THE PARADOX OF CONSTITUTIONALISM
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Constituent Power and Constitutional Form

Edited by

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and

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Acknowledgements

The origins of this book lie in a seminar convened at the European University Institute in March 2006 on the theme of ‘constituent power and constitutional form’. Our objective was to bring together a group of philosophers, historians, political theorists, political scientists, and constitutional and international lawyers to promote the idea of constitutional theory as a distinct area of inquiry by focusing attention on an issue situated at the heart of all attempts to construct and regulate political community in ‘constitutional’ fashion. We sought to demonstrate that what connects our constitutional past, present and future, and what links the state as the traditional site of constitutional government to new sub-national and transnational sites, is a constant preoccupation with the question of the relationship between authorization and authority, politics and law, pouvoir constituant and pouvoir constitué.

We hope that the volume that has emerged vindicates our editorial aspiration. To the extent that it does, this is due primarily to the contributors themselves; they came to the seminar with well developed drafts of their papers, but also ready to engage in a fertile exchange of ideas, the fruits of which are evident in their final set of texts. The seminar discussion was greatly facilitated by an insightful series of initial commentaries by Julio Baquero Cruz, Richard Bellamy, Christian Joerges, Gianluigi Palombella, Wojciech Sadurski, and Peter Wagner. To each of them we owe considerable thanks, and also to the wider group of seminar participants for their lively contribution over two days of intense discussion.

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In this global age it is no longer unusual that the co-editors of a book should be based in different jurisdictions, nor that the contributors should range more widely still. The fact that we came together from such diverse origins made our task as editors all the more enjoyable and, we hope, more productive. But we
should not pretend that such a global effort does not carry considerable additional costs, and we thank all involved for bearing these so readily.

Martin Loughlin (London)
Neil Walker (Florence)
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Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the ‘consent of the people’ and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms. The people, in Maistre’s words, ‘are a sovereign that cannot exercise sovereignty’; the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established. This indicates what, in its most elementary formulation, might be called the paradox of constitutionalism. The aim of this book is to examine the most significant of the puzzles associated with this paradox, in the hope that we might be able to throw some new light on the character of the modern discourse of constitutionalism.

These puzzles, long grounded in the institutional and cultural context of the modern state, are presently assuming a renewed and in some measure relocated significance. A variety of global trends that impact on the activity of governing invite a close examination of the idea of a constitutional order. These trends include: the short-lived triumph—and triumphalism—of liberal democracy at the end of the Cold War and the subsequent revival of ethnic and otherwise exclusionary forms of nationalism; the nurturing of a more localized politics of identity leading to the formation of political communities below the level of the nation-state; and, because of the globalization of capital, trade, labour, and communications, the emergence of supranational and transnational governmental agencies and ‘governance networks’ that invite increasingly insistent calls for their constitutionalization. By returning to the resilient conundrum at the core of constitutionalism, we hope not only to refresh our knowledge of this technique of governing, but also to deepen our understanding of the new challenges posed by these contemporary transformations of the legal and political landscape.

Central to virtually all formulations of the paradox of constitutionalism is that of the tension linking—and also the question of priority between—constituent power and constitutional form, politics, and law. Modern constitutional texts aspire not only to establish the forms of governmental authority (legally constituted power) but also to reconstitute the people in a particular way. The notion of a constitutional identity of a people, and particularly its relation to the constituent power possessed by the people, is perplexing. It suggests, first, that insofar as any prior socio-political identity of a people is indicated through the ‘natural’ drawing
of boundaries that separate one segment of humanity from another, this is capable of being reshaped by the formal constitution itself. But once it is conceded that a ‘constitutionalized’ collective political identity is necessarily malleable and fluid, so too the constitutional form cannot be regarded as unassailable; if the influence of constitutional form lies in its ability to refine the meaning and import of collective political identity, its authority must nevertheless in some measure depend upon its continuing capacity faithfully to reflect that collective political identity. The formal constitution that establishes unconditional authority, therefore, must always remain provisional. The legal norm remains subject to the political exception, which is an expression of the constituent power of a people to make, and therefore also to break, the constituted authority of the state.

