.⁴²⁴ They often foster authoritarian impulses and democratic backsliding.⁴²⁵ Moreover, constitutional designers typically lack experience in writing constitutions, work under time pressure, and they often need to overcome severe information asymmetries, they have limited abilities to predict how proposed institutional arrangements will work in the future, and what their political positions will be in the short term. They are required to produce a constitutional text in the context of political uncertainty.⁴²⁶

Constitution-making processes typically involve many different sorts of decisions—contemporary constitutions tend to be omnibus bills that address a theoretically infinite range of issues⁴²⁷—and constitutional designers do not necessarily care equally about all the issues they need to negotiate; nor do they have enough time to deeply and genuinely debate every single important item. Constitution-makers may not be sincere about the positions they advance; they may have to compromise and accept outcomes that do fall short of their initial expectations, and may leave some things undecided by adopting vague constitutional language or delegating decisions to other institutions.⁴²⁸ Constitutional negotiations are typically incomplete,⁴²⁹ agreements might include meaningful silences,⁴³⁰ and pragmatic gaps may be unavoidable in the interest of ratification.⁴³¹ Particular constitutional provisions may not have single goals or shared motivations.⁴³²

Considering these non-ideal conditions, how can constituent assemblies express any popular will at all? The extraordinary political circumstances in which constitutional moments take place make representative institutions difficult to function well. Political parties may be damaged, corrupted, and lacking credibility. Anti-party claims and independent politicians may come to the fore, elevating the information costs that voters incur in electoral procedures by harming the holistic platforms of political

⁴²² Horowitz, *supra* note 152; Gabriel Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 *LAW & SOC'Y REV.* 749 (2012).

⁴²³ Donald Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 *WM. & MARY L. REV.* 1213 (2008).

⁴²⁴ See LÓPEZ BOFILL, *supra* note 83 (claiming that all constitutional foundings require some coercion). See also Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 *WM. & MARY L. REV.* 1513 (2008).

⁴²⁵ William Partlett, *The Dangers of Popular Constitution-Making*, 38 *BROOKLYN J. INT'L L.* 193 (2012); David Landau, *The Importance of Constitution-Making*, 89 *DENVER U. L. REV.* 611 (2012).

⁴²⁶ Tom Ginsburg, *Constitutional Knowledge*, 2 *KNOW: J. ON FORMATION OF KNOWLEDGE* 15, 26 (2018).

⁴²⁷ See *supra* Section 4.2.

⁴²⁸ Dixon & Ginsburg, *supra* note 170; Tushnet, *supra* note 111, at 2007–12; Silvia Suteu, *Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making: Promise and Limits*, 6 *GLOBAL CONST.* 63, 96–9 (2017).

⁴²⁹ Tom Ginsburg, *Constitutions as Contracts, Constitutions as Charters*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 154, at 182, 194.

⁴³⁰ ISSACHAROFF, *supra* note 362, at 217, 220.

⁴³¹ Dieter Grimm, *Types of Constitutions*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 71, at 98, 109.

⁴³² Tom Ginsburg & Aziz Z. Huq, *Assessing Constitutional Performance* 3, 6–7 (2016).

parties with clear ideologies and reducing the accountability of the groups that are elected to a constituent assembly.⁴³³

When designing a process under these conditions, it is better to assume a non-ideal scenario and invoke something that could resemble what Arato has called the post-sovereign paradigm. Thus, for example, we need to find ways to legitimize agreements among competing factions to help avert the possibility of violence. If there are democratic institutions that are functioning reasonably well—such as independent judges, legislators elected under fair and democratic conditions, and political parties willing to compromise—it is better not to undermine them and use them to secure a consensual process. We need to keep in mind that constitution-making processes can become an opportunity for politicians who intend to interfere with institutions such as the judiciary,⁴³⁴ and that a constituent power narrative, by implicitly assuming unlimited power, could be functional to their agendas.

6.3. Two recent examples

I have shown that constitution-making processes typically operate under non-ideal conditions. We need to find out whether the constituent power theory might help alleviate those conditions and encourage processes of constitutional change to be carried out in stable ways. I argue that it is unlikely for the constituent power theory to be helpful if its core elements are taken seriously. Even more, the constituent power theory seems to foster unstable mechanisms that might aggravate the condition of constitutional change. I have picked two examples to illustrate this point.

