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RICHARD S. KAY*

Constituent Authority†

The force of a constitution, like the force of all enacted law, derives, in significant part, from the circumstances of its enactment. Legal and political theory has long recognized the logical necessity of a “constituent power.” That recognition, however, tells us little about what is necessary for the successful enactment of an enduring constitution. Long-term acceptance of a constitution requires a continuing regard for the process that brought it into being. There must be, that is, recognition of the “constituent authority” of the constitution-makers. This paper is a consideration of the idea of “constituent authority” drawing on a comparison of various constitutional systems.

What makes a constitution a constitution? The difficulty in answering this question lies, at least in part, in the fact that constitutions evoke political possibility as well as legal constraint. The explanation for the force they exert, therefore, depends on the political and social context in which they are observed and, critically, on the moment when the inquiry is made.

By “constitution,” I mean a constitution in the modern sense, an identifiable text or set of texts containing rules at the highest level of the formal legal hierarchy. I exclude, therefore, the “material constitution,” the total collection of rules, practices and values that underlie a functioning legal-political system. That is the sense, for example, in which we usually speak of the “British constitution.”¹

* Wallace Stevens Professor of Law, University of Connecticut. An earlier version was presented at the conference on Constitution Making and Constitutional Change: Prospects for Constitutional Change in Turkey, held on March 19-20, 2010 in Ankara, Turkey. I am grateful to the sponsor of the Congress, the Union of Turkish Bar Associations and to the principal organizer, Professor Ozan Ergül, for facilitating my participation. The original paper will also be published in the forthcoming proceedings of the conference. I thank Richard Albert, Chimène Keitner, Tokujin Matsudaira, John McGinnis and Carol Weisbrod, for helpful comments on prior drafts.

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1. See HANS KELSEN, *THE GENERAL THEORY OF LAW AND STATE*, 124-26 (Anders Wedberg trans., 1945); ANTHONY W. BRADLEY & KEITH D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 4 (14th ed. 2007). It appears to be with respect to the creation of this kind of unenacted constitution that Theodor Schilling says a constituent power acts “in the way customary law is formed; by developing a custom and a corresponding *opinio juris* over time.” Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARV. INT. L.J. 389, 396 (1996).

That kind of constitution develops organically; it is not the product of deliberate design. The modern sense of constitution, in contrast, the "formal constitution," is an instance of positive law, a piece of legislation and, therefore, it is the artifact of a discrete decision by some particular people at some particular time, of a "datable act of human will."²

In the first section, I will sketch out the dimensions of what I call constituent authority and attempt to distinguish it from the more familiar idea of "constituent power." In the next section, I will examine the relationship between constituent authority and positive law. More specifically, I want to emphasize how, notwithstanding possible appearances, constituent authority cannot be legal authority. In the third section, I will explicate some of the problems involved in defining the most widely accepted constituent authority, that of "the people." In the short concluding section, I will draw on that discussion to suggest that the identification of constituent authority is an inherently time-bound phenomenon. It results from the interaction of current values and the current perception of historical events.

Constituent authority, as I use that term in this essay, refers to the things that a given people in a given time and place understand as competent to make a binding constitution. As such, it is, definitionally, an artifact of and generalization from actual practice and experience. It is not and cannot be a Platonic concept, a "brooding omnipresence in the sky."³ It follows that inferring its characteristics requires a critical consideration of the way real constitutions have been generated and the way they have been regarded in different jurisdictions in various places and at various times. The elucidation of constituent authority is necessarily a comparative exercise.⁴

The two kinds of constitutions need not be mutually exclusive. See CONSTITUTION ACT, 1982 s. 52(1), (2) (providing that the Constitution of Canada is "the supreme law of the land" but defining it no further than to say that it "includes" certain specified enactments). Nor is this distinction identical to that Carl Schmitt drew between "constitution" and "constitutional law." For him, the more basic and more entrenched "constitution" was still the result of a fundamental decision. CARL SCHMITT, *CONSTITUTIONAL THEORY*, 80 (Jeffrey Seitzer, trans., 2008).

2. Larry Alexander, *Introduction in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* (Larry Alexander ed., 1998). See also Frank I. Michelman, *Constitutional Authorship*, in *id.* at 64, 64 [hereinafter Michelman, *Authorship*].

3. *Southern Pacific Company v. Jensen*, 244 U.S. 205, 244 (1916) (Holmes, J. dissenting).

4. This comparative examination is an attempt to identify "a network of overlapping and crisscross resemblances" which need not correspond to "some explicit or even fully discoverable set of rules and assumptions that give the tradition its character." THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 45 (1962).

I. CONSTITUENT POWER AND CONSTITUENT AUTHORITY

A modern constitution, like any other instance of positive law, must be associated with a law-maker.⁵ The term of art that has emerged to describe this constitutional law-maker is the “constituent power.” Recognizing the existence of such a power, however, tells us very little about the qualities that invest a group of human beings with the practical capacity to specify a constitution and to make it stick. That investigation calls for a further consideration, one focusing on the presence or absence of the components of constitution-making *authority*.

The very idea of a constitutional law-maker suggests two levels of power—the “constituent” that makes the constitution and the “constituted” that is made, directly or indirectly, by the constitution. This commonplace observation earned the Abbé Sieyès the reputation of being the originator of the idea of “constituent power.”⁶ So firm is this association, that the idea is commonly expressed in the language he used—as the *pouvoir constituant*. In fact, versions of the idea are much older. Some were elaborated in the constitutionally turbulent seventeenth century in England. Among the more notable statements in this period was George Lawson’s 1660 *Politica Sacra et Civilis*. Lawson posited that all government was circumscribed by an original act of consent by the “community civil,” an entity that was in suspense while civil government was in effect but stood ready to reassert itself on the appropriate occasion.⁷ John Locke’s version is better known. Near the end of the *Two Treatises*, Locke wrote that “the people are at liberty to provide for themselves, by erecting a new legislative, differing from the other, by the change of persons, or form, or both, as they shall find it most for their safety and good.”⁸ It was Locke’s ideas that influenced those phrases in the American Declaration of Independence referring to the right of the people “to institute new Government, laying its foundation on such principles

5. I am taking this relationship for granted in this essay. I thus will not discuss the interesting but, I think, unsupportable idea that it is sometimes proper to understand a legal text without reference to the intentional acts that brought it into being. This idea has some currency in the academic debate on constitutional interpretation in the United States. My views are set out in Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW U. L. REV. 703 (2009).

6. EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 125-32 (M. Blondel trans., S.E. Finer ed., 1964).

7. GEORGE LAWSON, *POLITICA SACRA ET CIVILIS*, 26-27, 57-58, 371-84 (London, 1660) (C. Condren ed., 1992).

8. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, s. 220 (Charles L. Sherman ed., 1937). On the constituent power in seventeenth century English political thought, see Martin Loughlin, *Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (Martin Loughlin & Neil Walker eds., 2007) [hereinafter *THE PARADOX OF CONSTITUTIONALISM*]. See also Andreas Kalyvas, *Popular Sovereignty, Democracy and the Constituent Power*, 12 *CONSTELLATIONS* 223 (2005).

and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."⁹

When, in the 1780's, the American revolutionaries turned constitution-makers, they invoked a well-developed theory of constituent authority according to which the people's will was both anterior and superior to every instance of positive law, not excluding any constitutional text.¹⁰ This dictum was taken for granted in the debates leading to the drafting and ratification of the federal Constitution of 1787-89. One of the serious questions engaging the participants in that process was the illegality—under the previous constitution, the Article of Confederation in effect from 1781-1789—of the constituent process.¹¹ The advocates of the new constitution did not so much argue the point as urge its irrelevance. The new regime was to be approved by special conventions elected in each of the states. Those conventions were understood to be surrogates for the people and, therefore, they represented an authority superior to the existing constitutional rules. No one expressed this idea more forcefully or insistently than James Wilson of Pennsylvania, a delegate to the Philadelphia Convention of 1787 and later a Justice of the United States Supreme Court. Writing about the constituent authority in 1791, he said:

From [the people's] authority the constitution originates: for their safety and felicity it is established; in their hands it is as clay in the hands of the potter; they have the right to mould, to preserve, to improve, to refine, and to finish it as they please. If so; can it be doubted, that they have the right likewise to change it?¹²

"As our constitutions are superior to our legislatures," he told the Pennsylvania ratifying convention in November, 1787, "so the people are superior to our constitutions."¹³ The approval of the people, wrote James Madison in *The Federalist Papers*, would "blot out antecedent errors and irregularities."¹⁴

It was exactly this logic that Sieyès employed in invoking the constituent power of the "nation" in 1789. The nation, he wrote, "is

9. THE DECLARATION OF INDEPENDENCE, para. 2.

10. The development is carefully recounted in GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). On the temporal priority of the American over French ideas of constituent power, see CLAUDE KLEIN, *THÉORIE ET PRATIQUE DU POUVOIR CONSTITUANT* 7-18 (1996).

11. Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57 (1987) [hereinafter Kay, *Illegality*].

12. James Wilson, *Lectures on Law*, in 1 THE WORKS OF JAMES WILSON 375 (James DeWitt Andrews ed., 1896).

13. JONATHAN ELLIOT, 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 432 (2d ed. 1891).

14. THE FEDERALIST No. 40 at 253 (James Madison) (C. Rossiter ed., 1961).

the source and supreme master of positive law." It exists "independently of any rule and any constitutional form."¹⁵ This idea was promptly put to work in the National Assembly. When it was argued that any new constitution would require the approval of the king, Guy-Jean-Baptiste Target denounced the idea that "the constituent power had to ask the permission of the constituted power."¹⁶

It follows that we can distinguish two kinds of political decision-making: the everyday public decisions of the constituted powers and the extraordinary decisions of the constituent power.¹⁷ The hallmark of the first category is that it is exercised within an accepted set of legal institutions and procedures. The hallmark of the second is exactly its freedom from such institutions and procedures. It is, rather, something undefined, unconstrained by anything but the facts of nature and its own will. Sieyès did say the constituent power (the nation) "owes its existence to *natural* law alone." But by this he meant only to emphasize its immunity to positive law. It is, he declared, "completely untrammelled by any procedure." "[W]hatever its decisions, it cannot lose the right to alter them as soon as its interest requires."¹⁸

As a result, the constituent power is often described in terms of raw force, physical, psychological and emotional. While he used the term in quite a different context, the sense of this characterization is captured in Max Weber's opposition of "legal" to "charismatic" authority. The lord-hero is respected not for the conformity of his actions with pre-defined formal criteria but because of his personal qualities, "magical abilities, revelations of heroism, power of the mind and of speech."¹⁹ Likewise, the only thing that makes the constituent power effective is its own nature, its own will and its own actions. It is, in these descriptions, unpredictable, almost wild. Ulrich Preuss emphasizes the "creative, unorganized and untamed power" of revolution.²⁰ There is something ominous about these depictions of

15. SIEYÈS, *supra* note 6 at 128, 131.

16. Quoted in Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 J. CONST. L. 346, 370 (2000) [hereinafter Elster, *Arguing*].

17. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6-10 (1991).

18. SIEYÈS, *supra* note 6, at 127. "Constituent power always remains alien to law." GEORGES BURDEAU, 4 *TRAITE DES SCIENCES POLITIQUES* 171 (1983) quoted in ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* 1 (1999). But see William E. Scheuerman, *Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt*, 10 CAN J. L. & JURIS. 141, 149-50 (1997) arguing that Sieyès thought the constituent power was limited by natural law.

19. Max Weber, *The Three Types of Legitimate Rule*, 4 BERKELEY PUB. IN SOC. INST. 1 (trans. Hans Gerth., 1958).

20. Ulrich Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, 14 CARDOZO L. REV. 639, 640 (1993) [hereinafter Preuss, *Powermaking*]. See also Ulrich Preuss, *The Roundtable Talks in the German Democratic Republic*, 99 [hereinafter Preuss, *Roundtable*], in *THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM* (Jon Elster ed., 1996) [hereinafter *ROUNDTABLE TALKS*] (describing a revolution as "a pe-

an illimitable power rising up out of a "normative and legal void."²¹ Carl Schmitt declared that the constituent power "springs out of a normative nothingness and from a concrete disorder."²² "[T]he paradigm of constituent power," according to Antonio Negri, "is that of a force that bursts apart, breaks, interrupts, unhinges any pre-existing equilibrium and any possible continuity."²³ It is no wonder numerous writers have seen the specter of totalitarianism in invocations of constituent power,²⁴ a prospect reinforced by its modern association with Carl Schmitt.

The concept of constituent authority I propose to examine in this paper is different from, or perhaps additional to, the constituent power these writers were attempting to describe. It will require elaboration but, put briefly, I refer to the observed quality in a person or persons that enables them to produce an effective positive law constitution. I do not intend to consider what, in light of one or another universal political morality, might be argued *properly* to invest a person or persons with that capacity.²⁵ In this essay, I am interested in *practical* authority, the kind that actually does produce a constitution that is regarded as binding for an extended period in the population governed by the legal system that the constitution purports to control. The character of such authority cannot be explained fruitfully simply by close study of the individuals, groups or institutions that made a constitution, the procedures they followed and the choices they made. An adequate description requires, as well, an examination of the social and political context in which the constituent process occurred and in which the resulting constitution operates. We need to know how the constitution-makers' identities, words and actions were, and continued to be, regarded in the relevant society in particular places and at particular times.²⁶

In this sense, constituent authority, like constituent power, is a factual not a moral competence. "Authority," according to Weber,

riod of lawlessness" in which "legal and constitutional questions are being reduced to questions of power.").

21. Kalyvas, *supra* note 8, at 223 (2005).

22. Quoted in *id.* at 227. See also SCHMITT, *supra* note 1, at 131 ("So long as [the people] exist at all their life force and energy is inexhaustible and always capable of finding new forms of political existence."). On the problematic character of Schmitt's life and jurisprudence, see LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM (David Dyzenhaus ed., 1998). For a useful synthesis of his sometimes inconsistent statements about the constituent power, see Jan Muller, *Carl Schmitt and the Constitution of Europe*, 21 CARDOZO L. REV. 1777 (2000).

23. NEGRI, *supra* note 18, at 11.

24. See, e.g., HANNAH ARENDT, ON REVOLUTION 153-64 (1963) discussed in Kalyvas, *supra* note 8, at 230-31, 234-35. See also Albert Soboul, *Some Problems of the Revolutionary State*, 65 PAST & PRESENT 52, 55 (1974) (connecting the embrace of Siey  s' idea of the constituent power and the rise of the Jacobin dictatorship).

