

Constitutionalism in an old key: Legality and constituent power

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Abstract: I argue that legal and constitutional theory should avoid the idea of constituent power. It is unhelpful in seeking to understand the authority of law and the place of written constitutions in such an understanding. In particular, it results in a deep ambivalence about whether authority is located within or without the legal order. That ambivalence also manifests itself within positivist legal theory, which explains the affinity between theories of constituent power and legal positivist accounts of authority. Legal theory should then focus on the question of law's authority as one entirely internal to legal order, thus making the question of constituent power superfluous.

Keywords: constitutionalism; rule of law; constituent power; legality; authority

The question on which natural law focuses is the eternal question of what stands behind the positive law. And whoever seeks an answer will find, I fear, neither an absolute metaphysical truth nor the absolute justice of natural law. Who lifts the veil and does not shut his eyes will find staring at him the Gorgon head of power.¹ Hans Kelsen (1927)

The idea of the rule of law has been around ever since it was thought appropriate that all of the political sovereign's acts should have a legal warrant, that is, be in accordance with the law. The idea of constitutionalism is of more recent provenance, with its first historical manifestations the written constitutions that followed the American and French revolutions. In the latter part of the twentieth centuries there was a surge in constitutionalisation, 'the attempt to subject all governmental action within a designated field to the structures, processes, principles, and values

¹ Hans Kelsen, in *Veröffentlichen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 3 (Walter de Gruyter, Berlin, 1927), 54–5.

of a [written] “constitution”,² with the result that many countries have by now adopted written constitutions that entrench rights and make judges the guardians of those rights.³

The surge in constitutionalisation has been matched by a surge in scholarship as lawyers, philosophers and political scientists writing in English have turned their attention to the theoretical significance of these events. Of course, there has been extensive debate in countries with written constitutions about how best to interpret the constitution and in countries without such constitutions about whether to adopt a written constitution. But only very recently has there been another sustained attempt to answer questions such as ‘What is a constitution?’ and ‘What is the source of a constitution’s authority?’⁴ These questions were, however, extensively debated in the classics of political and legal philosophy ever since the idea emerged that a political society has fundamental legal commitments such that law is to some extent constitutive of society; and the same questions were hotly contested in the debates in late Weimar by public lawyers and legal philosophers such as Carl Schmitt and Hans Kelsen.

Perhaps the most striking feature of the current debates is the revival of the idea of ‘constituent power’, the load-bearing part of the distinction between *constituent power* and *constituted power* introduced by Emmanuel Joseph Sieyès in his pamphlet, published in 1789, ‘What is the Third Estate?’⁵ Sieyès coined the terms in order to explain the difference between a power that represents the nation as a unified whole, ‘We, the people’, and the power that inheres in the institutions of government. He suggested that the authority of any system of government rests on the decision taken by the constituent power, whether that system was republican, monarchical, etc. Only the decision of the people, acting as a unified whole, can found the authority of government. It follows from this claim that a bill of rights, a term I will use as shorthand for a written constitution that entrenches rights and makes judges their guardian,⁶ is

² Martin Loughlin, ‘What is Constitutionalisation?’ in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) 47.

³ Though the actual terms ‘constitutionalisation’ and ‘rule of law’ are likely of roughly equal provenance, a fact of some significance since they come into to existence at a time of sustained effort to subject government to legal control, whether or not there is written constitution.

⁴ For an earlier exploration of these issues, see the essays in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, Cambridge, 1998), which contains an influential essay by Frank Michelman, ‘Constitutional Authorship’, 64.

⁵ Emmanuel Joseph Sieyès, *Political Writings*, edited and translated by Michael Sonenscher (Hackett, Indianapolis, IN, 2003) 92.