Ecuador provides an extreme example, as the constituent power theory was used to justify shutting down the congress, the court, mayors, and prosecutors.⁴³⁵ It is an easy case to show how the constituent power narrative was functional to an agenda of democratic erosion.⁴³⁶ After the assembly had dictated the Mandato Constituyente No. 1—a constitutional order attempting to dissolve the Congress—a number of citizens filed a petition with the Constitutional Court and asked the Court to declare that the constituent assembly merely possessed “derivative” (as opposed as “originary”) powers. The Court declared that the constituent power was “unlimited and originary.”⁴³⁷ Scholars who believed that the petitioners were right criticized the decision.⁴³⁸ Everyone—the assembly, the president, the petitioners, the Court, and the

⁴³³ See, e.g., Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 1 CURRENT LEGAL PROBS. 89 (2020); Tarunabh Khaitan, *Balancing Accountability and Effectiveness: A Case for Moderated Parliamentarism*, 7 CAN. J. COMP. CONTEMP. L. 81 (2021).

⁴³⁴ See Aníbal Pérez-Liñán & Andrea Castagnola, *Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America*, 46 BRIT. J. POL. SCI. 395 (2016) (showing evidence suggesting that constitutional change is a cause of court manipulation and judicial instability).

⁴³⁵ DIXON & LANDAU, *supra* note 26, at 124.

⁴³⁶ See also Catherine Conaghan, *Ecuador under Correa*, 27 J. DEMOCRACY 109 (2016); Catherine M. Conaghan, *Ecuador: Rafael Correa and the Citizens' Revolution*, in THE RESURGENCE OF THE LATIN AMERICAN LEFT 260 (Steven Levitsky & Kenneth Roberts eds., 2011); Dixon, *supra* note 203.

⁴³⁷ Tribunal Constitucional [Constitutional Tribunal], 0043-17-TC, Mar. 3, 2008 (Ecuador).

⁴³⁸ Alejandro Venegas Maingón & Verónica Hernández Muñoz, *Análisis de los Límites del Poder Constituyente*, 5 DERECHO GLOBAL ESTUDIOS SOBRE DERECHO JUSTICIA 41 (2019).

scholars—assumed that the constituent power theory was correct, but disagreed on whether the assembly had *originary* or *derivative* powers. The binary choices offered by the constituent power theory operated as an all-or-nothing alternative and left no space for compromise: either the assembly had a radical power, or it did not. Had the Court declared the contrary, President Correa's political project would have been strongly undermined. A balanced approach combining change and continuity was not possible. The stakes were high, and the theory helped reproduce and exaggerate them.

A less extreme example is the Chilean Constitutional Convention (2021–22), in which the constituent power theory was invoked—without much success—to declare that the Convention had unlimited sovereign power which allowed it to modify or ignore the Convention's founding rules. The example is less extreme than Ecuador's, because in Chile a sovereign assembly was rejected from the beginning.⁴³⁹ As the Convention's founding rules were the product of a multipartisan agreement which served the purpose of unlocking the constitutional system to allow for the existence of the Convention, putting those rules into question would raise the political stakes involved in the constitutional negotiations and risked upping the costs incurred by the electoral losers.

Responding to the risks posited by the constituent power theory, as in Ecuador, Chilean conservative scholars argued that the constitutional convention merely had *derivative* powers. For them, the idea was to provide civilized and institutional continuity between the previous Constitution—initially enacted by the Pinochet dictatorship—and the new constitution, while avoiding the experiences of Ecuador (2007) and Venezuela (1999).⁴⁴⁰ Opposing the ideas of conservative scholars, a group of constitution-makers declared that the Convention was sovereign, and,⁴⁴¹ invoking the constituent power theory, some politicians presented proposals to lower the majority requirements previously agreed upon in the multipartisan compact that initiated the process in November of 2019.⁴⁴² The idea of using the constituent power theory to justify the power of the Convention was also voiced by progressive scholars.⁴⁴³ Some of them have used the constituent power theory to argue that the substantive limits included in international treaties—which are explicitly recognized by the rules

⁴³⁹ See Sergio Verdugo & Marcela Prieto, *The Dual Aversion of Chile's Constitution Making Process: Between Bolivarian Constitutionalism and the Pinochet Constitution*, 19 INT'L J. CONST. L. 149 (2021).

⁴⁴⁰ See, e.g., Arturo Fermandois Vohringer, *Un Proceso Constituyente Civilizado: las Limitaciones del Artículo 135 inciso final de la Constitución a la Convención Constitucional*, in TRÁNSITO CONSTITUCIONA: CAMINO HACIA UNA NUEVA CONSTITUCIÓN 709 (2021). See also Gonzalo Serey Torres, *¿Qué tipo de Poder Constituyente redactará la Constitución Chilena? Hacia un Concepto de Poder Constituyente en un Proceso Democrático*, in TRÁNSITO CONSTITUCIONA: CAMINO HACIA UNA NUEVA CONSTITUCIÓN 693 (2021).