25. See, e.g., Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003).

26. See Michelman, *Authorship*, *supra* note 2, at 67. See generally Part IV *infra*.

“means the probability that specific command will be obeyed.”²⁷ It exists, as H.L.A. Hart said of the rule of recognition, “only as a complex, but normally concordant, practice of the courts, officials and private persons.”²⁸ As we have seen, the classic invocations of “constituent power” stress that it requires no justification, legal or moral. “Every attribute of the nation,” said Sieyès, “springs from the simple fact that it exists,”²⁹ and Schmitt said that the will of the “constitution-making power is existentially present: its power or authority lies in its being.”³⁰

This cannot be the whole story. There is always a reason why an attempted assertion of power is effective. Rules might, for some time, prevail solely because of the physical might the rule-maker can bring to bear on the addressees of its rules. But for a successful constitution to endure for an extended period, there must be something about it that persuades (or at least permits) its subjects to submit to it. Such a “reflective critical attitude,” moreover, will always derive, at least in part, from some regard for the circumstances of its creation.³¹ In the case of a constitution, it will be essential that there exists an explicit or implicit determination by some significant part of the population that the makers of the constitution are or were an appropriate source of constitutional rules.³² I use the term “authority” to underline the fact that successful constitution-making must involve something more than the expression of will. It calls for the “augmentation and confirmation of will by some sort of reasoning.”³³ Authority involves an evaluation of the rightness of the constituent events. In this way, it incorporates what may properly be called moral reasons.³⁴ This

27. Weber, *supra* note 19, at 1.

28. H.L.A. HART, *THE CONCEPT OF LAW* 110 (2d ed. 1994). For a recent elaboration, see Benjamin C. Zipursky, *Legal Obligations and the Internal Aspect of Rules*, 75 *FORDHAM L. REV.* 1229 (2007).

29. SIEYÈS, *supra* note 6 at 126. *See also id.* (“The national will . . . never needs anything but its own existence to be legal.”). *See* NEGRI, *supra* note 18, at 5 (“Whereas the order of the constituted power is that of the Sollen (what ought to be) the order of the constituent power is that of the Sein (what is).”).

30. SCHMITT, *supra* note 1, at 64.

31. HART, *supra* note 28, at 57. As I will discuss further below, the effectiveness of a constitution depends on two critical factors, the acceptability of its content and the authority of its makers. I am mainly concerned in this paper with the latter although, as I will discuss, the two are not perfectly separate. *See* Richard S. Kay, *Constitutional Chrononomy*, 13 *RATIO JURIS* 31 (2000) [hereinafter, Kay, *Chrononomy*].

32. On the complicated symbiotic relationship of constitutional legitimacy, political effectiveness, and social stability, *see* SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 64-70 (1960).

33. Carl J. Friedrich, *Authority, Reason and Discretion*, in *AUTHORITY (NOMOS VOL. I)* 28, 32 (Carl Friedrich ed., 1958).

34. *See* Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 175, 177-80 (Matthew Adler & Kenneth Himma eds., 2009) *See also* Michelman, *Authorship*, *supra* note 2, at 73 (“[F]ull knowledge of a social practice includes knowledge of how participants in the practice experience it, ‘from the inside’ so to speak . . .”).

does not make its existence any less a fact but it is a certain kind of fact, one that includes the collective critical judgments of some number of individuals in certain times and places. It is this continuing normative attitude that distinguishes constituent authority from simple constituent power.

This is why an inquiry into the character of constituent authority in any particular legal system obliges us to know something about the social, political and moral values shared in the population that the constitution is supposed to govern at the time that it is supposed to govern. Still, as the expositors of constituent power recognized, we need to think of those values apart from the requirements of the legality that the constitution in question brings into being. An indispensable attribute of the constituent authority is its "exteriority" to the constitutional system it establishes.³⁵ In the constitutional debates in late eighteenth-century America, it was common to refer to popular opinion and interest as things existing apart from the legal institutions of government. This was the "people at large" or, more suggestively, the "people out-of-doors," who expressed themselves outside of the ordinary devices of representation.³⁶ Whatever else it is, the authority that makes constitutions will always be out-of-doors.

II. LEGAL CONSTITUENT AUTHORITY

In 1981, the Canadian Ministry of Justice published a defense of the government's proposal for a fundamental change in the country's constitution, including the enactment of a Charter of Rights and the creation of a new procedure for constitutional amendment. "Canadians take pride," it said, "in the fact that our Constitution, unlike those of many nations, is entirely lawful both in its origins and its subsequent development."³⁷ The idea that a constitution might be "lawful . . . in its origins" is directly contrary the exteriority of the constituent authority just discussed. But the position of the Canadian government is far from unique. Constitution-making is often, perhaps usually, conducted under the claimed authority of positive law.

The creation of constitutions in former British colonies like Canada certainly seems to confirm that description. The constitution of Antigua and Barbuda, for example, in force now for almost thirty years, was promulgated by Queen Elizabeth II of the United Kingdom on July 31, 1981 as a schedule to an Order-in-Council, citing "the powers vested in Her in that behalf by section 5(4) of the West Indies

35. See Lucien Jaume, *The Constituent Power in France: The Revolution and its Consequences*, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 8, 67-68.

36. See WOOD, *supra* note 10, at 319-28.

37. JEAN CHRÉTIEN, *THE ROLE OF THE UNITED KINGDOM IN THE AMENDMENT OF THE CANADIAN CONSTITUTION* 5 (1981).

Act 1967.”³⁸ A more elaborate chain of legality is involved in the creation of the current Constitution of Sri Lanka. It was adopted in 1978 by the National State Assembly pursuant section 51 of the Constitution of Sri Lanka of 1972. That section specified a procedure requiring a two-thirds majority of the whole membership of the Assembly for any bill “for the replacement, repeal or amendment of the Constitution.”³⁹ That 1972 Constitution, giving the country a republican form of government and a new name, had itself been adopted by a two-thirds vote of the Parliament of Ceylon after an election in which the manifesto of the victorious party had sought the “mandate of the people to permit the members of Parliament they elect to function simultaneously as a Constituent Assembly.”⁴⁰ Once elected, however, the 1972 parliament acted explicitly under section 29 of the Ceylon (Constitution) Order-in-Council (1946) invoking that earlier constitution’s rules for its own amendment by the Ceylon Parliament. The 1946 Order-in-Council, like that of Antigua and Barbuda, drew legal effect from an act of the United Kingdom Parliament.⁴¹

In each of these cases—and many more examples could be cited—the jurisdiction in question either put into place a wholly new governing instrument or made such far reaching changes to existing documents that it is reasonable to say that the very basis of law and state had been altered. We are dealing, that is, with more than mere constitutional amendment. It is, admittedly, impossible to draw a precise line between amendment and replacement and the procedures established for the former are sometimes employed in effecting the latter. The enactments of the new Sri Lankan constitutions in 1972 and 1978 are examples. In a much-noted judgment, the Hungarian Constitutional Court declared that the 1989 “amendments” to the Communist Constitution of 1949 “conferred on the state, its law and the political system a new quality, fundamentally different from that of the previous regime” and, therefore, they “gave rise to a new Constitution.”⁴² Michel Rosenfeld notes that “since 1989 every section of the Hungarian Constitution has been changed except for the

38. The Antigua and Barbuda Constitutional Order, 1981. By its own terms, the Order and the Constitution did not come into force until October 31, 1981. On Orders-in-Council, see BRADLEY & EWING, *supra* note 1, at 680-81.

39. Constitution of Sri Lanka (1972), s. 51.

40. Quoted in W.A. Wiswa Warnapala, *Sri Lanka in 1972: Tension and Change*, 13 ASIA SURVEY 217, 219 (1973).

41. The Independence Constitution of Ceylon was put into effect in a series of procedural steps evidenced in a number of different instruments. The ultimate validating enactment was the Ceylon Independence Act, 1947. See IVOR JENNINGS, *THE CONSTITUTION OF CEYLON* 3-16 (1949).

42. Resolution No. 11/1992 (III.5) AB, 1 J. CONST. L. IN E. & CENT. EUR. 129, 134 (1994). See Andrew Arato, *Dilemmas Arising from the Power to Create Constitutions in Eastern Europe*, 14 CARDOZO L. REV. 661, 676 (1994). See generally Peter Paczolay, *Constitutional Transition and Legal Continuity*, 8 CONN. J. INT’L L. 559 (1993).

section which specifies that Budapest is the capital.”⁴³ Yet the Constitution is still presented on the website of the Hungarian Constitutional Court with the title, “The Constitution of the Republic of Hungary (*Act XX of 1949 as revised and restated by Act XXXI of 1989*”).⁴⁴ The idea, however, that any and every constitutional change can be accomplished by virtue of an authority that is itself created by a constitution has been increasingly doubted. The most prominent expression of this distinction is probably the Indian Supreme Court’s judgment in *Kesavananda Bharati v. State of Kerala*,⁴⁵ holding that the constitutional amendment power did not extend to alterations of certain basic features of the constitution. The amending authority, as explained in a subsequent judgment, creates no right “to destroy the identity of the Constitution.”⁴⁶ The character of this reasoning is highlighted by distinguishing the Indian Court’s decision in *Kesavananda Bharati* from that in an earlier case. In *Golak Nath v. State of Punjab*, the Court had also held a procedurally perfect amendment to the Constitution invalid. In *Golak Nath*, however, the analysis turned on the particular language of the existing constitution. The majority in the earlier case relied on the facts that 1) Article 13 prohibited the making of “any law” abridging guaranteed individual rights, and 2) an amendment to the Constitution, a parliamentary act, was a “law” subject to the limitations of Article 13. When, predictably, Parliament amended Article 13 to exclude constitutional amendments from the category of laws so limited, the Supreme Court was obliged to address the issue in more general terms.⁴⁷

There are few instances of courts following the precedent of *Kesavananda Bharati* in inferring limitations on the amendment power from the inherent characteristics of authorized constitutional change.⁴⁸ On the contrary, there are at least some courts that have expressly rejected it.⁴⁹ But the core notion on which the judgment

43. MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY* 31 (2010).

44. <http://www.mkab.hu/index.php?id=constitution>.

45. A.I.R. 1973 S.C. 1461.

46. *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C. 1789, *quoted in* Richard Albert, *Nonconstitutional Amendments* 22 CAN. J. OF L. & JURIS. 5, 24 (2009).

47. These cases are summarized and criticized in KEMAL GÖZLER, *JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: COMPARATIVE STUDY* 66-78, 88-99 (2008).

48. See *Anwar Hossain Chowdhary v. Bangladesh*, 1989 BLD (AD)(Spl) 1; *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324 (both discussed in Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections* at 34-35 (Oct. 25, 2005), available at <http://ssrn.com/abstract=835165>); *Loh Kooi Choon v. Government of Malaysia*, 1997 2 M.L.J. 187.

49. *E.g.*, *In re The 13th amendment to the Constitution*, [1987] 2 SRI LANKA L. R. 312. The United States Supreme Court summarily rejected a substantially similar argument in 1922. *Leser v. Garnet*, 258 U.S. 130 (1922). See also *Re Article 26 and the Regulation of Information (Services Outside the State Termination of Pregnancies) Bill 1995* 1 I.R. 1.

was based—that there is something wrong with the idea that an “amendment” might alter the essential character of a constitution while simultaneously invoking its authority—has been embraced by many modern constitution-makers. It finds expression in numerous provisions withdrawing certain subjects from the power of amendment.⁵⁰ The distinction was presaged by Schmitt in his dictum that amendments may change “constitutional laws” but not “the constitution.”⁵¹ The distinction is fundamental. Abraham Lincoln contested Southern arguments that states had a constitutional right to secede from the United States, insisting that no government “ever had a provision in its organic law for its own termination.” Such a revolution could only be effected by “some action not provided for in the instrument itself.”⁵² Andrew Jackson had earlier agreed that “[s]ecession, like any other revolutionary act, may be morally justified by the extremity of oppression; but to call it a constitutional right, is confounding the meaning of terms.”⁵³

Recognition of the difference between change within a subsisting constitution and the creation of a new constitution, however, has not prevented invocation of positive law in effecting even the latter. We have already noted the employment of the procedures of constitutional amendment to effect a thorough replacement of the constitution. Constitution-makers, moreover, sometimes attempt not only to write a constitution and specify the means of modifying it but also to control, in explicit terms, the circumstances in which the constitution is abandoned and a new one created. While its intended scope is not perfectly clear, this appears to be what the drafters of Article V of the United States Constitution intended in providing for the possibility, under certain circumstances, of a national constitutional convention. A convention specially elected for, and specially focused on, constitutional revision was understood as uniquely competent to represent the sovereign people and its very irregularity, its independence from existing state law, was felt to enhance its qualifi-

50. See, e.g., Constitution of the Republic of Turkey, 1982, arts. 2-4 (making certain features of the constitutional state irrevocable including, *inter alia* its “democratic, secular and social” character). For other examples, see GÖZLER, *supra* note 47, at 52-68; EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), REPORT ON CONSTITUTIONAL AMENDMENT, 41-42 CDL-AD(2010)001 at 12-13 (Jan. 19, 2010) [hereinafter VENICE COMMISSION REPORT]. A recent comparative critical review of such provisions is Albert, *supra* note 46. See also the perceptive discussion in KLEIN, *supra* note 10, at 173-85.

51. SCHMITT, *supra* note 1, at 79 (“The German Reich cannot be transformed into an absolute monarchy or into a Soviet republic through a two-thirds majority decision of the Reichstag.”).

52. 1 DOCUMENTS OF AMERICAN HISTORY 385 (Henry Commager ed., 1948).

53. *Id.* at 266. The claim of a legal right to change the jurisdictional reach of a constitutional regime might arise more naturally—though not, therefore, unproblematically—in those constitutions in which such a right is explicit. See Constitution of St. Christopher and Nevis, s. 113; Constitution of the Federal Democratic Constitution of Ethiopia, 1995, art. 39.

cations to do so.⁵⁴ By making provision for it in the Constitution itself (similar devices were written into state constitutions⁵⁵), the constitution-makers attempted to have it both ways. Similarly, Siey  s and Condorcet both (unsuccessfully) urged the National Assembly of 1789 to incorporate explicit machinery for periodic constitutional revision.⁵⁶ More recent constitutions also sometimes prescribe procedures for both their amendment and their replacement. Article 30 of the Argentine Constitution establishes a single procedure expressly declared to be competent to reform the whole constitution or any of its parts.⁵⁷ The Nicaraguan Constitution of 2007 provides distinct procedures for "partial" and "total" reform of the Constitution, the latter requiring the additional approval of a specially elected "Constituent National Assembly."⁵⁸ Perhaps surprisingly, the Swiss Constitution provides more avenues for a total than for a partial revision.⁵⁹ The ambiguity attached to such textual authority is captured in the term sometimes used to describe it, a *pouvoir constituant d  riv  *.⁶⁰

In this connection, Article 146 of the German Basic Law deserves special mention. In that provision, the Basic Law, consistent with its

54. See WOOD, *supra* note 10, at 306-43.

55. Kermit L. Hall, *The Irony of the Federal Constitution's Genius: State Constitutional Development*, in THE CONSTITUTION AND AMERICAN POLITICAL DEVELOPMENT 235-61, 241 (Peter F. Nardulli ed., 1992).

56. Jaume, *supra* note 35, at 70-71.

57. Constituci  n de la Naci  n Argentina, art. 30 (Aug. 22, 1994). See also Constitution of the Democratic Socialist Republic of Sri Lanka, Chapter XII (providing parallel procedures for the "amendment of any provision of the Constitution" and for the "repeal and replacement of the Constitution"); Constitution of the Republic of Bulgaria, art. 158 (1991) (providing that a "new constitution" might be adopted by a "Grand National Assembly").