⁶ A written constitution can of course confine itself to setting out the division of powers in a federal system of government or combine such a division with a statement of entrenched rights but I will for simplicity’s sake assume for the most part that the relevant document is a bill of rights.

just one way of establishing and regulating government, and cannot, as it were, establish its own authority. Its authority goes back to the decision. It inheres not in the kind of authority that the decision instituted or constituted, but in that the decision was taken by the nation, by ‘We, the people’.

The surge in constitutionalisation might by itself seem to explain why these questions are now in play. But, it is important to note, the surge has been accompanied by a kind of constitutional anxiety, and the anxiety likely explains better the interest in the questions than does the surge. Indeed, as I will now explain, the surge might with reason be thought to display a kind of historical irony, in that it happens just prior, or so it is alleged, to the realization that the conditions for successful constitutionalisation – the subjection of the state to a written constitution – are no longer firmly in place.

One kind of anxiety is expressed in the growing pessimism about the prospects for constitutional control over governments, as the executive branch becomes ever more powerful, though some scholars, for example, Eric Posner and Adrian Vermeule, seem to celebrate the phenomenon that the executive seems to be increasingly ‘unbound’ by law.⁷ That same anxiety manifests itself in current debates about proportionality, a methodology for deciding whether rights limitations are justified that appears ubiquitous in constitutional law these days, except for the USA. Some enthusiasts of rights protection worry that the subjection of rights to proportional limits waters down their protection, a kind of ‘administrativisation’ of constitutional law, which is to say the subjection of even our most fundamental commitments to cost–benefit analysis by ‘expert’, public officials. And that is why this anxiety turns out to be similar to the first, as Posner and Vermeule’s argument is that this administrativisation of constitutional law has already taken place in the USA, which would go to show that what is fundamental is not the adoption of the methodology, but the phenomenon to which it responds – the executive unbound.⁸

A second kind of anxiety manifests itself in debates about the constitutionalisation of international law and also the phenomenon of global administrative law. These debates arise in large part because of a growing sense of a loss of control by sovereign states over their own affairs, the consequence of either a cession of power to, or arrogation of

⁷ Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, New York, 2011).

⁸ This is the main theme of Martin Loughlin, *Foundations of Public Law* (Oxford University Press, Oxford, 2010).

power by, international and transnational bodies. The debates focus on whether this loss can be or is being compensated for by the emergence of an international or global constitution, whether, to use another term of art, constitutionalisation can compensate for ‘fragmentation’ – the process whereby power in the international legal order is increasingly dispersed, with the result that one might wonder whether terms like ‘order’ or ‘system’ are at all appropriate.

The two anxieties are distinct because the first focuses on an internal phenomenon, the loss of legal control within the state as the executive seems more and more unbound by law, whereas the second focuses on a loss of control externally, as international and transnational bodies make more decisions that have a domestic impact. But they are not wholly distinct because the issue of fragmentation is far from confined to the international sphere. While discussion in the USA of the executive unbound is often couched in terms of the ‘unitary executive’, one can just as easily, and perhaps more accurately, put the concern as one of a loosening or lack of constitutional control over a multitude of disparate governmental, quasi-governmental, and even wholly private bodies that seem to have a part in the exercise of public power. Thus uniting the anxieties is a more basic concern about the privatisation of the public sphere, both domestically and internationally, where privatisation connotes both the loosening of the kind of constitutional control we associate with public action and what it makes possible – the actual influence of private interests on public decisions. Consider, for example, the phenomenon of the privatisation of prisons and of security more generally.⁹

These sorts of anxiety are pervasive enough that scholars wonder whether the constitutional surge has been followed in short order by, to use the title of a recent collection, ‘the twilight of constitutionalism’.¹⁰ And in a review article of *The Paradox of Constitutionalism*,¹¹ a collection

⁹ Seen from one perspective, the reach of the state increases as it seeks to control more of what might once have been regarded as properly in the private or social spheres of individual activity; with privatisation, the state’s influence over our lives grows as it becomes ever more ‘decentered’. For an excellent analysis of this phenomenon, see Carol Harlow, ‘The “Hidden Paw” of the State and the Publicisation of Private Law’ in David Dyzenhaus, Murray Hunt, and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 75. For the term ‘decentered’ state see 96–7. But, seen from another perspective, this extension of the state’s reach makes it, to use terms coined by Schmitt in 1933, quantitatively strong but qualitatively weak; Carl Schmitt, ‘Weiterentwicklung der totalen Staats in Deutschland’ in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* (Duncker & Humblot, Berlin, 1985) 359, 360–1.