⁴⁴¹ They even managed to formally state that the Convention had the original constituent power in the first article of the procedural regulations that they enacted. See Reglamento General de la Convención Constitucional, art. 1, Octubre 13, 2021, DIARIO OFICIAL [D.O.] (Chile).

⁴⁴² Prieto & Verdugo, *supra* note 45.

⁴⁴³ See, e.g., Jaime Bassa Mercado, *Cómo Constituir: Asamblea Constituyente y Nueva Constitución*, in LA CONSTITUCIÓN QUE QUEREMOS: PROPUESTAS PARA UN MOMENTO CONSTITUYENTE 13 (2019); PALMA & ELGUETA, *supra* note 20.

governing the constitution-making process⁴⁴⁴—can only work as mere non-binding guidance for the constitutional drafters.⁴⁴⁵

It could be claimed that, in the end, and despite some dubious episodes,⁴⁴⁶ the Chilean Convention did not lower the majority requirements, it did not violate substantive limits, and it did not become sovereign. However, whether the sovereign claims won or not is not the point of this article. The point is that invoking the constituent power theory was functional in raising the stakes of the political negotiations by putting on the table the idea that the Convention did not need to respect a degree of legal continuity and even, at least according to a group of constitution-makers, that modifying the founding rules was a possibility. If shared understandings about the process existed from the start, they were put into question, making it hard for the process to be universally accepted. As in Ecuador, framing the debate around the problem of constituent power did not help achieve solutions that could combine and balance the need to provide legal certainty and the need to signal that actual constitutional change was going to take place within the parameters previously agreed by rival politicians who had found a middle ground. While it is true that some scholars advocated alternative accounts of the constituent power,⁴⁴⁷ those accounts were not politically influential.

A possible response to my criticism might suggest that there is a way in which invoking the constituent power theory may produce an opposite effect. Instead of promoting instability, such a response can unlock a constitution-making process in inclusive and consensual ways. The example of the Colombian constitution-making process is often cited. Even Bernal, a strong critic of the constituent power theory, has cited the Colombian case to say that a non-authoritarian call is possible within the constituent power narrative.⁴⁴⁸ However, Bernal still criticizes the theory as it does not secure constitutionalism and does not recognize any limits.⁴⁴⁹ If the Colombian case was successful, it was because of different reasons, and a possible reconceptualization of its story could provide a more plausible explanation. Andrew Arato has claimed, for example, that the success of that process is related to the consensual and post-sovereign elements that existed in it.⁴⁵⁰ Bejarano and Segura, comparing the Colombian case with the Venezuelan case, have focused on political dynamics that the

⁴⁴⁴ See *Constitución Política de la República de Chile* [C.P.] art. 135.

⁴⁴⁵ Constanza Salgado, Domingo Lovera, & Pablo Contreras, *¿Límites de tratados internacionales al poder constituyente? Análisis del caso chileno*, 19 INT'L J. CONST. L. 1351 (2021).

⁴⁴⁶ Benjamín Alemparte & Joshua Braver, *Constitutional Boot-Strapping in Chile?*, I•CONNEX BLOG (2021), www.icconnectblog.com/2021/10/constitutional-boot-strapping-in-chile/.

⁴⁴⁷ See, e.g., Sergio Verdugo, *Chile's New Constitutional Experiment*, 4 QUADERNI COSTITUZIONALI 842 (2020); Samuel Tschorne, *Las claves conceptuales del debate constitucional chileno: poder constituyente, legitimidad de la Constitución y cambio constitucional*, ESTUDIOS PÚBLICOS 81 (2020); Verdugo & Prieto, *supra* note 439; Sabrina Ragone & José Ignacio Núñez Leiva, *Algunas coordenadas esenciales sobre la Convención Constitucional*, 1 DCPE ONLINE (2021), www.dpceonline.it/index.php/dpceonline/article/view/1278.

⁴⁴⁸ Bernal, *supra* note 34, at 32–3.

⁴⁴⁹ See also Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. 339 (2013).