58. Constituci  n Pol  tica de la Rep  blica de Nicaragua, arts. 191-95 (Feb. 2007). See also art. 168 of the Spanish Constitution of 1979 requiring a plan for "total revision" to be passed by two-thirds of the members of each house of the legislature and that a resulting new text be approved by the same majorities after a new election and confirmed by a referendum. The case law of the Austrian Constitutional Court distinguishing *revisions* requiring referenda from *amendments* that may be effected by Parliament is discussed in G  ZLER, *supra* note 47, at 34-40. The Philippine constitution, in contrast, authorizes amendment but not revision by popular initiative. Constitution of the Republic of the Philippines, 1987 art. XVII. The Philippine Supreme Court elaborated the distinction in *Lambrino v. Comm'n on Elections*, G.R. No. 174153. Several American state constitutions allow constitutional amendments but not revisions to be proposed by popular initiative. See, e.g., California Constitution, art. XVIII. In this case, however, the different treatment may be motivated more by practical considerations than notions of legitimate political authority. The distinction may be based on a supposition that there is no way "the people" can formulate a complicated new constitutional scheme. In this respect the limitation is related to the common rule that referendum proposals be limited to a "single subject." See William B. Fisch, *Constitutional Referendum in the United States of America* 54 AM. J. COMP. L. 485, 499-504 (Supp. 2006).

59. Federal Constitution of the Swiss Confederation, arts. 193-95 (Apr. 18, 1999).

60. The same term is also used in connection with the power of constitutional amendment; see Michel Lascombe, LE DROIT CONSTITUTIONNEL DE LA V REPUBLIQUE 331-37 (9th ed. 2005).

enactors' understanding that it was a mere provisional constitution pending eventual German unification, "contemplated its own termination."⁶¹ It states that "this Basic Law will lose its validity on the effective date of a constitution that has been chosen by the German people in a free decision."⁶² The text is silent both as to the definition of the "German people" and the manner in which it might manifest its "free decision." The limited force of this kind of provision is demonstrated by the fact that, at the moment of unification, the powers-that-were, prominently including the holders of power conferred by the Basic Law, refused to invoke it. They chose instead to amend the Basic Law and leave it, so amended, in place over the now enlarged territory and population.⁶³ Significantly, however, Article 146 was retained in the Basic Law after unification. It is unclear how the constituent authority that it recognizes fits with Article 79 stipulating the process of constitutional amendment. It has been suggested that, like the ordinary amending authority, the "free decision" of the German people could not extend to alteration of the unamendable aspects of the Basic Law referred to in Article 79(3).⁶⁴ It says something about the nature of provisions like these that one astute commentator has assumed that these questions would have to be resolved by the Constitutional Court, itself of course, a creature of the Basic Law.⁶⁵

For the reasons suggested in the previous section, these attempted constitutionalizations of the constituent authority are deeply paradoxical. Recognition of the constituent authority necessarily presupposes something superior to all positive law that cannot logically be provided for *by law*. When James Madison offered a draft of the Bill of Rights in the first United States Congress in 1789, its first provision (rejected by Congress) would have inserted a statement at the beginning of the constitutional text, declaring "that the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution."⁶⁶ Numerous state constitutions of the period did incorporate such a principle.⁶⁷ Among the additions to the French Declaration of the Rights of Man and Citizen

61. PETER QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 49 (1997).

62. *Quoted in id.*

63. *See id.* at 50-51.

64. *See* Christoph Möllers, "We (are afraid of) the People:" *Constituent Power in German Constitutionalism*, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 8, at 87, 96-98.

65. *See* QUINT, *supra* note 61, at 54-55.

66. 1 Annals of Congress 451(House of Representatives, First Congress, First Session).

67. *See, e.g.* Constitution of Kentucky, 1792, art. 12(12); Constitution of New Hampshire, 1792, art. X; Constitution of Pennsylvania, 1790. art. IX (2).

adopted by the National Convention in 1793 was the proposition that "[a] people has always the right to review, to reform, and to alter its constitution. One generation cannot subject to its law the future generations."⁶⁸

Like Article 146 of the Basic Law, such constitutional statements of principle typically made no attempt to define or even identify the "people" possessing such a right. Much less did they seek to impose substantive or procedural limits on their exercise of that right. They might, therefore, be dismissed as rhetorical decoration. When a new exercise in constitution-making is actually undertaken, its uneasy relationship with positive law is often apparent. There is no better example than the 1787 Philadelphia Convention that drafted the United States Constitution. It had been called into being by a summons from the Continental Congress, meeting under the Articles of Confederation, for "the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures." It was to do nothing but make proposals which were then to be "agreed to in Congress and confirmed by the states."⁶⁹ When it grossly exceeded that charge, proposing a new constitution and by-passing the Congress and state legislatures, we have already seen that its actions were defended by reliance on the ultimate authority of the "people." The positive law of the Articles, it was pointed out, did not and could not speak to the rights of that constituent authority. Legal objections to the constituent process, one delegate said, "erroneously suppose that we are proceeding on the basis of the Confederation. This convention is unknown to the Confederation."⁷⁰

The efficacy of attempts to define and control the constituent authority with rules of positive law has sometimes been tested in connection with the actions of constitutional conventions in the American states. The experience in Pennsylvania in 1872 illustrates the deep ambiguity at the heart of this question. The Constitution of 1838 provided for amendments to be passed by two consecutive legislatures and approved by popular vote. No provision was made for a constitutional convention. Nevertheless, in June 1871, the legislature submitted a question on the calling of a constitutional convention to a referendum. That proposition was approved by the voters and further legislation the next year provided the machinery for electing and convening the convention. That body met and drafted a new constitution. It then passed an ordinance for the organization of an election at which the draft constitution would be put to a vote. The procedures specified appeared, in some respects, to be contrary to the

68. Art. 28.

69. 3 MAX FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 13-14 (1911). See generally Kay, *Illegality*, *supra* note 11.

70. 2 FARRAND, *supra* note 69, at 51.

convention's enabling legislation (not to mention the existing constitution) in several ways. Two suits were brought seeking to enjoin the referendum which state officials had been prepared to hold on the convention's terms. One of these suits was dismissed in the trial court in a remarkable opinion by Judge Edwin H. Stowe. Citing the state constitution's Declaration of Rights that recognized the people's "inalienable and indefeasible right to alter, reform or abolish their government in such manner as they think proper," he affirmed that "such power exists above and before the constitution." The right to remake the constitution exists "in all cases and at all times, whether there is a way provided in their constitution or not." This right, once revolutionary, had now been "restrained and modified." It could be exercised by "the introduction of constitutional and legal revolution by the consent of the constituted authorities of the state." The convention, "quasi-revolutionary in its character, [has] absolute power, so far as necessary to carry out the purpose for which [it was] called into existence . . . [W]hen once called into operation by proper authority, it cannot be subverted nor restrained by the legislature."⁷¹

This was a view of things that horrified the Supreme Court of Pennsylvania. In its opinion in the second suit, one that had been filed directly in the Supreme Court, it held the convention had no right to exceed the mandate set for it by the legislature that had called it into being. To recognize a broader power was not in any way a vindication of the constituent authority of the people recognized in the Declaration of Rights. The delegates to the convention were elected and assembled for the limited purpose expressed in the enabling legislation. It was only that legislation which was entitled to claim popular sanction. The convention was "the off-spring of *law*. It had no other source of existence." To give effect to the unauthorized actions of the convention would, in fact, deprive the people of the right, exercised in the appropriate legislation, to make their own decisions. The defendant officials were, therefore, enjoined from holding the referendum according to the rules prescribed in the convention's ordinance.⁷² When Judge Stowe's decision came before the Supreme Court some time later, it took pains to disassociate itself from his "unsound and dangerous" views. The facts presented did not raise the question of "the power of the legislature to restrain the people," but "the right of the people by the instrumentality of law to limit their delegates." "*Law* is the highest act of a people's sovereignty while their government and constitution remain unchanged." The convention could not rise above its legal source.⁷³

71. Wood's Appeal, 75 Pa. 59, 1874 Pa. LEXIS 35, at 8-10, 21-22 (1874).

72. Wells v. Bain, 79 Pa. 39, 48 1873 Pa. LEXIS 162, 22.

73. Wood's Appeal, *supra* note 71, at 69-72, 25-35.

But the events themselves muddled this neat priority of legislation and constituent authority. In neither of its judgments did the Supreme Court question the constitutionality of the legislation creating the convention nor the potential for its acts, after popular ratification, to replace the previous constitution. It reached these conclusions even though the existing constitution had provided what appeared to be an exclusive method of constitutional change, a method which had been entirely disregarded in the process under consideration. In a paradoxical argument, the court acknowledged that the convention procedure was a way of expressing the original will of the sovereign people—something outside the positive law rules of the constitution—but that procedure was cognizable as such only because it was authorized by the positive law of the enabling legislation.⁷⁴ More strikingly, by the time the Supreme Court was able to issue its judgment in the appeal from Judge Stowe's decision, the convention's draft had already been approved in the referendum and had, in most respects, been in force for almost a year. The Court did nothing to cast doubt on the validity of that adoption. Before launching its peroration on the limited powers of the convention, it conceded that "[t]he change made by the people in their political institutions, by the adoption of the proposed Constitution since the [issuance of the] decree [appealed from] forbids an inquiry into the merits of this case. The question is no longer judicial . . ."⁷⁵

The dual character of constitution-making bodies called into being by the legal institutions of an existing regime has been a persistent theme in debates concerning constituent authority. Jon Elster noted in connection with the Philadelphia Constitutional Convention of 1787 and the French National Assembly of 1789 that "[t]he tension between the assemblies and their conveners—between the creature and creator—was at the heart of both processes."⁷⁶ For Sieyès, there were obvious problems in locating the constituent authority of the "nation" in individuals chosen to participate in the old "constituted" machinery of the Estates-General. But the election and convocation of that body—occurring for the first time in 175 years—was truly extraordinary. The financial crisis that generated its meeting had been universally understood as centering on the fundamental political structure of the kingdom and the *cahiers* drafted to instruct

74. *Wells v. Bain*, *supra* note 68, at 47-48.

75. *Wood's Appeal*, *supra* note 71, at 68-69, 24-25. See also *Armstrong v. King*, 281 Pa. 207, 222-23, 126 A. 263, 268 (1924) ("[T]he approval by the people gives unattackable validity to the Constitution or amendment submitted to them."). On the American case law of challenges to constitutional conventions and referenda, see JOHN A. JAMESON, *A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY POWERS AND MODES OF PROCEEDING* (1887); ROGER S. HOAR, *CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS AND LIMITATIONS* (1917).

76. Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, 14 *CARDOZO L. REV.* 549, 559 (1994) [hereinafter Elster, *Bootstrapping*].

the delegates, especially those of the Third Estate, anticipated a new constitutional settlement.⁷⁷ In these circumstances, the self-transformation of the augmented Third Estate in June 1789 to a National Assembly and, then, to a Constituent Assembly was, if not inevitable, at least understandable. In fact, in *What is the Third Estate?*, Sieyès had foreseen the capacity of extraordinary representatives who could act for the nation “[w]hatever the manner in which they were appointed as deputies.”⁷⁸ The convening of any constituent authority, after all, is the expression of a belief that the existing constituted powers are so defective as to require replacement.⁷⁹ In these circumstances—and armed with the legitimacy of popular selection in a time of crisis—the temptations presented to such a body to break free of mere legal constraints must be considerable. In the New York Constitutional Convention of 1821, one delegate responded this way to an argument that the convention had to act within limits imposed by positive law: “No restriction limits our proceedings . . . Sir, we are standing upon the foundations of society. The elements of government are scattered around us.”⁸⁰

Sometimes, of course, an assembly convenes under the law of an existing constitution, regards itself as the agent of that constitution, acts according to its procedures and restricts its changes so as to remain within limits authorized by positive law. This has, in fact, been the more common course in the many constitutional conventions that have been held in American states. In contrast to the experience in Pennsylvania, such constitutional changes have, on occasion, been successfully challenged in state courts and then reformed to comply with the adverse judicial decision.⁸¹ Recently the Philippine Supreme Court successfully blocked a referendum on a major alteration to the Constitution (changing *inter alia*, the presidential system to a parliamentary one) because the existing constitutional text limited the use of initiative to proposals for “amendments” and requiring that more extensive constitutional revisions be approved by a constitutional convention.⁸²

77. See TIMOTHY TACKETT, *BECOMING A REVOLUTIONARY: THE DEPUTIES OF THE FRENCH NATIONAL ASSEMBLY AND THE EMERGENCE OF A REVOLUTIONARY CULTURE* 77-116 (1996); CHIMÈNE KEITNER, *THE PARADOXES OF NATIONALISM: THE FRENCH REVOLUTION AND ITS MEANING FOR CONTEMPORARY NATION-BUILDING* 55-63 (2007).

78. SIEYÈS, *supra* note 6, at 131. He hoped that the product of the Assembly might be provisional pending the approval of a more appropriate constitution-making body. See Jaume, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 8, at 69-70.

79. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 375 (1995) [hereinafter Elster, *Forces*].

80. Quoted in JAMESON, *supra* note 75, at 303.

81. See, e.g., *State ex rel Kvaalen v. Graybill*, 159 Mont. 190, 496 P.2d 1127 (1972) (holding a state constitutional convention could not delegate its educational functions to a committee and rejecting a claim that the convention had “plenary” authority).

82. *Lambrino v. Comm’n on Elections*, G.R. No. 174153 (Oct. 25, 2006). The court’s action in this case may be contrasted with its prior judgments recognizing the

In the final analysis, however, given the definitions with which we are working, the exercise of genuine constituent authority can never be identified by its relation to legal form. "Like every other order, the legal order rests on a decision and not on a norm."⁸³ To inquire into the authority to make a new constitution is exactly to ask who may establish law without legal sanction. This is merely the other side of the juridical learning about the limits of the power of constitutional amendment canvassed above. If, as the Supreme Court of India said, it is impossible for an amendment "to destroy the identity of the Constitution,"⁸⁴ it follows that an action that does destroy a constitution's identity and effectively establishes a new one amounts to a fresh exercise of constituent authority. The creation of a new constitution—as opposed to the modification of a continuing constitution—is always, in significant part, an act of negation.⁸⁵ The critical variable is the quality of the change. Has that change altered the "identity" of the legal system so that the chain of reasoning about the validity of a legal act can no longer plausibly work back to the prior constitution? Constitution-making, according to Michel Rosenfeld, "requires both negation of pre-constitutional identities and creation of a new identity, which call for reincorporation of material from the pre-constitutional past."⁸⁶ When we are able to say that the underlying sanction for all lawmaking (the rule of recognition) has successfully changed, it is proper to say that the agent of that change has exercised constituent authority.

Consequently, when the constitution of Antigua and Barbuda, already mentioned as an example of apparent legal enactment of a constitution, went into effect in 1981, it marked the full emergence of a constitutional system premised on a new set of political institutions as well as the excision of any rights of government in persons or organizations in the United Kingdom. It was the culmination of a process in which the participants included the local government under British colonial authority, a constitutional committee that received and collated public responses to a draft constitution and a special constitutional conference held in 1980 that included delegations from Antiguan political parties, regional associations as well as the United

effectiveness of extra-legal constitutional change attributable to a decision of "the people." *Javellana v. Executive Secretary*, G.R. No. L-36142 (Mar. 31, 1973); *Saturnino v. Bermudez*, G.R. No. 76180 (Oct. 24, 1986).

83. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 10 (George Schwab trans., 2005).

84. *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C. 1789, *quoted in* Albert, *supra* note 46, at 24.

85. See ROSENFELD, *supra* note 43, at 46-51.

86. *Id.* at 186. By pre-constitutional, Rosenfeld means certain features in the history of the people for whom the new constitution is made. It might, I think, be usefully understood in a logical as well as historical sense, as a reference to the social and political conditions for any kind of law-making.

Kingdom Foreign and Commonwealth Office. The Antigua and Barbuda parliament approved the text of a constitution that was then promulgated by the Queen in London as an Order-in-Council.⁸⁷ In this case, an investigation of the paper trail reveals no illegal step but it would be formal in the extreme to say the Antigua and Barbuda Constitution actually derives its force from regard for the authority of the Queen-in-Council, acting pursuant to an act of the United Kingdom Parliament. Specifying the decisions that really gave the force of law to the constitution is a complicated matter (as will be discussed in the next two sections). In this case, however, it is surely closer to the truth to credit what the text of the constitution itself says—that it is founded upon a “desire to establish a framework of supreme law” expressed by “the people of Antigua and Barbuda.”⁸⁸ This experience is typical of that of many of the independent states formerly governed as part of the British Empire. The substantive adoption of a new constitutional order by some indigenous process was simply put into a legal form by the old machinery of colonial legal authority.⁸⁹

In certain circumstances, this masking of an exercise of constituent authority behind a façade of legality serves important political interests. The moment of constitution-making is typically one of intense consultation of the political values of the relevant society. When, as is often the case, one of those values is that of legal regularity, it may be useful to combine revolutionary change with the appearance and rhetoric of positive law.⁹⁰ The eighteenth century German writer, Friedrich von Gentz, distinguished the American and French revolutions on exactly this ground. He took the Americans— notwithstanding the unfortunate references to an unlimited power in “the people” in the Declaration of Independence—to have acted at all times within the constraints of the pre-existing legal rights of subjects of the British crown. The French revolutionaries, on the other hand, acted without the benefit of law. It was, therefore, unsurprising that excesses followed:

For so soon as in a great undertaking, a step is taken wholly out of the boundaries of definite rights, and everything is declared lawful, which imaginary necessity, or unbridled passions inspires, so soon is the immeasurable field of arbitrary will entered upon; and a revolution, which has no other principle than to attack the existing constitu-

87. On the authority for Orders-in-Council in United Kingdom law, see BRADLEY & EWING, *supra* note 1, at 680-81.

88. The Constitution of Antigua and Barbuda (Schedule 1 to the Antigua and Barbuda Constitutional Order).

89. See STANLEY A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 75-85 (4th ed. 1981).

90. See Richard S. Kay, *Legal Rhetoric and Revolutionary Change*, 7 CARIB. L. REV. 161 (1997).

tion, must necessarily proceed to the last extremities of imagination and criminal guilt.⁹¹

The Canadian encomium to "lawful" constitutional origins quoted at the beginning of this section is a good example of the perceived value of invoking the forms of law in connection with any and every kind of change. Indeed, a recent report on constitutional amendment for the European Commission for Democracy Through Law (the Venice Commission), "strongly endorse[d]" the use of a legal procedure even for the adoption of "new constitutions." Such a course, according to the Commission, "strengthen[s] the stability, legality and legitimacy of the new system."⁹² In such cases, the invocation of law, no matter how illogical, can, as Claude Klein observes, facilitate "*une transition en douceur*."⁹³

In identifying the constituent authority, however, the use of such legal form may also be distracting. We have to see that a constituent event has, in fact, occurred before we can describe its source. We need, therefore, to ask, about the real connection between constitutional change and the prior legal authority cited on its behalf. Is it a case of genuine validation of the former by the latter or a mere, formal "relationship of validating purport?"⁹⁴ The more pungent phrase used by Georges Liet-Veaux about the establishment of the Vichy regime with the legal tools of the Third Republic was that it worked a "fraud upon the constitution."⁹⁵ In fact, sometimes the participants in fundamental constitutional change find the device of legal justification objectionable exactly because they perceive the legitimacy of the

91. FRIEDRICH VON GENTZ, *THE ORIGIN AND PRINCIPLES OF THE AMERICAN REVOLUTION, COMPARED WITH THE ORIGIN AND PRINCIPLES OF THE FRENCH REVOLUTION* 54-55 (John Quincy Adams trans., 1800) (I am grateful to Chimène Keitner for this reference).

92. VENICE COMMISSION REPORT, *supra* note 50, 15.

93. KLEIN, *supra* note 10, at 195-96.

94. H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 318-21 (1984).

[I]t is not sufficient in order to establish that two rules form part of a single system to show that one of them provides that rules of a certain description satisfied by the other are valid [W]hen such a relationship holds between two rules it is dangerously misleading to express this fact by stating, *without stressing a very important qualification*, that one rule "determines the validity of the other" or is "the reason for its validity" [T]o do so] concentrates too much on what laws of validating purport *say* about other laws and pays too little attention to matters that do not concern the content of the laws but their mode of recognition.

Id. at 318-21.

95. Georges Liet-Veaux, *La "Fraude a la Constitution": Essai d'une Analyse Juridiques des Révolutions Communitaires Récentes: Italie, Allemand, France*, 59 *REVUE DU DROIT ET DE SCIENCE POLITIQUE EN FRANCE ET A L'ETRANGER* 116 (1943). Liet-Veaux made clear that legal fraud, in this context, did not always carry a pejorative connotation. *Id.* at 145 ("Grâce à la forme régulière qu'elle revêt, la révolution par fraude à la constitution évite bien des troubles et des émeutes."). See KLEIN, *supra* note 10, at 153-56.

new regime to require an explicit and overt reference to the political forces that actually did bring it into being. When Ireland adopted the Constitution of 1937, the enacting institutions took pains to make clear that they were, in no way, exercising powers granted by the United Kingdom parliament.⁹⁶ Similarly, in proposing constitutional reform in Canada, a committee of the Canadian Bar Association, in marked contrast to the sentiment expressed by the Ministry of Justice, unsuccessfully recommended that a new constitution be implemented without recourse to authorities in the United Kingdom for the very purpose of effecting a “break with the established legal order.”⁹⁷

Like it or not, a true constituent authority must act without the comfort of legal authorization. “Anarchy,” the Count of Clermont-Tonnerre told the French Constituent Assembly, “is a frightening but necessary transitional stage; the only moment in which a new order of things can be created.”⁹⁸ Like every human phenomenon, a legal system must have a beginning. It can’t be “turtles all the way down.”⁹⁹

III. VERSIONS OF THE PEOPLE

The absence of a legal answer to the question of who has constituent authority obliges us to identify a social and/or political one. At the beginning of the twenty-first century, the identification of such an authority seems obvious to most people who bother to consider the question. Constituent authority belongs to *the people*.¹⁰⁰ So deeply has this idea rooted itself that many thoughtful writers on constitutionalism take it as a self-evident starting point.¹⁰¹ Constitutions,

96. “[T]he point seems to have been to enact the new constitution without reference to the old.” MARRKU SUKSI, MAKING A CONSTITUTION: THE OUTLINE OF AN ARGUMENT 71 (quoting ANGELA CLIFFORD, THE CONSTITUTIONAL HISTORY OF EIRE/IRELAND 88-90 (1983)); Richard S. Kay, *Comparative Constitutional Fundamentals*, 6 CONN. J. INT’L L. 445, 455-58 (1991) [hereinafter Kay, *Comparative*].

97. Committee on Constitution, Canadian Bar Association, TOWARDS A NEW CANADA 6 (1978) quoted in PETER W. HOGG, CANADIAN CONSTITUTIONAL LAW 59, n.42 (Student ed. 2006). See also KENNETH C. WHEARE, THE CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH 89-113 (1960, reprinted Greenwood Press, 1982).

98. Quoted in Elster, *Bootstrapping*, supra note 76, at 557.

99. Among many versions of this figure of speech, see *Rapanos v. United States*, 547 U.S. 715, 754 n.14 (2006) (plurality opinion of Scalia, J. joined by Roberts C.J. and Thomas and Alito JJ.).

100. In this section and the next, I will use the italic font to indicate that I am speaking of *the people* as a will-bearing entity that could exercise constituent authority. Quotations will not be altered. Sieyès and many subsequent writers referred to the constituent power of “the nation.” But as Thomas Paine was shortly to write, the meaning was the same. See THOMAS PAINE, THE RIGHTS OF MAN (1791), in THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE, 381 (Philip Foner ed., 1974).

101. See Pavlos Eleftheriadis, *Law and Sovereignty* 3-4 (Oct. 9, 2009). Oxford Legal Studies Research Paper No. 42/2009, available at <http://ssrn.com/abstract=1486084>.

one commentator has recently noted, may be said to have become a literary genre defined by the use of the phrase "We the People."¹⁰²

A. *Alternatives to the People*

Before proceeding to a discussion of the dimensions and difficulties associated with the now almost universally recognized authority of *the people*, it is worth stepping back to note that legitimate constitutions can be, and have been, attributed to quite different sources. It is entirely familiar, for example, for the basic rules governing a polity to be located in an instance of divine legislation. The most traditional Jewish understanding of the Torah is that it was a law given by God to the people of Israel through revelation to Moses.¹⁰³ "According to the medieval understanding," wrote Carl Schmitt, "only *God* has a *potestas constituens* . . ."¹⁰⁴ James Wilson, whose emphatic affirmation of the constituent authority of *the people* was quoted above, saw that authority itself as flowing from a moral sense instilled and regulated by "divine monitors within us." "Human law," he said, "must rest its authority, ultimately upon the authority of that law, which is divine."¹⁰⁵ Today, theocratic states continue to attribute the binding quality of all law, including constitutional law, to derivation from, or at least conformity with, God's commandments. The 1979 Constitution of Iran, among many other references to the paramount force of God's authority, states in Article 4 that "[a]ll civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations . . ."¹⁰⁶

In societies where the monarchical principle is entrenched (sometimes itself as a manifestation of divine authority), it is only natural that the king should possess constituent authority. In the early days of the French Revolution, it was a genuine question as to what the National Assembly could do without the assent of the king.¹⁰⁷ The Constitutional Charter of the Bourbon restoration of 1814, at least in form, rejected the monarch's demotion from constituent to constituted authority. In it, the King swore fealty to the principles it established. It maintained, however, "all authority in France resides in the person of the king." The Charter stated that the King had

102. Ming-Sung Kuo, *Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman's Presentist Critique of Constitutional Authorship*, 7 I-CON 683, 683 (2009).

103. PIRKE AVOT, Ch. 1. v.1.

104. SCHMITT, *supra* note 1, at 126.

105. Wilson, *supra* note 12, at 92-93.

106. Constitution of Iran (1979) art. 4. *See also* art. 2 (Foundational Principles) affirming belief in "[d]ivine revelation and its fundamental role in setting forth the laws" and "the justice of God in creation and legislation."

107. *See* Elster, *Arguing*, *supra* note 16, at 370.

promulgated it “voluntarily, and by the free exercise of our royal authority”¹⁰⁸ Many European constitutions of the nineteenth century were edicts of reigning monarchs and, whatever the actual circumstances of their creation, were formally expressions of their wills. When the King of Sardinia-Piedmont, with an eye on the revolutions of 1848, agreed to a constitution, he made sure to enact it “heeding only of the impulses of our heart by our certain Royal authority.”¹⁰⁹ The two 1848 constitutions of Prussia exemplify the same distinction. Having called a national assembly to draft a constitution, King Frederick William IV declined to accept the instrument it produced, preferring to promulgate one on his sole authority.¹¹⁰ The same was true of the first real Turkish constitution, the Ottoman Constitution of 1876.¹¹¹ For Carl Schmitt, writing in 1928, the notion of monarchical constituent authority was a genuine, if problematic, alternative to the democratic authority of the nation.¹¹² Even today, some of the constitutions of the monarchies of the Persian Gulf assert no authority other than the rulers who promulgated them.¹¹³

For the most part, the plausibility of these alternative sources of constituent authority had been exhausted by the time constitutionalism became a near-universal value in the twentieth century. A survey of the world’s constitutions finds few which do not found their authority on some constituent act of *the people*. Even where that authority is not invoked as the sole basis of the constitution, some reference to *the people’s* agreement is routinely included. The King of Bahrain, promulgating the 2002 constitution, did so “in implementation of the popular will” and “pursuant to the authority entrusted to us by our great people.”¹¹⁴ In large part, therefore, consideration of the nature of constituent authority amounts to an inquiry into what, in this context, we mean by *the people*.

We are able, without much difficulty, to understand why God or the King or the priests might be understood as proper constitution-making agents. These are identifiable sources with known or presumed qualities or clearly defined statuses who might be regarded as suitable agents to produce proper constitutions. A society may attribute to them a wisdom or power or honor or courage or benevolence

108. Constitutional Charter of June 14, 1814, reproduced at http://www.napoleon-series.org/research/government/legislation/c_charter.html. See Jaume, *supra* note 35, at 76.

109. Constitution of Sardinia (Mar. 1848).

110. JUSTINE DAVIS RANDERS-PEHRSON, *GERMANS AND THE REVOLUTION OF 1848-1849*, 403-38 (2001).

111. ERGUN ÖSBUDUM & ÖMER F. ÖÇKAYA, *DEMOCRATIZATION AND THE POLITICS OF CONSTITUTION-MAKING IN TURKEY* 8-9 (2009).

112. SCHMITT, *supra* note 1, at 77, 18-130.

113. Kuwait Constitution, 1962; The Basic Law of the Sultanate of Oman, 1996; Permanent Constitution of the State of Qatar, 2004. See also Constitution of Brunei Darussalam, 1984.

114. Constitution of the Kingdom of Bahrain, 2002.

that seems good in the formulation of fundamental law. Or they might be believed to have an entitlement to make these rules according to some supra-legal normative system.¹¹⁵ *The people's* attraction as a constituent authority is of a different kind. It appears premised on a particular dogma, the political rightness of *self-government*. That principle rests on the axiom that no person ought to be subject to the will of another absent his or her own consent to be so bound. It follows that, since all government depends on the capacity to coerce, all government must be legitimated by some actual or presumed agreement from its subjects. It must, in the words of the American Declaration of Independence, "derive [its] just powers from the consent of the governed."¹¹⁶ This idea is explicit or implicit in every argument that lays the origin of government in original contract.¹¹⁷ Constitution-making by *the people* supplies the necessary consent of the governed to the law to be made by the constituted powers. The result of such a founding is summed up in Lincoln's reference to "the government of the people, by the people and for the people" and continues regularly to appear in the modern literature on constitutionalism.¹¹⁸

Recognizing, on these grounds, the constituent authority of *the people* may be clear enough as an abstract proposition. When, however, we ask how that general proposition translates to the authority to make a particular constitution in a particular time and place, a number of complications arise. I examine some of these in the following sections.

B. *Finding a People*

If we regard *the people's* constituent authority as deriving from a right of self-government, we need to start its specification by some reference to the human beings who are to be governed by the constitution it creates. Although we can imagine other possibilities, it is

115. See Norman Jacobson, *Knowledge, Tradition and Authority: A Note on the American Experience*, in *AUTHORITY (NOMOS VOL. 1)*, *supra* note 33, at 113, 121 (referring to the American political system as being "without the divinity which has usually hedged the figure of the founder, without a theory of personal fealty, without a mystique surrounding the exercise of power, without an image of the special skills and special knowledge competent to rule- without, in a word, traditional political authority").