¹⁰ Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010).

¹¹ Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2007).

devoted to the question of constituent power, Alexander Somek used the title ‘The Owl of Minerva: Constitutional Discourse Before its Conclusion’,¹² in order to indicate just this phenomenon.

I will claim that these gloomy prognostications are perhaps the result of too much hype in the first place for constitutionalism. In my contribution to *The Paradox of Constitutionalism* I argued both that there is no question of constituent power that exists outside of the politics of constitutional and legal theory and that for one branch within such theory, which I called ‘normative legal theory’, that question simply fails to arise.¹³ By normative legal theory, I meant simply the family of theories that includes Lon L. Fuller and Ronald Dworkin, and which I take to be committed to showing how legal order and law itself are best understood from the inside, from a participant perspective that argues that legal order has intrinsic qualities that help to sustain an attractive and viable conception of political community. It is, I will argue, those intrinsic qualities that give law its authority and without which there is neither law nor authority. Moreover, while these are specifically legal qualities and a specifically legal kind of authority, the qualities and authority are moral as well as legal, and thus explain why law’s claim to authority is justified.

I contrasted this family with what I called ‘negatively prescriptive political theories’, a cumbersome label designed to capture the singularity of accounts of law such as Schmitt’s that make a normative claim about legal order, but one that both comes from a perspective external to law and denies that law’s authority can be founded on the intrinsic qualities of legal order. In particular, they seek to refute the claim of those in the family of normative legal theory that there are intrinsic qualities of legal order that make government under the rule of law tend to serve the values associated with liberal democracy. The distinction between constituent and constituted power is a natural one for such theories since they are committed to the view that whatever authority a legal order might have must have its basis outside the legal order, for example, in a political decision of ‘We, the people’.

However, as we will see below, even strong versions of such theories such as Schmitt’s find themselves unable to locate authority in something entirely external for they are drawn to claim that the basis is quasi-legal. From this fact arises the well-known paradox of authorship – for a people to act as author of the legal forms of constituted power, it must already

¹² Alexander Somek, ‘The Owl of Minerva: Constitutional Discourse Before its Conclusion’, (2008) 71 *Modern Law Review* 3, 473–89.

¹³ David Dyzenhaus, ‘The Question of Constituent Power’, in Loughlin and Walker (n 11) 129, 143–5.

exist as an author – an entity capable of authorizing. But an entity capable of so authorizing is an artificial entity, not just a random assemblage of individuals. Hence, it must itself be identifiable by legal forms. This paradox leads to an ambivalence in such theories about whether the basis of authority is internal or external to law. Normative legal theories are not subject to this ambivalence since they explain law's authority in general by reference to law's intrinsic qualities, hence the question of constituent power does not arise for them.¹⁴

Here I wish to elaborate my earlier argument by going beyond an attempt to show why the question of constituent power does not arise for normative legal theory. I will argue that the idea of legality is basic to understanding the authority of law in a way that the ideas of a constitution and of constituent power are not. This is in some sense a deflationary exercise – it deflates the claims of constitutionalism. But, as I will suggest at the end, it might be that out of deflation comes hope. I will start by setting out an account by a distinguished constitutional lawyer of why constitutionalism takes us beyond mere legality.