⁴⁵⁰ See ARATO, *supra* note 49.

constituent power theory is unable to identify.⁴⁵¹ To give another example: González Bertomeu has argued that Schmitt’s theory has undemocratic elements “at odds with the circumstances and needs of Colombia. . . .”⁴⁵² If the Colombian constitution-making process was a success, it was no thanks to the appeal to the constituent power theory.⁴⁵³

6.4. Constituent power theory and the redeemers’ tragic dilemma

The conventional understanding of the constituent power theory is not able to justify bipartisan agreements that took place to channel processes of constitutional change under non-violent conditions because it is not a theory aimed at supporting the constituted powers that those agreements used. As a result, the constituent power theory cannot justify the authority of existing democratic institutions. Moreover, the theory’s exclusive popular appeal to political legitimacy might undermine those institutions and serve to create opportunities that harm the credibility of critical political commitments instrumental to the stability of the process. The redeemers are yet to find a theoretical correction that can remove its destabilizing element unless, of course, we agree to move away from the core elements of the conventional theory.

As a result, the redeemers face what I call the dilemma of constituent power redemption. They can either accept that most—if not all—constitution-making processes take place in non-ideal conditions; or they can ground their claim in a small number of idealized cases where reasonably democratic conditions are possible.

Yet the dilemma itself is tragic. If the redeemers choose the first option, they need to move away from the core elements of the conventional theory to seek ways to provide stability and certainty in non-ideal conditions. The conventional account of the theory should be abandoned as a result. If, on the contrary, the redeemers choose the second option, then the theory either depends on an idealized version of the cases—which makes them vulnerable to the problems of romanticized constitutions—or they will have the difficult task of showing that democratic institutions were well-functioning.

However, if they show that the institutions were well-functioning, the normative appeal of invoking a radical theory that calls for dismantling the regime in unlimited ways is less warranted. Indeed, if there were cases in which society could be represented fairly, the party system would succeed at reducing the democratic costs, the procedure would be sufficiently inclusive and consensual, and deliberations would take place and bring about a sort of overlapping consensus. The claim suggesting that the people should radically emancipate itself from the previous order will be weaker.

Nevertheless, there may still exist a demand for constitutional change. Perhaps legislative inertia prevents necessary reforms from happening, or the parties have lost popularity in worrying ways. According to these scenarios, the advantages of citing the constituent power theory to promote the establishment of a constituent assembly

⁴⁵¹ Bejarano & Segura, *supra* note 245; Bejarano & Segura, *supra* note 228.

⁴⁵² González-Bertomeu, *supra* note 102, at 137.

⁴⁵³ This is not to say, of course, that the absence of the theory is necessary to prevent authoritarian and abusive political practices.

should be compared with other mechanisms and justifications for constitutional change. The constituent power theory will elevate the stakes and bring risks, but, as some may argue, it can open the way for possible popular emancipation—whatever that means. Suppose there are other ways of effecting constitutional change that can find a more balanced approach with lower risks. If that is the case, there will be reasons to prefer those alternatives. Continuing down the amendment route, or finding a sort of living-constitution narrative that can help bring constitutional change, are possibilities that should be envisaged. These possibilities may not suit the needs of specific societies in every context—in which case, we might need to find other ways to justify constitutional change. The point is that the redeemers should not invoke a theory that was designed to revise every institution if some of those institutions are working in accountable ways, are responsive to the people, help to secure and stabilize processes of institutional change, or help to reduce transaction costs among rival factions. In those scenarios, alternatives should be considered.

The example of the constitutional conventions in Ireland is helpful.⁴⁵⁴ Those conventions were completely or partly composed by randomly selected citizens whose task was to discuss and recommend possible political changes, including constitutional changes. The conventions were politically salient: they contributed to informing—and arguably influencing—the public,⁴⁵⁵ they involved genuine public deliberation,⁴⁵⁶ and they allowed Ireland to finally pass reforms on items such as abortion and same-sex marriage.⁴⁵⁷ Despite their importance in providing a significant opportunity for constitutional change and their appeals as a meaningful exercise of constitutional change, those conventions cannot be justified by the constituent power theory.⁴⁵⁸ Previously established political bodies defined their convention's agendas; the representatives of the people were not allowed to focus on something else; the implementation of the decisions was politically mediated by the sitting politicians; and there was arguably insufficient attention paid to the risks of manipulation by elite actors.⁴⁵⁹ Despite these problems,⁴⁶⁰ the conventions were useful to allow significant constitutional demands to be expressed in a participatory and dialogic way. In their best version, the conventions required pre-established rules that the constituent

⁴⁵⁴ Jacobsohn and Roznai have used those conventions as examples of how to design a process that can allow a “legal approximation of the constituent power.” See JACOBSON & ROZNAI, *supra* note 46, at 254–5.