116. Declaration of Independence, 1776, para. 2.

117. *E.g.*, LOCKE, *supra* note 8, at 63.

118. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), reprinted in 2 *ABRAHAM LINCOLN: SPEECHES AND WRITINGS (1859-1865)* 536 (D. Fehrenbacher ed., 1989). See also *e.g.* James Tully, *The Imperialism of Modern Constitutional Democracy*, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 8, 325, 320 ("I take 'constituent powers' to be the powers of humans (individually and collectively) to govern themselves."). More substantive justifications are also sometimes suggested. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 *Nw. U. L. REV.* 383 (2007) (claiming the super-majoritarian process of constitution-making and amendment produce superior rules of government).

reasonable to assume we are dealing with some group of individuals associated with some territory. In theory, residence in a common geographical space might be sufficient to define a *people*. But, in practice, something more is necessary. I can map out a large contiguous area, say, the southern hemisphere, and identify its population. Even if I were somehow able to assemble a fair representative of that population, however, it would be odd to think of its decisions as acts of *the people* of the southern hemisphere.¹¹⁹ When we speak of a people capable of making decisions about a constitution, we presuppose an association that has “a type of being that is more intense in comparison to the natural existence of some human group living together.”¹²⁰ There must be, that is, commonalities that transcend physical space. Put another way, locating a constituent authority in a *people* takes for granted that there is some plausible way of mapping a pre-legal (if not pre-political) group onto the projected population of the prospective state.¹²¹

It is impossible fully to understand this problem without taking into account the fact (*pace* Rousseau¹²²) that no *people* can act directly. Whatever will we attribute to *the people* must be manifested in some process of representation, deliberation and decision that can bind the population universally. In an established legal system, such a power to bind can be based on positive law but we are now, by hypothesis, in a world where there is no law to invest a representative with this power. Willingness to cede authority in these circumstances must depend on a shared sense of the rightness of treating such a representative decision as the decision of every individual. Any such process depends on the pre-legal propriety of dealing with a mass of individuals as a single thing and that, in turn, presumes that all of the people affected share, at least at a general level, the same interests with respect to the decisions that are to be made. In the Virginia

119. See KEITNER, *supra* note 77, at 10 (“A given territory is not necessarily a nation; self-identified members of a single nation do not necessarily inhabit the same territory . . .”).

120. SCHMITT, *supra* note 1, at 243. In its unrepresented state, *the people* is assumed to be “a simple, inarticulate, immanent unity, generated through the dissolution of interpersonal boundaries.” Lior Barshack, *Constitutional Power as a Body: Outline of a Constitutional Theology*, 56 U. Tor. L.J. 185, 193 (2006).

121. See Stephen Tierney, “We the Peoples”: *Constituent Power and Constitutionalism in Plurinational States*, in THE PARADOX OF CONSTITUTIONALISM, *supra* note 8, 229, 231. Preuss quotes Rousseau that to have a constitution a people must “find itself already bound together by some original association, interest or agreement [so as to be in a position to combine] the cohesion of an ancient people with the malleability of a new one.” Preuss, *Powermaking*, *supra* note 20, at 659. The definition of a people capable of making a domestic constitution is, from an international perspective, identical to the definition of a people entitled to self-determination. For a sensitive treatment, see KEITNER, *supra* note 77.

122. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, Book IV, Ch. 14 (“Sovereignty cannot be represented Every law the people has not ratified in person is null and void.”)

Convention that ratified the United States Constitution, George Mason worried about granting the taxing power to the proposed federal Congress: "[I]t is to be determined by those who have neither knowledge of our situation, nor a common interest with us nor a fellow-feeling for us."¹²³ The need for confidence in a "fellow-feeling" is especially acute with regard to constituent decisions. What Joseph Weiler has said about democratic decisionmaking within a polity, follows a *fortiori* for the process that effectively creates a polity: "The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a *demos*. Simply put, if there is no *demos*, there can be no democracy A *demos*, a people, cannot after all be a bunch of strangers."¹²⁴

This conclusion has been rephrased by Ulrich Preuss: "[T]he constitutional state presupposes some minimum degree of prepolitical sameness and homogeneity of the constituent power."¹²⁵ The exact kinds of unities that define a constituent people, however, have been a matter of substantial debate. The problem has received a great deal of academic attention in recent years in connection with proposals to create a European constitution.¹²⁶ The discussion has been stylized into two contending positions, roughly tracking nineteenth-century arguments on the essential characteristics of a nation. On one side, *the people* refers to a natural organism, a *Volk*, what Jürgen Habermas referred to as "a community of fate shaped by common descent, language and history."¹²⁷ In its crudest form, this comes down to matters of race and ethnicity. More broadly put, it may be based on shared culture and experience. On the other side, *the people* is a political construction, a voluntary association of rational individuals acting on the basis of shared principles.¹²⁸ On this second view, the relevant people is itself partly created in the process of constitution-making. This understanding accounts for the perception of a paradox in popular constitution-making since, according to it, *the people* both creates and is created by the constitution.¹²⁹

123. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 30-31 (Jonathan Elliot ed., 1888).

124. JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR AND OTHER ESSAYS ON EUROPEAN INTEGRATION 337 (1999).

125. Preuss, *Powermaking*, *supra* note 20, at 659.

126. See, e.g., Miguel Poiates Maduro, *Europe and the Constitution: What If This Is As Good As It Gets?*, in EUROPEAN CONSTITUTIONALISM: BEYOND THE STATE 74, 81-82 (Joseph H.H. Weiler & Marlene Wind eds., 2003).

127. Jürgen Habermas, *Why Europe needs a Constitution*, 11 NEW LEFT REVIEW 5, 15 (Sept.-Oct. 2001) [hereinafter Habermas, *Why Europe*].

128. See Preuss, *Powermaking*, *supra* note 20, at 644-47; Dominique Schnapper, *The Idea of a Nation*, 18 QUAL. SOC. 177, 181-83 (1995); Anthony D. Smith, *National Identity and the Idea of European Unity*, 68 INT'L AFFAIRS 55, 56 (1992).

129. See Martin Loughlin & Neil Walker, *Introduction*, in THE PARADOX OF CONSTITUTIONALISM, *supra* note 8, 1-8.

This need not, however, be an either-or question. We are interested in whether or not all the circumstances of a given group of human beings are such that it makes sense to treat their interests collectively for the purposes of constitution-making. Experience tells us that a long-term successful state need not have the ethnic-linguistic uniformity that characterizes the Romantic *Volk*. Switzerland provides the standard example of a multi-linguistic society with a stable constitutional structure. The Italian state was assembled successfully during an era when "it was not possible to speak of a collective 'Italian self.'"¹³⁰ Jose Ortega y Gasset reasoned that "[i]f the XIX-th century concept of nationality had existed in the Middle Ages, England, France, Spain and Germany would never have been born."¹³¹ Perhaps the most stunning example is the United States where a genuine civic identity has been forged out of a riot of cultures, languages, religions, and traditions.¹³² That there now exists an American culture is as much a consequence of the success of the American polity as a cause of it.¹³³ Experience, therefore, belies the claim that the existence of *the people* as "some primordial substrate" is a necessary precondition to the creation of the constitution.¹³⁴ The only essential thing is the existence of a "common sphere of public debate and reasoning."¹³⁵ It is clear, in fact, that, by itself, ethnic or linguistic unity is insufficient to constitute a *people* for these purposes. There must also be some shared political consciousness.¹³⁶

It does not follow, however, that the presence or absence of cultural-linguistic homogeneity is irrelevant to the likelihood of a constituent authority linked to a *people*. At least in certain historical-political contexts, the amalgamation of some group of human beings into a workable constitutional unit has proven impossible exactly because of the inability of the individuals to see each other as part of a common people. The Habsburg monarchy more or less successfully maintained political hegemony over highly diverse populations for hundreds of years but when, in the nineteenth century, for many rea-

130. Giuseppe Federico Mancini, *Europe: The Case for Statehood*, 4 *EUROP. L.J.* 29, 36 (1998).

131. JOSE ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 174 (1932). See also Habermas, *Why Europe*, *supra* note 127, at 16 (the "emergence of national consciousness involved a painful process of abstraction, leading from local and dynastic identities to national and democratic ones").

132. Herbert J. Gans, *The American Kaleidoscope, Then and Now*, in *REINVENTING THE MELTING POT: THE NEW IMMIGRANTS AND WHAT IT MEANS TO BE AMERICAN* 33-46 (Tamar Jacoby ed., 2004).

133. See ROSENFELD, *supra* note 43, at 158-63.

134. Jurgen Habermas, *Remarks on Dieter Grimm's "Does Europe Need a Constitution?"* 1 *EUROP. L.J.* 303, 305-06 (1995) [hereinafter Habermas, *Remarks*].

135. Preuss, *Powermaking*, *supra* note 20, at 648. See also Dieter Grimm, *Does Europe Need a Constitution?* 1 *EUROP. L. J.* 282, 297 (1995) [hereinafter Grimm, *Need*]; Habermas, *Remarks*, *supra* note 134, at 305-06.

136. This is what, for Schmitt, constituted the difference between a "nation" and a mere "people." SCHMITT, *supra* note 1, at 127.

sons, those people began to focus on their identities as members of more narrowly defined nationalities, that entity became unsustainable.¹³⁷ The difficulty is particularly acute in jurisdictions where disparate communities share a historically entrenched mutual hostility.¹³⁸ The intense but futile attempts at constitution-making in Cyprus over the last fifty years is a dramatic example of how inter-group antagonism can frustrate the construction of a common identity for a geographically defined population.¹³⁹ Habermas recognized the relevance of pre-legal commonalities to the feasibility of the formation of a polity when he noted that the development of national consciousness was “*facilitated* by the stabilizing contents of traditional communities.”¹⁴⁰ The American experience does not, itself, demonstrate the invariable sufficiency of a politically defined people. The United States had the relatively unusual advantage of an extended period of immigration and assimilation, allowing it to accommodate its diverse ethnic communities over time and in relatively small pieces.¹⁴¹ At least ordinarily, “without [a] resonant fiction of relatedness through memory, and myth and history and/or real kinship, a real sense of membership is hard to come by.”¹⁴²

In the end, there can be no precise algorithm specifying the conditions for defining a *people* capable of exercising constituent authority.¹⁴³ Dieter Grimm summed up the minimum conditions: “All that is necessary is for the society to have formed an awareness of belonging together that can support majority decisions and solidarity efforts, and for it to have the capacity to communicate about its

137. See VICTOR-L. TAPIE, *THE RISE AND FALL OF THE HABSBURG MONARCHY* 317-92 (Stephen Hardman trans., 1971).

138. See Hanna Lerner, *The People of the Constitution: Constitution-Making, Legitimacy, Identity* 21 (2004), available at http://www.columbia.edu/cu/polisci/pdf-files/aspa_lerner. Even some of those countries that are often cited as examples of successful multi-ethnic polities seem to have achieved something less than a unitary polity. The constitutional status of Canada is, at best, a kind of *modus vivendi* between French and English-speaking populations. This is, in part, because much of the French population believes the supposed constituent authority, acting in 1982, did not represent a single Canadian people. The problem of a single Canadian polity has been further complicated by recognition of the national claims of indigenous peoples. See Richard S. Kay, *Canada's Constitutional Cul-de-Sac*, 35 AM. REV. OF CAN. STUD. 705 (2005).

139. VAN COUFOUDAKIS, *CYPRUS: A CONTEMPORARY PROBLEM IN HISTORICAL PERSPECTIVE* (2006).

140. Habermas, *Why Europe*, *supra* note 127, at 16.

141. See Gans, *supra* note 132, at 33-46.

142. WEILER, *supra* note 124, at 345 (citing Smith, *supra* note 128). On the relative force of rational and inherent criteria of national belonging, see KEITNER, *supra* note 77, at 69-86.

143. It is hard, therefore, to take seriously Bruce Ackerman's suggestion that although “there is lots of room for good faith disagreement on the right numbers,” a constituent process is triggered by evidence of “the deep support of 20 percent of the citizenry, and the additional support of 31% of *private* citizens.” ACKERMAN, *supra* note 17, at 274-75.

goals and problems discursively.”¹⁴⁴ We require, that is, common factors sufficient to permit us to perceive the collectivity as capable—through some kind of procedure—of acting as “a person with all the attributes of personality, conscience and will.”¹⁴⁵ It is idle, however, to think that there can be an act of constitution-making that banishes the centrifugal tendency of distinct historical-cultural sympathies and that one can always and everywhere construct a purely demotic polity, one based solely on loyalty to shared civic values.¹⁴⁶

C. *The Voice of the People*

Even if we are satisfied that a constitution is being created for a sufficiently coherent population, identifying the exercise of constituent authority by *the people* presents further difficulties. Recognition of constituent authority in God, or the King or the priests refers to identifiable individuals whose decisions are fairly traceable to them. The direct active participation of significant parts of the population in the deliberations associated with the drafting of constitutions, on the other hand, is usually a matter of form and rhetoric.¹⁴⁷ *The people*, we have already noted, cannot exercise its will directly. References to *the people* as a constitution-maker must be to the “imaginary collective body of the group” capable of signifying the assent of the real human beings who are to be governed by the constituted power.¹⁴⁸ We need, therefore, to identify some authentic representative of *the people* whose decisions may plausibly be attributed to that body. A series of possible surrogates with claims of varying plausibility have been successfully employed.

In many instances, it has been assumed that an ordinary legislature, existing under an established constitution, is sufficiently representative to speak for *the people* in creating a new one. That was the principal mode of constitution-making in the American states immediately after independence¹⁴⁹ and legislatures continue to be the

144. See Grimm, *Need*, *supra* note 135, at 295-96.

145. LÉON DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* (2d ed. 1921) *quoted and translated* in KEITNER, *supra* note 77, at 27. See also *id.* at 75 (“While a group can have an identity and even an interest defined as the aggregate of the identities and interests of its individual members, in order to have a *will* of its own it must be in some sense a ‘collective being.’”).

146. See Lerner, *supra* note 138, at 42-43 (“Not all problems are constitutionally solvable. As long as individual tensions over the identity of the polity are not settled, prepolitical forces will threaten constitutional unity.”). Cf. Preuss, *Powermaking*, *supra* note 20, at 647, 660 (expressing a preference for a principally demotic polity). For a recent attempt to reconcile a polity based on shared commitment to abstract principles with the inevitability of particular attachments, see JAN WERNER-MÜLLER, *CONSTITUTIONAL PATRIOTISM* (2007).