Who, then, is ‘the people’ at the centre of the paradox? In some formulations, ‘the people’ is treated as an essentially rhetorical formulation, either an inert datum to be impressed with meaning and self-consciousness and thereby ‘activated’ only through the constitutional form or a purely symbolic and retrospectively instituted collective entity. This is a line of argument that takes us back to Hobbes’ view that the minds of the common people (the multitude) ‘are like clean paper, fit to receive whatsoever by public authority shall be imprinted in them’. By contrast, in more modern expressions—those that engage directly with the precepts of constitutionalism—the people, however constructed, is acknowledged to be an active agent of change. This might be a happier formulation in its recognition of the democratic possibilities of collective self-authorship and self-authorization, but it is one that carries its own difficulties. If the people is treated as an active agent of change, is its agency merely momentary, or is it of continuing significance? And if of continuing significance, how is the multitude that possesses such agency—such latent authority—to be accorded political or constitutional recognition?

We might note that many of the great works of political philosophy from Hobbes to Rawls seek to identify the essential nature of collective authority and of the realm of the political by reference to the idea of a social contract. This device is widely used not only because it provides a mechanism that is able to ‘account for’ how the constitution of a state is founded, but also because it offers a device through which the claims of autonomy and authority associated with that founding may be reconciled. But let us be clear on one thing: the social contract is such a potent and versatile tool of political philosophy precisely because it is treated as being entirely an exercise of the imagination. No philosopher claims the social contract to be an historical event—the ‘account’ is not an explanation. Consequently, while intriguing counterfactuals and rich normative scenarios abound, within political philosophy we are unable to find persuasive explanations and projections of actually existing systems and rhetorics of government. When we turn to the domain of constitutional theory proper—the domain of reflecting on the nature of actually existing regimes—we are obliged to focus on immanent possibilities, and for that reason matters also become more complicated. Here, rationality must be tempered by history, norm by fact.
Modern constitutions invariably come into existence as a consequence of some founding act. That act—an historical event—purports to establish a polity by creating a framework of government and defining the essential form of the political bond between the people (the citizens of the state) and its governing authorities. Rather than some fictive social contract, therefore, it is that act, and the social meanings it is capable of generating, which must provide the starting-point for the investigation of the significance of ‘the people’ in constitutional theory, and of how the people-thus-signified may address and resolve the paradox of constituent power and constitutional form. How, then, are we to make sense of this authorizing moment? Who is its author—its ‘constituting power’ or, in modern parlance, the ‘constituent power’? What is the authority of the founding establishment? Does that founding authority extend through time to bind subsequent generations? Does the authorizing agent manifest itself only for the purpose of a foundational act and, its business concluded, extinguish itself? Or does that agent maintain a continuing presence within the polity, such that it may reassert itself to modify, or radically alter, the terms of the original foundation?

This emphasis on the concrete act ensures that the idea of ‘the people’ as a collective entity on whose behalf and in whose spirit of self-government the text is narrated must be an active and empirically-informed one, yet even if thus rescued from a realm of pure normativity it remains a question-begging abstraction. It may bear only the flimsiest connection with the actual people who deliberated on the terms of the arrangements, or who drafted the text in a Constitutional Convention or Constituent Assembly, or even those who ratified the text in the name of ‘the people’. The historic events concerning the formation of constitutions thus raise, in their various ways, a series of questions concerning knowledge, consent, and imputation. In some interpretations indeed, the entire constitutional performance might seem to be an elaborate confidence trick, in which governing elites invent and deploy this idea of ‘the people’ to bolster their oligarchical arrangements of government. On this view, the rhetoric surrounding the constitutive moment is just so much hypocrisy and cant: behind the constitutional claims of right and equality lies only exploitation and entrenched inequality. And if this is correct, there is nothing much more to examine in the discourse of constitutionalism: the constituted authority (the power-wielders) simply use the discourse of constitutionalism as a means of promoting their rule.