The achievement of constitutionalism

In the eyes of many, constitutionalism is a precious achievement that marks a change in the nature of legal order. Thus the constitutional lawyer and former justice of the German Constitutional Court Dieter Grimm argues that it would be wrong to 'identify constitutionalism as involving a submission of politics to law' since the legalization of politics is 'nothing new'.¹⁵ Rather, constitutionalism marks the transformation into law of, depending on how one sees it, either two aspects of one philosophical idea or of two closely connected ideas: first, the liberal idea that government is in the service of the rights of the individuals subject to the power of the state and, second, the democratic idea that the legitimacy of government rests on the consent of those individuals.¹⁶ Constitutionalism is, in Grimm's view, an achievement, because the constitution it envisages is both democratic and committed to the rule of law. It uses law to rule out 'any absolute or arbitrary power of men over men'.¹⁷

¹⁴ Of course, this might just show that normative legal theory is either naïve or simply fails to understand what is special about a constitution's claim to authority. See, for example, Somek's remarks about my 'The Question of Constituent Power' (n 12) 478.

¹⁵ Dieter Grimm, 'The Achievement of Constitutionalism', in Dobner and Loughlin (n 10) 3, 3–4.

¹⁶ *Ibid.*, 8. Grimm suggests there is but one idea.

¹⁷ *Ibid.*, 10.

Constitutionalism accomplishes this task by taking the philosophers' regulative idea of the social contract and making it rest not 'on the power of persuasion but on the power of a commitment'. But the problem that this move encounters is that it can no longer rely on the idea of divinely inspired natural law as the fundamental law. The commitment is made in an act of positive law, which raises the question of how a 'law that emerged from this process could at the same time bind this process'. This problem was, Grimm says, solved:

by taking up the old idea of a hierarchy of norms (divine and secular) and re-introducing it into positive law. This was done by a division of positive law into two different bodies: one that emanated from or was attributed to the people and bound the government, and one that emanated from government and bound the people. The first one regulated the production and application of the second. Law became reflexive. This presupposed, however, that the first took primacy over the second.¹⁸

In order to understand this primacy, he claims, we need the distinction between constituent power and constituted power.

It follows, in Grimm's view, that constitutionalism is 'not identical with legalization of public power'. It is a 'special and particularly ambitious form of legalization' with the following five characteristics:

1. The constitution in the modern sense is a set of legal norms, not a philosophical construct. The norms emanate from a political decision rather than some pre-established truth.
2. The purpose of these norms is to regulate the establishment and exercise of public power as opposed to a mere modification of a pre-existing public power.
3. The regulation is comprehensive in the sense that no extra-constitutional bearers of public power and no extra-constitutional ways and means to exercise this power are recognized.
4. Constitutional law finds its origin with the people as the only legitimate source of power. The distinction between *pouvoir constituant* and *pouvoir constitué* is essential to the constitution.
5. Constitutional law is higher law. It enjoys primacy over all other laws and legal acts emanating from government. Acts incompatible with the constitution do not acquire legal force.¹⁹

But Grimm then worries, for reasons we have already encountered, that the achievement of constitutionalism is under threat because two of its

¹⁸ Ibid, 8–9.

¹⁹ Ibid, 9.

preconditions are in doubt. The first is that before constitutionalism could emerge there has to be ‘an object capable of being regulated in the specific form of a constitution’, that is, the absolutist state had to come into existence that concentrated ‘all prerogatives on a certain territory in one hand’. ‘Only after public power had become identical with state power could it be comprehensively regulated in one specific law’.²⁰ A corollary of this concentration is a strict separation between public and private – no private individual may wield public power.²¹ As Grimm notes, it follows from this precondition that the British do not have a constitution in his sense.²²

Second, there should be no external competitor for the state within its territory. There is no ‘lawless zone’ above states: the rules of international law are based on the voluntary agreement of states and there is no means for one state to intervene other than by war in the affairs of another. ‘The two bodies of law – constitutional law as internal law and international law as external law – could thus exist independently of one another’.²³