147. See Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?* 3 ANN. REV. OF L. & SOC. SCI. 201, 206 (2009).

148. Barshack, *supra* note 120, at 186.

149. See WOOD, *supra* note 10, at 306-07.

most common site of deliberation and drafting in the constitution-making process.¹⁵⁰ The 1984 Constitution of Guinea-Bissau was adopted by the national legislature, "acting as a faithful interpreter of the will of the people and exercising its responsibilities as the highest sovereign organ."¹⁵¹ Likewise, the 1993 Constitution of the Czech Republic was an enactment of the Czech Parliament. Its preamble referred to its adoption by "[w]e the citizens of the Czech Republic [acting] through our freely elected representatives."¹⁵² Some legislatures have simply changed their names before exercising such power. That is what the French National Assembly did on July 9, 1789 making itself the Constituent Assembly.¹⁵³ The Territorial Assembly of the Republic of Guinea, on declaring independence from France in 1958, announced itself to be the National Sovereign Constituent Assembly.¹⁵⁴ Such a procedure, blurring the basic distinction between constituted and constituent power, has been the target of serious objections. Although chosen in fair elections, ordinary legislators are supposed to act within the limits created by the constitution and, insofar as they presume to alter those limits, they act as judges in their own causes.¹⁵⁵ The constitution, charged one critic of the supposed constituent authority of the Pennsylvania colonial legislature in 1776, "is an act which can be done *to them*, but cannot be done *by them*."¹⁵⁶ It is arguable, moreover, that ordinary legislative elections, in which a range of workaday public matters are in contest, may be defective vehicles for representing the fundamental constitutional preferences of *the people*. The act of constitution-making is an extraordinary kind of legislation in which the focus must be narrow and the deliberation intense. It requires what Bruce Ackerman has called "constitutional politics" to be distinguished from the ordinary politics

150. See Jennifer Widner, *Constitution-Writing in Post-Conflict Situations*, 49 WM. & MARY L. REV. 1513, 1523 (2008).

151. Constitution of the Republic of Guinea-Bissau, 1984, Preamble.

152. Constitution of the Czech Republic, Dec. 16, 1992. On the adoption procedure, see Rainer Grote, *The Czech Republic*, Introductory Note in *Constitutions of the Countries of the World*, available at <http://www.oceanalaw.com/gateway/gateway.asp?ID=31&SessionID={1EF71CD7-70B2-4D22-A2B4-9C190A88563B}>.

153. TACKETT, *supra* note 77, at 211.

154. See Rainer Grote, *The Republic of Guinea*, Introductory Note, in *Constitutions of the Countries of the World*, available at <http://www.oceanalaw.com/gateway/gateway.asp?ID=31&SessionID={4030D653-5F6D-4EF3-BB55-2346A7038EF8}>.

155. See Elster, *Arguing*, *supra* note 16, at 386-88; Elster, *Forces*, *supra* note 79, at 380-82; Ginsburg et al., *supra* note 147, at 212. A recent survey of the creation of constitutions over a long period and in many jurisdictions, however, failed to identify any strong correlation between legislative constitution-making and extensive legislative power in the resulting constitutions. See *id.* at 212-13.

156. Quoted in WOOD, *supra* note 10, at 337. See also SIEYES, *supra* note 6, at 129 ("How can one believe that a constituted body may itself decide on its own constitution?").

of everyday legislation. "The first is a decision by the . . . people; the second by their government."¹⁵⁷

One response to this concern is to hold that legislatures may exercise constituent authority but only after an election in which the possibility of a new constitution is a central issue. We have already seen the example of the Sri Lankan constitution of 1972, adopted after an election in which the prevailing party had pledged to turn the parliament into a constituent assembly. When the first post-war French parliament was elected in 1945, the voters were asked "Do you want the assembly elected today to be a constituent assembly?"¹⁵⁸ Alternatively, the structure of the legislature might be modified when it undertakes to create a constitution. Many constitutions call for *amendments* to be considered in a combined sitting of the two houses of a bicameral legislature.¹⁵⁹ When the Constitution of Bangladesh was created in 1972, it was adopted by a Constituent Assembly consisting of some representatives who had been elected to the National Assembly of Pakistan from the former East Pakistan and some who had been elected to the Provincial Assembly of East Pakistan.¹⁶⁰

The paradigmatic (if not the most common) modern procedure for writing a new constitution is the extraordinary, purpose-made Constituent Assembly or the Constitutional Convention. A key characteristic of such bodies is exactly the fact they are not provided for in prior law. Such lack of authorization in this context, of course, is not a defect. It is, as we have seen, an inevitable aspect of constituent authority which must be located outside of the pre-existing legal order. For this reason, eighteenth-century American states rejected the constituent authority of the legislatures and insisted on special purpose constitutional conventions.¹⁶¹ It is also why the Philadelphia Convention of 1787 that drafted the United States Constitution felt justified in by-passing the approval of state legislatures and submitting the instrument to special conventions to be called in each state.¹⁶² When those conventions had approved it, it was understood

157. ACKERMAN, *supra* note 17, at 6. For a sensitive discussion of the advantages and disadvantages of legislative constitution-making, see Jon Elster, *Legislatures as Constituent Assemblies*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 181 (Richard W. Bauman & Tsvi Kahana eds., 2006) [hereinafter Elster, *Legislatures*].

158. Elster, *Legislatures*, *supra* note 157, at 182.

159. *E.g.*, Constitution of France, 1958, art. 89; Bahrain Constitution, 2002, art. 120.

160. Introductory Note, The People's Republic of Bangladesh, in *Constitutions of Countries of the World*, available at <http://www.oceanalaw.com/gateway/gateway.asp?ID=31&SessionID={4030D653-5F6D-4EF3-BB55-2346A7038EF8}>. On the various institutional combinations of legislative and constituent authority, see Elster, *Legislatures*, *supra* note 157, at 182-83.

161. See WOOD, *supra* note 10, at 313-18.

162. See Kay, *Illegality*, *supra* note 11, at 72-75.

to have received the assent of *the people*. "The people acted upon it," Chief Justice Marshall was later to say "in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in Convention."¹⁶³ This is the "body of extraordinary representatives" of which Sieyès wrote that it "takes the place of the assembly of the nation."¹⁶⁴

The distinction between the acts of representatives elected to a legislature and those elected to a constituent assembly is, it must be observed, more a matter of symbol than substance. At one time, the qualifications for voters to the latter may have been more liberal. That was the case in the United States in 1787-89.¹⁶⁵ But, with the advent of universal suffrage, it is hard to believe that the quality of representation could be very different. In this respect, the observation in 1788 of the American lexicographer and essayist, Noah Webster, is still apt. A constitutional convention, he noted, was "a body of men chosen by the people in the manner they choose the members of the Legislature, and commonly composed of the same men; but at any rate they are neither wiser nor better."¹⁶⁶

The final and most direct method of expression of *the people* is the constitutional referendum and it has become a near staple of modern constitution-making. Of twenty-three new constitutions promulgated in this century, thirteen have been approved in referenda.¹⁶⁷ Carl Schmitt found the "people's constitution-making will always expresses itself only in a fundamental yes or no and thereby [it] reaches the political decision that constitutes the content of the constitution." At least "[t]heoretically" he went on, the plebiscite "corresponds thoroughly to the democratic principle and to the idea of the people's constitution-making power."¹⁶⁸ Notwithstanding the direct

163. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819).

164. SIEYÈS, *supra* note 6, at 130.

165. THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION, at 32, 108-11 (Patrick T. Conley & John P. Kaminski eds., 1988). On the use of special electoral rules in the election of constituent assemblies, see Elster, *Legislatures* at 187-89.

166. Quoted in WOOD, *supra* note 10, at 379.

167. Burundi (2005), Central African Republic (2004), Comores, (2001), Democratic Republic of Congo (2004), Republic of Congo (2001), Cote d'Ivoire (2000), Iraq (2005), Myanmar (2008), Qatar (2003), Rwanda (2003), Senegal (2001), Serbia (2006), and Thailand (2007). The constitutions promulgated without referenda are from Afghanistan (2004), Bahrain (2002), Bhutan (2008), East Timor (2002), Finland (2000), Kosovo (2008), Maldives (2008), Nepal (2007), Sudan (2005), and Swaziland (2005). Almost all of the latter group, however, still declare themselves to be the work of *the people*. The survey is based on material in the Constitutions of Countries of the World database, available at <http://www.oceanalaw.com>. I have, of course, had to exercise some judgment as to what exactly amounts to a "new constitution." See also SUKSI, *supra* note 96, at 12-13 (1995) (noting the high incidence of constitutions providing for referenda in constitutional revision).

168. SCHMITT, *supra* note 1, at 134. See also Barshack, *supra* note 120, at 213 ("The potential political advantages of the referendum in certain, mostly critical, historical contexts derive from its semi-religious dimensions, its capacity to occasion an enact-

participation of large numbers of people, however, there are well-known problems in associating this kind of constitution-making with the constituent authority of *the people*. Designating the individuals qualified to participate implicates all of the issues involved in identifying a *people* canvassed in the last section. There will always be numerous ways to specify the ballot question or questions and the selection of one or another method will, as a practical matter, facilitate or frustrate alternative outcomes.¹⁶⁹ In general, as Schmitt recognized, *the people's* ability to express itself directly is drastically limited. It is confined to the propositions that the organizers of the referendum put before it. It can dispose but not propose.¹⁷⁰ It is impossible for *the people* to state its will with nuance or qualification. It cannot reconsider and revise. Even these crude expressions of its will may be rendered only infrequently.

These doubts are reinforced by the historical association of plebiscitary democracy with totalitarian government. Napoleon is credited with developing the plebiscite as a prop for authoritarianism and the techniques of electoral manipulation have, if anything, been radically advanced with the advent of electronic mass communication.¹⁷¹ The constitution of Haiti, adopted in 1987 after the fall of the Duvalier dictatorship, actually states that “[g]eneral elections to amend the Constitution by referendum are strictly forbidden.”¹⁷² This kind of criticism, however, (indeed any of the criticisms that have been discussed for various means of representing *the people*) must be tempered by our recognition that *the people* is not a flesh-and-blood entity, much less the bearer of a genuine single psychological will. The perfectly unmediated voice of *the people* is necessarily a fiction.

ment of the sovereign body.”). On the peculiar affinity of referenda and constituent decision-making, see Stephen Tierney, *Constitutional Referendums: A Theoretical Enquiry*, 72 MOD. L. REV. 360 (2009).

169. A useful recent survey of the numerous contingent choices in the context of self-determination referenda for non-self-governing territories is Chimène Keitner, *Associate Statehood: Principles and Prospects*, 3 FAROESE L. REV. 13, 27-37 (2003).

170. See CARL SCHMITT, *LEGALITY AND LEGITIMACY* 89 (Jeffrey Seitzer trans., 2004) (“The people can only respond yes or no. They cannot advise, deliberate or discuss.”); Preuss, *Roundtable*, *supra* note 20, at 121 (discussing the power of the 1989 Roundtable in the German Democratic Republic to frame the questions for a constitutional plebiscite).

171. 1 LOUIS MADELIN, *THE CONSULATE AND THE EMPIRE* 69, 159, 243 (E.F. Buckley trans., 1967). On the structural defects of direct democracy, see Alan Hamlin, *The Voice of the People*, 10 CONST. POL. ECON. 367, 370-73 (1999); SUKSI, *supra* note 96, at 8-9, 13. See also VENICE COMMISSION REPORT, *supra* note 50, at 37.

172. Constitution of the Republic of Haiti, 1987, arts. 284-3; SUKSI, *supra* note 96, at 8.

D. *The People in Time*

A further problem with the constituent authority of *the people* seems to be built into the structure of popular constitutionalism. Two propositions are crucial. First, constitutions are written, in part, to establish stable rules to distinguish areas of potential public regulation from those of private autonomy. To accomplish this, those rules need to be in force for some reliably long period, to be, at least, more durable than ordinary legislation.¹⁷³ Second, as we have already noted, the constituent authority of *the people* derives from the assumed political rightness of self-government, the idea that people should be bound only by rules and institutions to which they have somehow consented. These two propositions are in tension. As the constitution ages, it becomes less plausible for the members of society to see it as a manifestation of their own decisions. Assuming the original constitution-making emerged in an acceptable representative process, the constitution's authority will be defensible at the moment of enactment and for some time thereafter. All democratic rule making assumes the law-making people to be a temporally extended entity, one that can "bind itself" over some period.¹⁷⁴ But this temporal identification cannot be indefinite. The constitution-makers, acting at time t_0 , may be a proper surrogate for *the people* at time t_0 or time t_{10} . That will be much more doubtful at time t_{100} or time t_{200} .¹⁷⁵ Noah Webster, writing during the debate on ratification of the United States Constitution, contended that the attempt to create a "perpetual" constitution assumed a right to "legislate for those over whom we have as little authority as we have over a nation in Asia."¹⁷⁶

This has been a prominent theme ever since constitutions began to be identified with *the people*. Various devices have been suggested to refresh the legitimacy of such constitutions. Rousseau insisted on the necessity of "fixed periodical assemblies [at which] the people is legitimately called together by law, without need of any formal summoning." The first question on the agenda of such assemblies was always to be "[d]oes it please the Sovereign to preserve the present form of government?"¹⁷⁷ During the French Revolution, as mentioned, both Sieyès and Condorcet had argued for the necessity of

173. Obviously, I am only stating not defending this proposition. I attempt to elaborate this purpose of constitutions in Richard S. Kay, *American Constitutionalism*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16 (Larry Alexander ed., 1998).

174. See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 221 (Jon Elster & Rune Slagstad eds., 1988).

175. See Frank I. Michelman, *Reply to Ming-Sung Kuo*, 7 I-CON 715, 722 (2009) [hereinafter Michelman, *Reply*]. For an attempt to describe a single, popular temporally extended political entity, see, e.g., JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001).

176. Quoted in WOOD, *supra* note 10, at 379.

177. ROUSSEAU, *supra* note 122, at Book III Ch. 13, Ch. 18.

periodic revision by extraordinary assemblies.¹⁷⁸ In a letter to James Madison, Thomas Jefferson insisted that no constitution could bind for more than nineteen years, which he calculated to be the lifespan of a “generation.” After that time, the enforcement of a constitution “is an act of force, not of right.”¹⁷⁹ Fourteen American states currently have constitutional provisions calling for referenda at intervals ranging from nine to twenty years in which the electorate must be asked whether or not to call a constitutional convention to revise the constitution.¹⁸⁰ The logic (if not the mathematics) of this position is impeccable once we have concluded that constituent authority is a device for securing the consent of the governed to the coercive acts of the state. The practical problems with time-limited constitutions, however, are obvious. The prospect of frequent rewriting of the constitution could have, as Madison argued in his reply to Jefferson, a most unsettling effect on human relations.¹⁸¹

There is presumably some period of time that represents the best trade-off between these two imperatives.¹⁸² During that period, however it is necessary to accept that the legitimacy of the constitution will depend on an increasingly remote and, therefore a decreasingly authentic, expression of the decision of *the people*.¹⁸³

178. See Jaume, *supra* note 35, at 70-71.

179. Letter from Thomas Jefferson to James Madison. “The Earth Belongs to the Living” (Paris, Sept. 6, 1789) (on file at Electronic Text Center, University of Virginia Library, etext.virginia.edu/toc/modeng/public/JefLett.html); see KLEIN *supra* note 10, at 138-40.