Although aspects of this strategy can be traced to the foundations of all modern constitutions, we should also recognize that the historic circumstances of the founding do not necessarily exhaust the significance of the event. By establishing a unity of a people (albeit by the work of a small group) and by expressing the purposes of this association in universal and aspirational terms, is it not possible that the constitution acquires its mature meaning not at the foundational moment but only in its aftermath, through continuous deliberation within the institutions of the polity about the import of the event and the (evolving) character of the association? The constitution is, on this interpretation, to be
treated not simply as a ‘segment of being’ but a ‘process of becoming’. This mode of understanding enables us to treat the constitution as constantly developing while maintaining some sense of fidelity to the original compact.

It must be conceded nonetheless that while this helps us to appreciate something of the flexibility and nuance implicit in the idea of constitutionalism, it may not take us much further. To the extent that the evolving constitution—the augmentation of the foundation—is expressed through edicts of the instituted authorities, the constituent power of the people would appear to remain encased in the constituted power of the governmental forms. Once again, however, we might note that unless it is assumed that constitutional theory is merely a form of applied political philosophy—and hence that constitutions are faithful articulations of the normative design appropriate to a particular ‘people’ and political community—this does not settle the question of the relationship between constituent power and constituted form in favour of the latter.

Constitutions can undoubtedly be both initiated and sustained as hegemonic tools—as ways of representing particular interests as the public interest, national authority as universal authority, and imperial power as the only conceivable power. But established constitutional forms are, ‘in the name of the people’, also challenged and resisted, marginalized, and undermined, and even surpassed and overcome. That is, constitutions can be operationalized and compromised in ways that owe no consistent fidelity to the original compact, or which offer entirely new interpretations of the status and content of that original compact. It is in coming to terms with these realities of power in modern societies that constituent power insinuates itself into the discourse of constitutionalism, whether in the form of oppositional politics in their various guises and the (counter)constitutional visions they implicitly or explicitly espouse or, more generally, by ensuring that the intrinsic tension between the abstract rationalities of constitutional design and the quotidian rationalities of governing remains exposed.

* * *

The essays collected in this book are designed to investigate various aspects of this apparently paradoxical relationship between constituent power and constitutional form. They are divided into three main sections: Part I considers the historical emergence of the idea of constituent power in modern European thought and practice; in Part II, a range of theoretical perspectives on the nature of the relationship are examined; and finally, in Part III, the continuing importance and (possible) reconfiguration of this relationship in the light of a series of contemporary issues of a constitutional nature are evaluated. Before addressing these issues, however, the core idea of constituent power must first be examined. Thus, in the opening chapter of the volume, Hans Lindahl analyses the nature of collective identity implicit in the notion of a political community. Taking the debate between Hans Kelsen and Carl Schmitt on the competing claims to
priority of the legal-normative and the political as exemplary of influential and opposing positions in constitutional theory, Lindahl argues (against both) that collective identity is reflexive identity, that self-constitution is constitution both by (political) and of (legal-normative) a collective self, and that the paradoxical relation of constituent power and constitutional form—of democracy and legality—is in a certain sense specious. Lindahl’s sophisticated statement, in which constituent power is exercised in the very process of assuming constitutional form and in the continuous flow of its refinement, sets a frame for addressing the arguments of the papers that follow.

In Part I, the evolution of the concept of constituent power is explored initially by examining the founding premises of the modern state, as illustrated through the experience of revolutionary action in England, America, and France. Setting mid-seventeenth century English constitutional conflicts in the context of disputes over the ideas of the body politic, the crown, and divine right, Martin Loughlin argues that in the revolutionary discourse of the 1640s, we see not only the expression of popular sovereignty but also the drawing of a distinction between the constituting power of the people and the constituted power of government. Loughlin proposes that these more radical claims were suppressed, initially to stabilize the republican revolution but later to bolster the principle of (revived) monarchical and aristocratic rule. It is, he claims, through the consequent absence of a concept of constituent power in modern British constitutional arrangements that we are best able to appreciate its peculiar character.