In sum, Grimm’s worries fasten onto what he regards as the blurring of both boundaries, the one between the public and the private and the one between the internal and the external.²⁴

I will come back to Grimm’s concerns below. For the moment I want to concentrate on a puzzle that arises out of this conception of constitutionalism. As we have seen, Grimm supposes that the distinction between divinely based, fundamental, natural law and secular positive law is transformed by constitutionalism into a distinction within positive law, a distinction between the positive law of the constitution and all other positive law. But, as we have also seen, he regards a further distinction – between constituent and constituted power – as necessary to explain the primacy of the law of the constitution. Indeed, the issue for him is not simply explanation since without the distinction, he says, ‘constitutionalism would have been unable to fulfil its function’.²⁵ Constituent power makes possible the concrete commitment that turns the philosophical idea of social contract into the reality of ‘reflexive’ law,²⁶ law that regulates its own production.

But does that not make the exercise of constituent power the authorizing moment of the legal order, and its fundamental law? And if it does, the

²⁰ Ibid, 11.

²¹ Ibid, 12.

²² Ibid, 11.

²³ Ibid, 12–13.

²⁴ Ibid, 13 ff.

²⁵ Ibid, 9.

²⁶ Ibid.

problem of fundamental law is not solved by the distinction between two kinds of positive law, one of which has primacy, since it is displaced onto the more fundamental distinction between constituent and constituted power.

One way of solving this problem is to see the constituent power as somehow extra-legal. But many, maybe all of those who regard the idea of constituent power as of fundamental importance do not see it as entirely extra-legal. Rather, they see it as legal but as transcendent of any positive law, including the positive law of the constitution. For example, Sieyès said that while government is ‘solely a product of positive law’, a ‘nation is formed solely by *natural law*’.²⁷ However, he also insisted that it is by virtue of its existence as a nation – through the ‘reality of its existence’ – the ‘origin of all legality’, and that every nation is ‘like an isolated individual outside of all social ties or, as it is said, in a state of nature’.²⁸ And he offered as an ‘even stronger proof’ of the claim that a nation both should not and cannot subject itself to ‘constitutional forms’ the necessity in any political order for a supreme judge able to decide constitutional conflicts, which in turn requires the existence of an entity ‘independent of all procedural rules and constitutional forms’.²⁹

The invocation of the nation as that entity might then be seen as the product of the shift to which Grimm alludes from claims about the divine origins of authority to claims that rest on a secular basis, where the only candidate in fact for such a basis is the nation. For it is the nation, by definition a unity that has exclusive criteria for membership, that in its decision about its identity – articulated in the constitution – turns into a concrete reality the philosophers’ idea of the social contract. But then it remains the case that the nation has the authority at any moment to make a different decision. As a result, the authority of modern constitutional law cannot rest on its reflexivity – the regulation by the positive law of the constitution of the production and implementation of ordinary positive law. It has to rest on a decision that gets its authority from the nation unbound by any legal forms but still somehow the fundamental legal entity.

If there is anything to this line of argument, then Carl Schmitt’s constitutional and political theory looks a great deal less exotic. His claims that the essential distinction of the political is the one between friend and enemy and that the decision about how to make that distinction establishes the substantive homogeneity of the people might seem to do no more than dramatize the necessarily exclusionary character of the nation state in

²⁷ Sieyès, ‘What is the Third Estate?’ 136–7, his emphasis.

²⁸ *Ibid.*, 137.