180. See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF CONSTITUTIONS* 13-14 (2009).

181. Letter from James Madison to Thomas Jefferson (New York, Feb. 4, 1790) (on file at www.constitution.org/jm/17900204_tj.htm). See also Madison’s discussion of the dangers of frequent constitutional revision in *THE FEDERALIST* No. 49, 313, 313-15 (C. Rossiter ed., 1961). One obvious solution to this difficulty is the design of an amendment procedure that will allow an adequate surrogate for *the people* to act from time to time in an incremental and therefore manageable way. But for reasons already discussed, there are limits to the extent to which it is possible legally to contain the constituent authority. Constitutional amendment procedures, crafted exactly in order to maintain the long term continuity of the constitution, must, depending on the skill and foresight of the constitutional drafters, sooner or later, collide with whatever we have determined to accept as representing the will of the constituent authority. See Kay, *Chrononomy*, *supra* note 31, at 43.

182. A careful recent consideration of this question is ELKINS ET AL., *supra* note 180, at 12-35.

183. Alternatively, we could give up our conviction that *the people* who wrote the constitution possessed authority because they were exercising the right of self-determination for their and for succeeding generations. We could decide, instead, that their authority derives from the fact that they possessed certain virtues that qualified them to create a proper constitution. This does seem to be at least part of the constituent authority of the American constitution-makers. The drafters, if not the ratifiers, of that instrument have acquired the reputation of being extraordinarily gifted statesmen. At the time, Jefferson, then the United States minister to France, described them as “an assembly of demi-gods.” Thomas Jefferson to John Adams, “Revolt of the Nobles” (Paris, Aug. 30, 1787) (on file at From Revolution to Reconstruction at www.let.rug.nl/usa/P/tj3/writings/brf/jefl62.htm). The chairman of the National Endowment for the Humanities concluded his 2009 “Constitution Day” message with the

E. *The people or the Peoples*

One last problem in the attribution of constituent authority to *the people* requires examination. That is the fact that so many effective modern constitutions have been enacted as a result of a process of elite negotiation among important interests in a given society. The constitutions of the nineteenth century, for example, may, in substance, be seen as jointly created by the monarch and the leaders of the popular resistance.¹⁸⁴ More recent variations will be discussed below. The difficulty arises when we try to identify the role of *the people* or some plausible surrogate in these acts of constitution-making. Among modern constitutions, these bargained out instruments seem to fall into two classes. In the first are those that follow from the agreement of groups whose aspirations can be associated with certain geographical areas so that the resulting constitution sets out a territorially defined federation. While we will need to reconsider the matter, the United States Constitution of 1787 might be put into this category as the process of ratification was undertaken state by state.¹⁸⁵ The German constitution of 1871 was, in express terms, an "eternal alliance" among five German states for the purpose of establishing a "confederation."¹⁸⁶ The Basic Law of 1949 was also adopted by approval of state parliaments¹⁸⁷ and German reunification in 1989, while formally effected under Article 23 of the Basic Law allowing accession of new territories, was worked out in a treaty between the eastern and western German states.¹⁸⁸ The same kind of process can result whenever the constituent parties are more or less geographically concentrated ethnic groups. Among recent examples, the cases of Bosnia and Herzegovina and Iraq are notable.¹⁸⁹

There is a second category of negotiated constituent authority. Constitutions are sometimes formed as part of the settlement of internal divisions not linked to specific territories. The new constitutions of the states of central and Eastern Europe after the

flat out statement that "[t]he underlying Constitutional framework [of 1787], which established limitations on government, has provided the world the most enlightened model of governance ever created." Available at http://edsitement.neh.gov/ConstitutionDay/constitution_index2.html#founders.

184. Schmitt thought such processes merely postponed a determination of where the real constituent authority resided. See SCHMITT, *supra* note 1, at 105.

185. United States Constitution, Article VII. See text at *infra* notes 218-21.

186. Constitution of the German Empire (1871) Preamble (translation available at http://en.wikisource.org/wiki/Constitution_of_the_German_Empire).

187. The elected German officials successfully convinced the occupying allied powers that popular participation should be avoided in light of the "temporary" character of the Basic Law. See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 10 (1994).

188. See QUINT, *supra* note 61, at 51, 103-23.

189. Brett Dakin, *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska: Human Rights in a Multi-Ethnic Bosnia*, 15 HARV. HUM. RTS. J. 245 (2002); Joseph Khawam, *A World of Lessons: The Iraqi Constitutional Experiment in Comparative Perspective* 37 COLUM. HUMAN RIGHTS L. REV. 717 (2006).

collapse of communism were drafted and enacted through popularly elected bodies of various kinds. But many of the elements of the reformed constitutions were effectively decided in "roundtable talks" establishing the path that the transition was to take. The participants in those talks were representatives of the departing government and of various opposition groups. They were neither chosen, nor did they deliberate, as constituent assemblies, as any kind of surrogate for *the people*.¹⁹⁰ The extent to which they made decisions that determined constitutional change varied considerably. The Bulgarian Roundtable of 1990 took an especially strong view of its ability to shape future events. At an early stage, it reached an agreement that its decisions were to have "supreme legislative status." "The acting National Assembly was expected to vote 'automatically' and with no corrections to the texts of the constitutional amendments and laws agreed on at the [Roundtable.]" and did so.¹⁹¹ The South African Constitution of 1997, discussed at length below, is another prominent example.¹⁹²

These negotiated constitutions create obvious problems for the claim that *the people* are the sole legitimate constituent authority. The radically mediated participation in these processes of the human beings who will be subject to such constitutions is something quite different from their role in directly elected constituent assemblies or constitutional referenda. It was just this kind of constitution, one brokered by discrete corporate interests, that the National Assembly rejected in 1789, when it insisted on voting by head instead of by order.¹⁹³ Writing about the practice of "voting by order" in Britain and pre-revolutionary France, Thomas Paine declared that "[w]e have but one order in America and that of the highest degree, the order of sovereignty and of this order every citizen is a member in his own personal right."¹⁹⁴

It will be observed that doubts about negotiated constitutions are manifestations of the same concerns already examined in connection with the capacity of a given population to form a single *people* capable of exercising constituent authority.¹⁹⁵ One response is to posit two different kinds of states, depending on which kind of constituent au-

190. See generally ROUNDTABLE TALKS, *supra* note 20.

191. Rumyana Kolarova & Dimitr Dimitrov, *The Roundtable Talks in Bulgaria*, in ROUNDTABLE TALKS, *supra* note 20, at 178, 190, 193. It should be noted that the Roundtable in Bulgaria did provide for the subsequent election of a Constituent Assembly that undertook further constitutional revision without substantive restriction. *Id.* at 201, 209-10.

192. See text at *infra* notes 198-211.

193. The short-lived transformation of the Finnish constitution (still under Russian suzerainty) in 1906 was effected by the unanimous assent of the four "orders" of the Finnish Diet. SUKSI, *supra* note 96, at 80-81.

194. Thomas Paine, *Constitutional Reform (1805)*, in THE THOMAS PAINE READER 525, 536 (Michael Foot & Isaac Kramnick eds., 1987).

195. See Section III(B) *supra*.

thority produced them. Miguel Poiares Maduro makes the comparison:

The first would be a constitutional political community, where individuals are regarded as the dominant political subjects and their interests are directly aggregated, with deliberation being based on the promotion of universal rules guaranteed, *ex ante*, by its generality and abstraction and, *ex post*, by non-discrimination. The second may be described as an intergovernmental political community, where individual interests are aggregated through the states and deliberation does not aim at universal rules based on the individual status of citizens but reflects the bargaining power of states and generates accommodations among their perceived conflicts of interest.¹⁹⁶

In this description, it will be observed, the adjective “constitutional” is reserved for the first kind of polity. In defending the 1787 Philadelphia Convention’s decision to submit the proposed constitution to specially elected state conventions instead of the state legislatures, Alexander Hamilton had stressed the need for recourse to the sovereign people. The previous instrument of government, the Articles of Confederation, was suspect exactly because it “never had a ratification by the people” and, therefore, “rest[ed] on no better foundation than the consent of the several legislatures.” The difficulties that had followed demonstrated “the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority.”¹⁹⁷ The academic debate on a European Constitution has rehearsed these concerns about constitution-making by intergovernmental agreement. Dieter Grimm, noting that this was the only realistic possibility for a near-term European constitution, insisted that such an arrangement could not be a “constitution in the full sense of the term. The difference lies in the reference back to the will of the Member States rather than to the people of the Union.”¹⁹⁸

196. Miguel Poiares Maduro, *The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism*, 3 I-CON 332, 333 (2005). See also Tierney, *supra* note 121, at 232 (describing a “plurinational state” resulting from a “founding moment,” a “union of pre-existing peoples subsequent to which sub-state national societies within the state continue to develop as discrete *demos*.”).

197. THE FEDERALIST NO. 22, 152 (Alexander Hamilton) (C. Rossiter ed., 1961).

198. Grimm, *Need*, *supra* note 135, at 291. In a subsequent article Grimm agreed that a constitution may arise out of a treaty. Such a “founding treaty is, at the same time, the final international treaty providing the legal basis of the new political entity.” Dieter Grimm, *Integration by Constitution*, 3 I-CON 193, 207 (2005). The proposed European Constitutional Treaty, however, did not qualify as a true constitution under this definition since all subsequent amendments were to be submitted to the Member States for ratification. The evident success of supranational European institutions might also be explained by factors other than a widely held perception of some autonomous European constitutional authority. For a valuable recent discus-

A particularly salient example of the ultimate constituent authority of a negotiated agreement is the South African Constitution of 1997. That constitution was the final product of the settlement that ended the apartheid regime after decades of internal resistance and international pressure. Painful negotiations involving the government, the African National Congress and various other interested groups, in numerous formats, extended over several years. In November 1993, a group called the Multiparty Negotiating Forum agreed on a long and detailed Interim Constitution that provided for non-racial elections to a new Interim Parliament and the sharing of executive power.¹⁹⁹ The Interim Parliament would also sit in joint session as a Constituent Assembly and it was enjoined to adopt a new constitution within two years.²⁰⁰ The Constituent Assembly, however, would not be the uncontrolled force we have associated with constituent authority. It was obliged to draft the new constitution so as to conform to thirty-four "Constitutional Principles." Before the new constitution could be promulgated, moreover, it would have to be certified by the Constitutional Court (also created by the Interim Constitution) as consistent with those principles.²⁰¹ The Parliament-Constituent Assembly was elected and conducted an elaborate campaign of public education and consultation.²⁰² After two years, it produced a final text and submitted it to the Constitutional Court which issued a judgment of almost 300 pages, carefully parsing the new document and interpreting the sometimes obscure Constitutional Principles. The Court identified nine different aspects of the Constitution that were out of compliance with ten different Constitutional Principles.²⁰³ Only after the Constituent Assembly made the necessary amendments did the Court issue the necessary certification.²⁰⁴

The preamble to the resulting 1997 Constitution proclaims it to be the act of "we the people of South Africa." The historical record, however, contradicts this assertion. The members of the Constitutional Assembly that drafted it and, eventually, declared it to be in force, were elected but the Assembly's composition was carefully planned to prevent it representing *the people* on a one person-one vote basis. Four hundred of its five hundred members were elected from constituencies with roughly equal populations. The other one

sion, see PETER L. LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* (2010).

199. Interim Constitution of South Africa, 1993 ss. 40, 42, 48, 50, 84, 88.

200. *Id.* s. 73.

201. *Id.*

202. See Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. REV. 809 (2000-2001).

203. Certification of the Constitution of the Republic of South Africa, 1996 (1996) 4 SA 744, para. 482 (CC).

204. Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (1997) 2 SA 744 (CC).

hundred, however, the members of the Senate, were chosen by the political parties sitting in the various provincial legislatures on a proportional basis and each province was awarded the same number of senators. The influence of these members was enhanced by the Interim Constitution's requirement that, at least in the first instance, a constitutional text had to be approved by a two-thirds majority.

It would be misleading, moreover, to describe the resulting constitution even as an expression of the unfettered will of the Constituent Assembly. The Assembly was constrained by the substantive limits incorporated in the Constitutional Principles prescribed in the Interim Constitution. While many of those standards were the innocuous bread and butter of modern constitutionalism, others dealt with specific and contestable issues. "Diversity of language and culture" were to be promoted and "linguistic, cultural and religious associations" protected.²⁰⁵ Indigenous law and institutions including the "authority and status of a traditional monarch" were to be preserved. A fairly carefully defined federal structure was to be set up which had to include "national, provincial and local levels." Trade unions and collective bargaining were to receive constitutional status. There was still ample room for the Constituent Assembly to make important decisions but all of them were reviewable by the Constitutional Court which would decide if they were compatible with "a democratic system of government," protection of "fundamental rights" and "separation of powers."²⁰⁶ The Interim Constitution's provisions on the Constitutional Principles and its requirement of certification by the Constitutional Court were themselves made unamendable.²⁰⁷ In its certification judgment, the Constitutional Court was candid about the necessary abridgment of the right of *the people* to make any constitution it chose: "[t]he government and other minority groups were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country."²⁰⁸ This was not the constituent authority envisioned by Sieyès, effecting an "act of will which is completely untrammelled by any procedure."²⁰⁹

205. Interim Constitution of South Africa, 1993, Schedule 4, Constitutional Principles XI, XII.

206. Interim Constitution of South Africa, 1993, Schedule 4, Constitutional Principles I, II, VI.

207. Interim Constitution of South Africa, 1993, s. 74.

208. Certification of the Constitution of the Republic of South Africa, 1996 (1996) 4 SA 744, para. 12 (CC).

209. SIEYÈS *supra* note 6, at 127. The model of constitution-making constrained by pre-determined constitutional principles had already been employed, although, less smoothly, in Portugal in 1974-1976 and played a role, as well, in the extended, violence-ridden process pursued in Angola beginning in 1992 and culminating in the certification of a new constitution by the Constitutional Court in 2010. See Andre Thomashaussen, *Constituent Power and Legitimacy in the Political Evolution of Southern Africa*, 7-9 (2010) (manuscript on file with the author).

In sum, the 1997 Constitution was very much the product of a process defined and limited by the Interim Constitution. The Interim Constitution, in its preamble announced that there was to be a new constitution to be created by “representatives of all the people of South Africa” but it would have to be made “in accordance with [the] solemn pact recorded as Constitutional Principles.”²¹⁰ That solemn pact and the prescribed method of constitution-making, were not adopted by any kind of Constituent Assembly. They were the result of a deal worked out in the Multiparty Negotiating Forum, an ad hoc collection of representatives of numerous interests, none of whom (certainly not the existing government) could claim to be speaking for *the people*.²¹¹ The Interim Constitution had, indeed, been formally enacted by the apartheid parliament under the provisions of the 1983 Constitution Act²¹² but if ever there were a constitutional revision that exceeded the plausible boundaries of mere amendment, this was it. When we attempt, therefore, to trace our way back to the real creators of the South African Constitution, we 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 Sieyès’ expression, “completely untrammelled.”

When the authority of the South African Constitution is discussed today, however, this is not the locus of authority on which people base its binding quality. After accurately describing the process of its creation, the website of the South African government concludes: “[t]his Constitution therefore represents the collective wisdom of the South African people and has been arrived at by general agreement.” In a judgment, actually referring to the Interim Constitution, the Constitutional Court cited its preamble as indicating “the general purpose for which the people ordained and established the Constitution.”²¹³ These expressions might be dismissed as flourishes meant to reconcile a historical fact with conventional political morality but, as we will see, this kind of transformation, is common and discloses a critical aspect of constituent authority.