The claims of the seventeenth century English radicals were bequeathed to their American compatriots during the following century and, as Stephen Griffin explains, it enabled the American revolutionaries to utilize the device of a constitutional convention as the authoritative voice of the people to establish the world’s first modern constitution. Griffin then tracks the question of what became of the people once the constitution had been established, and suggests that their influence has been felt not only through the process of formal amendment and judicial interpretation, but also informally through politics, sometimes crystallized as ‘constitutional moments’ but often on-going and incremental. Consequently, he concludes that while many would view constituent power as dangerous to the integrity of constitutional forms, few would deny the resilience of its influence in shaping American constitutionalism.

If the Americans have often sought to tame constituent power through the veneration of constitutional form—generating a set of political practices that are peculiarly backward-looking in their claims to constitutional fidelity—it is evident that for the French the consequences of the founding moment have been more treacherous. Lucien Jaume shows how the sound of revolution has echoed across two centuries of French constitutional history: from formal constitutional revision, referenda, and appeals to the idea of the Nation, to tumult, coups d’état, and revolutionary insurrection. In particular, Jaume argues that, influenced by the work of Sieyès, the French developed a powerful sense that the nation is
represented in the Assembly, and indeed that it is through the claims and counter-
claims associated with that idea that we can make sense of the trajectory of major
constitutional change.

The late-eighteenth century revolutions opened the era of modern constitu-
tionalism, and the forms of the American and French constitutions have since
proved highly influential as other nations underwent the process of constitutional
‘modernization’. But the narrative in each regime is invariably singular, not least
with respect to the German case where the path of development—from
Kaiserreich, through Weimar to the Nazi regime—has rendered any attempt to
make a direct appeal to the people, or even to the authority of a representative
parliament, problematic. Christoph Möllers takes up the challenge of explaining
this dynamic. He shows how the highly legalistic constitutional culture that
evolved in the post-war Federal Republic was a product of conscious efforts to
eliminate any claim to populism in the constitutional settlement imposed by the
Allies, and suggests that the appeal to an especially formal notion of ‘constitu-
tional patriotism’ has its basis in that history.

The first part of the book on conceptual history concludes with a study by John
McCormick of a critical distinction between traditional and modern constitu-
tions. In traditional constitutions ‘the people’ signifies not only the body politic
but also the common people with a distinctive interest in ensuring their freedom
from oppression by the patrician class who invariably exerted a disproportionate
influence in government. In modern constitutions, by contrast, ‘the people’ is
invariably treated as a unitary entity of formally equal citizens, with class-blind
representative forms that tend to shield from view the reality of elective oligarchy.
McCormick’s argument points in the direction of acknowledging the necessity of
maintaining within contemporary constitutional arrangements the tension
between the instituted power of elected (patrician) rulers and the powers of the
common people to check their more reckless or restrictive projects.

A second section of the collection introduces and assesses the different types of
answers given to the question of constituent power in contemporary constitu-
tional and political theory. In our initial communication to authors, we suggested
that, in broad terms, these answers can be grouped in four categories: (i) the
juridical containment thesis, whereby constituent power is exhausted by and
absorbed within the settled constitutional form, as, for example, in much contem-
porary liberal theory based on contractarian assumptions (e.g. Rawls); (ii) the
co-originality and mutual articulation thesis, whereby the legally constituted
power of the polity operates in productive tension with a continuing background
commitment to popular sovereignty (e.g. Habermas); (iii) the radical potential
thesis, whereby constituent power is neither colonized by nor in symbiosis with
the legal, but remains a latent revolutionary possibility which lies behind and
shadows the legally constituted authority of the polity (e.g. Negri); and (iv) the
irresolution thesis, which rejects the first two forms of accommodation, but also
dismisses the possibility of isolating the radical potential of constituent power from the constituted forms of sovereign power, and instead views constituent power as an irreducible supplement which irritates and challenges rather than transcends the specific forms of constituted power (e.g. Benjamin, Agamben).