²⁹ *Ibid.*, 138.

which the supreme political entity is ‘We, the people’. And the famous opening line of *Political Theology* in which Schmitt claims that the sovereign is the one who both decides when there is an exception to the constitutional order and how to respond to it might seem to say no more than that the foundation of the authority of a legal order cannot be its positive law.³⁰ There is some higher law beyond the positive law that is the origin of all legality. Indeed, seen in this way, Schmitt’s constitutional theory looks little different from that put forward by Bruce Ackerman in *We the People*, an account of US constitutional law in which the normal reign of constitutional law is interrupted by ‘constitutional moments’ in which fundamental changes are wrought through the occasional and constitutionally uncontrollable intervention of the constituent power of the people.³¹

Consider also that Ronald Dworkin argues for the merits of a ‘communal’ reading of democracy in contrast to a ‘statistical reading’, which says that in a democracy political decisions are made ‘in accordance with the votes or wishes of some function ... of individual citizens’.³² The communal reading holds that ‘in a democracy political decisions are taken by a distinct entity – the people *as such* – rather than by any set of individuals one by one’. Dworkin recognizes that this idea has much in common with Rousseau’s claim about government by general will and thus that it might seem ‘dangerously totalitarian’, relying as it does on the image of freedom as residing in self-determination, particularly when the entity with which individuals identify is defined by religious, racial, or nationalist criteria.³³ Dworkin goes on to argue that the idea can be suitably demystified while retaining its power. But for the moment I want just to note that he shares with Schmitt the idea that ultimate authority resides in the people ‘as such’ and thus might also be said to subscribe to constituent power.

Moreover, there is much to Schmitt’s critique of a legal positivist account of constitutionalism, in which Kelsen is his foil. According to Schmitt, Kelsen’s account of a constitution reduces to a claim that a constitution is no more than a set of positive laws grouped in one document and that differ from other kinds of positive law only in that they cannot be altered except in accordance with positively prescribed procedures that make it more difficult than usual to amend this set of positive laws. But argues Schmitt, there has to be more to a constitution than that. For if all there were to a

³⁰ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago University Press, Chicago, IL, 2005) 5.

³¹ Bruce Ackerman, *We the People, vol. 1: Foundations* (Belknap Press, Cambridge, MA, 1991).

³² Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Belknap Press, Cambridge, MA, 1996) 20.

³³ *Ibid*, 20, 21–2. His emphasis.

constitution is the set of enactments that are more difficult to amend, it follows formally speaking that the British constitution is the complete set of its statutes, which means that a statute regulating dentists has the same constitutional status as any other statutory provision. As Schmitt points out, the ‘inadequacy of such a type of “formalism” already reveals itself in the absurdity of this example’.³⁴ Thus, he insists that ‘a majority decision of the English Parliament would not suffice to make England into a Soviet state. ... Only the direct, conscious will of the entire English people, not some parliamentary majority, would be able to make such fundamental changes’.³⁵

Now the response might be precisely, as we have seen Grimm suggest, that the British do not have a constitution in the relevant sense. But Schmitt does not accept this. He thinks that the same point can be made about any written constitutional settlement. The provisions of the Weimar Constitution do not all have the same fundamental status in virtue of the fact that they are written down in one document. Moreover, if all that there were to an entrenched constitution were the difficulty of amendment of its provisions, the constitution would reduce to the provision containing the amending formula, which would make the content of the constitution provisional.³⁶ What I wish to resist, however, is the conclusion that Schmitt draws, and which we have seen Grimm accepts, that these insights into the nature of constitutionalism require us to accept the distinction between constituted and constituent power, and hence, the claim that ultimate authority resides in the concrete decision that amounts to the exercise of constituent power.

In order to do this, I will begin by discussing a recent attempt to demonstrate the need for the idea of constituent power for the understanding of constitutionalism. The failure of this attempt is instructive, first, because it shows that the idea of constituent power is unhelpful to an understanding of law’s authority. Second, as I will elaborate in the next section, it is instructive because it shows that despite the fact that Schmitt used the idea in his critique of Kelsen’s legal positivism, it is positivistic commitments that lead legal theorists to the idea of constituent power or analogues.

The strange logic of constituent power

My foil in this section is a recent essay by constitutional scholar, Richard S. Kay, ‘Constituent Authority’.³⁷ Kay’s essay starts with the question,

³⁴ Carl Schmitt, *Constitutional Theory*, edited and translated by Jeffrey Seitzer (Duke University Press, Durham, NC, 2008) 71–2.