210. Interim Constitution of South Africa, 1993, Preamble.

211. On the Multi-Party Negotiating Process’s “problems with legitimacy,” see DION A. BASSON, *SOUTH AFRICA’S INTERIM CONSTITUTION: TEXT AND NOTES* xxi (1994). Notwithstanding these facts, the Interim Constitution’s preamble, like that of the final Constitution, included the canonical declaration that it was enacted by “We the people.” Interim Constitution of South Africa 1993, Preamble.

212. R.S.A. Act 200 (1993) enacted under the authority of the South Africa Constitution Act 110 of 1983 s.99.

213. *Du Plessis and Others v De Klerk and Another*, [1996] (3) S.A. 850, para.157.

IV. RECONSTRUCTING THE CONSTITUENT AUTHORITY

The multiple problems we have identified in connection with the constituent authority of *the people* share a theme: constituent authority depends on perception. The plausibility of one or another specification of the constituent authority will always require consideration of prevailing attitudes in the population of the jurisdiction in which the constitution will operate.²¹⁴ It makes no sense, to speak of any constituent authority—of the King or of the priests or of the representatives of powerful communities, or of some particular manifestation of *the people*—apart from the question of how people in general view those actors, what they did and how they did it.

The force of any constitution depends on it continuing to be acceptable over time to the real human beings whose lives it affects. That acceptance will have two aspects. First, some minimum part of the relevant population must find the constitution's substantive rules satisfactory, or at least tolerable. Second, that population must regard the constitutional rules as having issued from a legitimate source. It is this second requirement that engages the question of constituent authority. Rules may be disliked but still effective if people believe them to be the acts of an authority they accept as proper. Of course, even the commands of the most revered authority will finally become ineffective if they impose intolerable burdens over an extended period. In contrast, the reverse situation—substantively attractive rules traceable to an illegitimate source—might sustain itself for a long time. Most of the time, and for most people, there is no occasion to think about constitutional rules at all, much less to make a critical appraisal of the events that created them. A constitution, however, like any set of fixed rules, must eventually pinch some people in unpleasant ways.²¹⁵ These pains and burdens of a given constitutional regime will be easier or harder to take depending on one's view of the authority of the constitutional rule maker. Moreover, constitutional provisions, like all legal rules, require interpretation in doubtful cases. On such occasions, the interpreters are likely to resort to speculation about the purposes for which those

214. See, for example, the idealized expression of this idea in a comment expressing concern over the legitimacy of the South African Interim Constitution discussed in the last section:

[T]he resultant Constitution will be legitimate or acceptable to the people in the state for the very reason that it was drawn up by the representatives of the people in a democratic and unfettered fashion. The fact that the Constitution gains acceptability and legitimacy to the extent that it can be said that it lives in the hearts and minds of the people, ensures its longevity and constitutional stability.

BASSON, *supra* note 211, at 96.

215. It is a truism to state that the option of making a new constitution only emerges when someone is unhappy with the existing one. On the occasions for critical review of constitutional arrangements, see ELKINS ET AL., *supra* note 180, at 122-46.

rules were created, returning us to the constitution-making events and the nature of the constituent authority.

Sooner or later, that is, people will ask what it is about the creation of a constitution that obliges them to respect it. Perceptions of the founding events, moreover, are liable to change over time. This means that the existence of constituent authority in some person or process can only be determined as of a given moment. To be sure, some kind of regard or respect or fear must be present at the time a constitution is created and put into effect. But for a constitution to endure over decades or centuries, it will be necessary for that attitude toward the constitution-makers to persist. The force of a constitution that is created and established because of regard for its religiously privileged authors will necessarily fade if the strength of the religious convictions of the population diminishes. In this respect, the existence of constituent authority, like the existence of a nation in Ernest Renan's phrase, is a "daily plebiscite."²¹⁶

Examples are provided by the fates of some of the original independence constitutions of former British colonies. Like Antigua and Barbuda, which has already been mentioned, these countries acceded to independence under constitutions which had been agreed to by political forces in the relevant country but which were formally promulgated in legislation of the United Kingdom. Over time, many of these countries found it unacceptable to live under constitutions created, even in form, by what was undoubtedly colonial legal authority.²¹⁷ When Trinidad and Tobago considered changing its Westminster constitution in the 1970s, a government commission commented that "[i]ndependence must involve indigenous symbols of nationhood. Among young people in particular the British Sovereign has no symbolic meaning." It was necessary to leave "behind the colonial heritage of subjection, imitation and external dependence."²¹⁸ What sufficed as a constituent authority in 1962 had lost its force by 1976.

The experience of Trinidad and Tobago illustrates one natural response to recognition that new attitudes and values make the constituent authority that produced a given constitution unsustainable.

216. ERNEST RENAN, *QU'EST-CE UNE NATION: WHAT IS A NATION?* 49 (Wanda Romer Taylor trans., 1997).

217. See WHEARE, *supra* note 97, at 89-113; Kay, *Comparative*, *supra* note 96, at 455-58 (discussing the Irish Constitution).

218. Quoted in William Dale, *Making and Remaking of Commonwealth Constitutions*, 42 INT. & COMP. L.Q. 67, 69 (1993). Deploring the fact that many of the original Caribbean Independence Constitutions had been left unchanged, Simeon C.R. McIntosh has recently argued that "a country's processes for fundamental law making [should] be so designed and conducted that outcomes will be continually apprehensible as products of 'collective deliberation' conducted rationally and fairly among free and equal individuals." Simeon C.R. McIntosh, *West Indian Constitutional Authorship 2*, available at http://www.eccourts.org/jei_doc/2008/book_launch/WestIndianConstitutionalAuthorshipbySimeonMcIntosh.pdf (quoting Seyla Benhabib).

That is the explicit and overt substitution of a new constitution enacted in a new and politically more congenial procedure.²¹⁹ It is also possible, however, to retain a constitutional text but to re-conceive the events that created it. This kind of re-depiction may even occur in the very process of enactment. We have already seen instances where the actual political circumstances of a constitution's creation do not jibe with the more agreeable political values proclaimed by the resulting constitutional documents. The Japanese Constitution of 1947, to cite another well-known example, was substantially determined by the dictates of the occupying forces. Yet it declares itself to be the work of "we the Japanese people."²²⁰ Likewise, the preamble of the carefully brokered 2004 constitution of Afghanistan states the authority of "we the people of Afghanistan," though hedging that claim with a concession that the people had to act "in accordance with the historical, cultural and social realities as well as requirements of the time."²²¹

Constituent authority is not a fixed thing. It can be, and often is, a shape-shifter, changing the way it is understood according to the pressures of the moment. When, in the seventeenth century, the nature of government in England became a matter of deadly controversy, most of the supporters of parliamentary authority declined to denounce the historical monarchical constitution. They insisted, instead, that, under that constitution, the King and parliament each held critical and irreducible authority. That version of the constitution was founded in a fantastic history in which the essential role of the representatives of the people had existed from time immemorial.²²² The invasion of William of Normandy in 1066 in this narrative was no conquest but a trial by battle of a legal claim.²²³

219. In fact, the example of Trinidad and Tobago does not represent the thorough recognition of a new constituent authority since the new constitution was adopted in accordance with the amending procedure of the previous Independence Constitution thus leaving a "relationship of validating purport." See text at *supra* notes 93-94. A complete repudiation of the now unacceptable constituent authority requires that the new constitution be created in a way that does not comport with the previous rules for constitutional revision—that is by candid revolution.

220. Constitution of Japan, 1947, Preamble; John M. Maki, *Japanese Constitutional Style*, in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS* 3-40 (Dan Fenno Henderson ed., 1969).

221. Constitution of Afghanistan, 2004, Preamble.

222. See, e.g., JANELLE GREENBERG, *THE RADICAL FACE OF THE ANCIENT CONSTITUTION: ST. EDWARD'S "LAWS" IN EARLY MODERN POLITICAL THOUGHT* (2001).

223. See J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 53 (1987). Blackstone held that William's title was based on conquest but also that he took the crown subject to the law of England:

For, the victory obtained at Hastings not being a victory over the nation collectively, but only over the person of Harold, the only right that the conqueror could pretend to acquire thereby, was the right to possess the crown of England, not to alter the nature of the government. And therefore, as the English laws still remained in force, he must necessarily take the crown subject to those laws, and with all its inherent properties . . .

Another example of the mutability of the constituent authority is revealed in the dispute over the nature of the United States Constitution in the decades following its adoption in 1789. The proper description of its creation was sharply contested throughout that period. It was, depending on the point of view adopted, either the constituent act of a single "people of the United States" or the product of an agreement among the original states. The Constitution had been ratified by special popularly elected conventions in each of the states. By its terms, it became effective when nine states had ratified it but only among the states that had approved it. Still, the Preamble famously referred to the enactment by "we the people of the United States," suggesting that this process replicated the will of some single undivided people. The legitimacy of that authority in these circumstances was almost immediately attacked. In a pamphlet opposing ratification in New York, published in February 1788, the writer warned that by the terms of the Preamble, the Constitution was to be "an agreement of the people of the United States as one great body politic."²²⁴ Replying to such arguments, James Madison insisted that the mode of ratification was "to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong." It was not a "national but a federal act."²²⁵

In an important case decided in 1819, the Supreme Court dealt with the same question. In urging a narrow construction of federal powers, one party argued that "the constitution was formed and adopted not by the people of the United States at large but by the people of the respective states." The other side asserted that "state sovereignties are not the authors of the constitution." They were, in fact, subordinated to the "national sovereignty . . . by the will of the people." In his judgment, Chief Justice Marshall (who had participated in the ratification) categorically denied that the federal government exercised only powers delegated by the states. Its power, he stated "proceeds directly from the people."²²⁶ Such judicial declarations, however, failed to conclude the issue and the "compact theory" of the constitution continued to divide the nation along sec-

WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *192-93 (1765).

224. Brutus, *Essay XII* (Feb. 7 and 14, 1788), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 298, 300 (R. Ketcham ed., 1986). See also *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents* (Dec. 18, 1787) in *id.* at 237, 246. (The Preamble is "the style of a compact between individuals entering into a state of society and not that of a confederation of states.")

225. *THE FEDERALIST* No. 39 at 243 (James Madison) (C. Rossiter ed., 1961).

226. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 363, 377-78, 403-05 (1819).

tional lines until the matter was finally tested and decided by force of arms in the American Civil War.²²⁷

A similar kind of transformation is observable in the cases discussed above concerning the nature of the authority of the 1873 Pennsylvania Constitutional Convention, in which the state Supreme Court described the work of the Convention, an agency unauthorized by the prior constitution, as the instrument of positive law.²²⁸ Something similar happened to the constitution of South Africa. Despite the careful limits placed on the constitution-making process by the original parties who wrote the Interim Constitution, it came to be seen as an expression of the will of the undivided people of South Africa. Visitors to the Constitutional Court can stop by the "We the People Wall" and view the "We the People" photo exhibit.²²⁹ The invocation of *the people* to legitimize a constitution that is, in fact, the product of an energized minority, or an agreement among several such minorities, is made easier by the fact that the voice of *the people*, for reasons discussed in the previous section, can never be equated with the simple utterance of some person or group of persons. *The people* is always an artifice with some more or less convincing tie to the actual political wishes of some number of human beings at the time of constitution-making.²³⁰

What is true of *the people*, moreover, is true of any constituent authority. The capacity to understand the making of the constitution in new ways suitable to the needs of a given time means that constituent authority is not a fixed phenomenon. It may be an artifact not only of the historical past but also of a past reconstructed to meet current needs. What Wojciech Sadurski has said about constitutional tradition is equally true of the more specific phenomenon of constituent authority. Ascertaining it "is always a matter of reconstruction (of what we make of the past) for . . . 'the past is not univocal in complex traditions.'"²³¹ In this respect, constituent authority is an attribute of a constitutional system at a particular moment. Kelsen's idea of the

227. See Kay, *Comparative*, *supra* note 96, at 460-63. See also *id.* at 455-58 discussing litigation concerning the authority responsible for the legal quality of the Irish Free State Constitution of 1922: the Judicial Committee of the Privy Council located this authority in an act of the United Kingdom Parliament while the Supreme Court of Ireland found it in the approval of the Irish Dail Eireann sitting as a constituent assembly.

228. See text at *supra* notes 70-74.

229. See <http://www.southafrica.info/about/history/constitutionhill.htm>.

230. Ulrich Preuss gives a benign characterization to this phenomenon when he says "the people' or 'the nation' are not empirical entities; they are social constructs which embody the aspirations, the ideals and the unity of the society and which are purified from all traces of its more trivial and disuniting attributes . . ." Ulrich K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe*, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 8, at 211, 216. See generally Barshack, *supra* note 120.

231. Wojciech Sadurski, *European Constitutional Identity* 5 (University of Sydney Law School, Legal Studies Research Paper, No. 06/37), available at <http://ssrn.com/>

basic norm as merely the necessary presupposition of a given legal system is, in this way at least, valid.²³²

I need, however, to be clear. It does not follow from this that constituent authority is a “pure abstraction,”²³³ merely a logical inference from effective legal rules. Nor is it a fiction or a sham. It is, as I stated at the outset, a fact. Since it is a fact that principally concerns how people regard constituent events, however, it can and does change over time. The very success of a constitution might influence these critical perceptions, casting the events associated with its creation in a more favorable light. Thus we can conceive the curious notion that, in part, and at least in some circumstances, it is the constitution that makes the constituent authority and not the other way around. In that strictly limited respect, there is a sense in which it may be reasonable to characterize constituent authority as an “imagined competence.”²³⁴ But prevailing accounts of the founding of a legal system cannot be perfectly fluid. When they change, they can only change slowly, incrementally.²³⁵ The success of a constitution depends on the ability, at any given time, to posit a narrative about its creation that is both politically acceptable and, if not historically accurate, at least historically plausible. The materials available to construct that narrative are malleable but they are not infinitely malleable.²³⁶ The constituent authority may be many things but it is not anything we want it to be.

abstract=939674) (quoting Martin Krygier, *Thinking Like a Lawyer*, in WOJCIECH SADURSKI, *ETHICAL DIMENSIONS OF LEGAL THEORY* 67, 68 (1991)).

232. See Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 8, at 9, 21 (“A collective can only act by re-acting to what, preceding it at every step, never ceases to confront it with the question ‘Who are we?’ Constituent power comes second not first . . .”).

233. See Michelman, *Authorship*, *supra* note 2, at 93 (referring to “the people”). See also Eleftheriadis, *supra* note 101, at 25 (“[T]he idea of a people is itself a legal construction.”).

234. KLEIN, *supra* note 10, at 192.

235. There are, however, cases where two plausible and developed versions of constituent authority are in contest for an extended time and one or the other finally prevails in a moment of revolution. This is what happened in Britain in 1688 and in the United States in 1865.

236. For this reason, while I think Frank Michelman is right when he says that “it will not be any *fact* of constitutional authorship to which we refer our legitimacy assessments, but only *currents of belief or narration* about authorship,” I do not think it follows that those beliefs reduce to “our several appraisals of the rightness and fitness of what we presently and severally observe as the evolved and evolving constitutional practice of our country.” Michelman, *Reply*, *supra* note 175, at 730.