⁴⁵⁵ See Oran Doyle & Rachael Walsh, *Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy*, 20 INT'L J. CONST. L. 398 (2022).

⁴⁵⁶ For a discussion of the evidence, see Jane Suiter, David M. Farrell, & Eoin O'Malley, *When Do Deliberative Citizens Change Their Opinions? Evidence from the Irish Citizens' Assembly*, 37 INT'L POL. SCI. REV. 198 (2016).

⁴⁵⁷ Though, from a quantitative perspective, the outcomes may remain mixed because political institutions haven't been always responsive. See Jane Suiter, David Farrell, & Clodagh Harris, *The Irish Constitutional Convention: A Case of “High Legitimacy”?*, in CONSTITUTIONAL DELIBERATIVE DEMOCRACY IN EUROPE 33 (Min Reuchamps & Jane Suiter eds., 2016); Oran Doyle & Rachael Walsh, *Deliberation in Constitutional Amendment: Reappraising Ireland's Deliberative Mini-Publics*, 16 EUR. CONST. L. REV. 440 (2020).

⁴⁵⁸ See also LÓPEZ BOFILL, *supra* note 83, at 188.

⁴⁵⁹ This is not to say, of course, that the conventions could not expand their mandate. See DAVID M. FARRELL & JANE SUITER, *REIMAGINING DEMOCRACY: LESSONS IN DELIBERATIVE DEMOCRACY FROM THE IRISH FRONT LINE* 25 (2019).

⁴⁶⁰ See E. Carolan, *Ireland's Constitutional Convention: Behind the Hype about Citizen-Led Constitutional Change*, 13 INT'L J. CONST. L. 733 (2015).

power narrative could not guarantee in advance.⁴⁶¹ This would include, for example, a regulated participation of experts, roundtable deliberations and a sensitive regulation of transparency, and the establishment of specific—and not too many—items in the agenda. Of course, more research needs to be done to fully gauge the potential of these kinds of mechanisms and to understand their normative implications.⁴⁶² Still, they offer a plausible alternative that seems to have fewer risks than constituent assemblies that justify their power in the constituent power theory.

7. Conclusion: Is it time to abandon the constituent power theory?

Although scholars may be aware of the problems presented by the conventional approach to the constituent power theory, and they may recommend, for example, a limited use of the theory that focuses only on its normative dimension, a pluralistic and non-homogenous approach to the idea of the people and may suggest its purely retrospective use, the theory can still raise various problems. First, we should not expect political actors to follow academic advice. Although academics can try and influence political processes with nuanced ideas that reduce the risks of the constituent power theory, it is more likely that the conventional approach to the constituent power theory will prevail at the political level because that account is more widespread, easy to understand, fits well with populist narratives, and is more beneficial to opportunistic politicians seeking to put pressure on the previously established procedures or institutions. The examples examined in this article suggest that political leaders might prefer to use a simple yet dangerous version of the constituent power idea in their political narrative, and there is little scholars can do about it.

Second, there are problems associated with romanticizing the idea of the people that some scholars promote. These accounts might invisibilize those excluded from constitution-making processes and conceal events of discrimination, racism, and other arbitrary acts that decent normative theories cannot justify. I argue that recognizing and encouraging the historical accuracy of the founding moments can be important to raising awareness of the problems, helping prevent the same mistakes from happening in the future, foregrounding the issues, and helping citizens be aware of the lessons of the past. Societies can learn from past experiences and address their problems without the need to invoke constituent power. If enacting a new constitution becomes a critical demand, societies will be better prepared if they know what accurate history can teach them.

If scholars are to accept the use of a non-idealized version of the founding moment, the question of constitutional legitimacy cannot be answered by the best version of the constituent power theory. It is then time to abandon the constituent power theory or correct it in a way that can be widely accepted. This article did not aim to offer an

⁴⁶¹ See, e.g., FARRELL & SUTTER, *supra* note 459.

⁴⁶² But see HELENE LANDEMORE, *OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY* (2020).

alternative version of legitimacy, but the question is not new, and there are normative theories out there that we can revisit and discuss. Democratic forms of legitimation do not need to use the language of constituent power. Consensual approaches to democracy and perspectives that emphasize democracy's competitive nature or that approach it through the language of political rights or equality may provide a fertile and feasible ground for offering an alternative to the constituent power theory. The project of abandoning the constituent power theory needs to be complemented by these types of academic exercises. The appropriate approach will depend on the question we are asking. Some questions will require a justification internal to the law, and others will require external justifications. We need to start by making those types of distinctions.