³⁵ *Ibid.*, 79–80.

³⁶ *Ibid.*, 73–4.

³⁷ Richard S Kay, ‘Constituent Authority’ (2011) 59 *American Journal of Comparative Law* 3, 715–61.

‘What makes a constitution a constitution?’³⁸ and he assumes that ‘a modern constitution, like any other instance of positive law, must be associated with a law-maker’.³⁹ This brings him to the idea of constituent power, and thus to Sieyès and to Schmitt. But Kay says that idea of constituent power ‘tells us very little about the qualities that invest a group of human beings with the practical capacity to specify a constitution and make it stick’,⁴⁰ with the result that one has to focus on authority rather than power. However, authority, Kay says, is still a ‘factual not a moral competence’, something that arises in a particular social and political context.⁴¹

Here he refers to Hart’s rule of recognition which he thinks is analogous to Schmitt’s idea that ‘the constitution-making power is existentially present: its power or authority lies in its being’.⁴² But that, says Kay, cannot be the whole story. There is ‘always a reason why an attempted assertion of power is effective... [F]or a successful constitution to endure ... there must be something about it that persuades (or at least permits) its subjects to submit to it’.⁴³

Kay adds that such a ‘reflective critical attitude’⁴⁴ will ‘derive, at least in part, from some regard for the circumstances of its creation’.⁴⁵ Thus, more than an expression of will is required – ‘an evaluation of the rightness of the constituent events’. Recognizing authority in the constitution-makers, therefore,

incorporates what may be properly called moral reasons. ... This does not make its existence any less a fact but it is a certain kind of fact, one that includes the collective critical judgment of some number of individuals in certain times and places. It is this continuing normative attitude that distinguishes constituent authority from simple constituent power.⁴⁶

He continues that we thus need

to know something about the social, political, and moral values shared in the population that the constitution is supposed to govern at the time

³⁸ Ibid.

³⁹ Ibid, 717.

⁴⁰ Ibid.

⁴¹ Ibid, 720.

⁴² Ibid, 721.

⁴³ Ibid.

⁴⁴ Here he quotes from the description of the ‘internal point of view’ of legal officials in HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press, Oxford, 1994) 57.

⁴⁵ Kay, (n 37) 721.

⁴⁶ Ibid, 721–2, footnote omitted.

it is supposed to govern. Still, as the expositors of constituent power recognized, we need to think of these 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.⁴⁷

However, as Kay goes on to frankly acknowledge, it is hardly easy to understand the people as a constitution-making agent in the way that one might understand how God, or the King, or the priests, identifiable sources with known or presumed qualities or clearly defined statuses, might be understood as proper constitution-making agents. In order to understand the people as a constituent authority, we have to take into account a political principle, 'the political rightness of *self-government*'. That principle in turn 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'.⁴⁸

How does one then find 'the people'? A bounded territory, it seems, does not suffice. One needs something more, indicated by Schmitt in his claim that what is at stake is an association that has 'a type of being that is more intense in comparison to the natural existence of some human group living together'.⁴⁹ But when one goes about the task of trying to discern the 'voice' of the constituent authority things become murky. Taking as his example the recent and well-documented negotiation of South Africa's Interim and Final Constitutions, Kay finds that

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'.⁵⁰

However, as he also notes, when the authority of the South African Constitution is discussed today, 'this not the locus of authority on which people base its binding quality'. Rather, we find references to 'We, the people'. One should not, he says, dismiss these expressions as mere

⁴⁷ Ibid, 722.

⁴⁸ Ibid, 738, his emphasis.

⁴⁹ Ibid, 739, quoting from Schmitt, (n 34) 243.