In responding to the challenge that we set, the contributors to the second section align themselves more or less directly with one or more of these options. David Dyzenhaus mounts a robust defence of a liberal constitutionalism in which constitutional architecture is treated as eclipsing constituent power, not on the basis of the empirical inevitability of the legal taming of the political, but on account of the impossibility of developing normative accounts of how we might live together except on the basis of such a working assumption. Rainer Nickel develops a theoretical perspective that is in basic sympathy with the Habermasian idea of the symbiosis of the legal and the political—of (private) rights and (public) democracy—but supplements this by showing that the productiveness of the tension between the two remains no less precarious than it has ever been, always likely to become skewed in favour of the rigid priority of rights or of communitarian excess. Paolo Carrozza focuses on the radical potential of contemporary constitutionalism, but argues that this need no longer be seen in terms of a revolutionary paradigm. Rather, under conditions of fragmented or multi-level authority in which the state is no longer the dominant level, constitutional form continues to structure but no longer determines political possibilities. Emilios Christodoulidis is also concerned to conceive of the supplement of constituent power as more than a mere irritant, but insists both that its radical openness depends on its occupying a domain independent of constitutional structure and form and that it is possible to imagine and activate such a domain as something other than the ante-room of constitutional initiative and authority.

The final section examines the question of constituent power in various contemporary settings, and against a background of diverse challenges to the state as the monopoly site for the mobilization of political power and legal authority. To begin with, in what ways, if at all, are the terms of the problem of constituent power in its paradigmatic state setting altered by new challenges to state authority? This question is addressed first by Ulrich Preuss in the ‘acute’ setting of Central and Eastern Europe—in the context of recently reconstituted post-Communist states. For Preuss, the peculiarity of constitutionalism in this region lies precisely in the fact that in such well embedded political communities its traditional constitutive role is unnecessary, but that it nonetheless remains vital as a way of allocating and checking power. Paradoxically, however, such a one-sided constitutionalism may face significant opposition from those very embedded forces of community which make its constitutive role redundant. Stephen Tierney then addresses the challenge to state authority from the perspective of sub-state nationalism. He asks how such movements might find constitutional voice, whether such voice is likely to affirm or compromise their ‘constituent’ autonomy, and, more generally,
whether and in what circumstances we might conceive of the relationship between the constituent potential of sub-state and state demoi in either zero-sum or positive-sum terms.

In the second place, the question of the relationship between constituent power and constitutional form is asked in the context of new or shifting non-state political configurations themselves. Neil Walker and Bardo Fassbender look at two of the most prominent of such sites—respectively, the European Union and the global ‘community’ of international law (and the UN in particular). Both seek to develop positions asserting the possibility of a transnational constitutionalism that retains at least some ‘constituent’ qualities without undermining the continuing constituent authority of states. Yet both are aware of the danger of a cheapening of constitutional currency in such an exercise—of constitutionalism as hubris or empty fantasy. The question of the relationship between constitutionalism and the alternative political imaginaries of post-national formations is also the subject of our two final essays by Damian Chalmers and James Tully. While one offers a reconstruction of the idea of state constituent power in the face of the diversification of political authority, the other offers a deconstruction. For Chalmers, while constituent power at the nation state level undoubtedly has its dark side, it also retains an unparalleled potential for emancipation and for the energization of the political. For Tully, on the other hand, the very idea of constituent power is a (vital) component of the deep structure of imperial authority, one that denies and seeks to suppress the ‘always/already constituted’ way in which political community and authority is experienced and practised in other contexts.

There are two reasons why Chalmers and Tully represent a particularly apt pairing with which to conclude our collection. In the first place, as befits constitutional theory as an activity distinct from political theory, both are firmly grounded in constitutional practices, extrapolating from concrete constitutional acts and processes to the broader horizons of political meaning these acts and processes reflect or generate. In the second place, they come to starkly different conclusions about the quality and potential of these wider political horizons, so underlining the enduring contestability of the very idea of constituent power in particular and the vocabulary of modern constitutionalism more generally.