⁵⁰ Kay (n 37) 755.

rhetorical flourishes, since this ‘kind of transformation is common and discloses a critical aspect of constituent authority’ that, first, ‘some minimum part of the population must find the constitution’s substantive rules satisfactory, or at least tolerable’, second, ‘the population must regard the constitutional rules as having issued from a legitimate source’.⁵¹

It is this second requirement that, according to Kay, engages the question of constituent authority. He notes that ‘perceptions may change over time’, so that the renewal of constituent authority amounts to what Renan in his essay on the nation famously called a ‘daily plebiscite’.⁵² Thus Kay concludes that ‘[t]he 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’.⁵³ Since ascertaining the people is always a matter of reconstruction, ‘Kelsen’s idea of the basic norm as merely the necessary presupposition of a given legal system is, in this way at least, valid’.⁵⁴

Kay’s attempt thus fails because he cannot stay with the idea of power but finds himself obliged to deploy an idea of authority. He then finds that there is no existential moment in which authority is asserted. Rather, authority is bestowed, as it were, retrospectively as those who are subject to the law seek to make sense of their subjection. Finally, he finds that in so far as the idea of constituent authority has any concrete manifestation within legal order, it is in what the two most eminent twentieth-century legal positivists identified as the ultimate basis of law’s authority, Kelsen’s *Grundnorm* and HLA Hart’s rule of recognition.

Now of course this is only one attempt to deploy the idea of constituent power. But I will now try to show why the twists and turns in Kay’s argument are the product of the idea not of Kay’s particular use of it. However, while my overall argument is supposed to lead to the rejection of the idea, there is something to it, which is why either the idea itself or something like it is at the core of debate in legal philosophy.

Legal theory and the question of constituent power

If we think of a bill of rights as a positive legal instrument, albeit one that is given a pre-eminent place among other such instruments, the idea of constituent power does chime with a dominant theme in legal philosophy that there is a higher law beyond the positive law of a legal order. This idea

⁵¹ Ibid, 756.

⁵² Ibid, 757.

⁵³ Ibid, 760, his emphasis.

⁵⁴ Ibid, 760–1.

is shared by the legal positivist thinkers to whom Kay refers: Hart – the rule of recognition as the ultimate customary rule of a legal order; and Kelsen (despite what he says in the epigraph to this paper) – the *Grundnorm* whose validity has to be presupposed as the norm that authorizes the enactment of all the positive laws of a legal order. It is also shared by critics of legal positivism such as Lon L. Fuller in his account of an internal morality of legality, and by Dworkin in the argument that implicit in a legal order's positive law is the political morality that shows the positive law in its best light.⁵⁵

These thinkers also share the view that the higher law beyond the law can be determined through what we can think of as a reconstructive methodology. We can take legal orders as they are and work out the conception of higher law that gives unity or, as Dworkin would prefer to call it, integrity to the positive law of a legal order, thus arriving at an answer to the question of what makes it a legal order rather than a set of the acts of those with the power to impose their will on others. In other words, the idea of higher law, however construed, is essential to understanding why the law might be said to have authority rather than being the sum total of the recorded expressions of will of those powerful enough to enforce their will on others.

A second point of commonality between these legal philosophers is that I think it is fair to say that all of them do not consider the introduction of a bill of rights, or any form of written constitution, as being especially significant for legal philosophy. An appropriately designed and implemented bill of rights might make a great deal of beneficial difference to the lives of those subject to the law, just as an appropriately designed and implemented constitutional division of powers might make such a difference. However, the written document that states a bill of rights or a constitutional division of powers is not legally fundamental because its authority still needs explanation by reference to the higher law of the legal order.

Even Dworkin, who has been immersed for years in debates about the best way to interpret the US Bill of Rights, and whose legal theory is sometimes unfairly said to be a theory of how to interpret that Bill rather than a theory of law, does not regard the existence of a bill of rights as the essential feature of legal order. Rather, he argues that the theory of interpretation he proposes as his version of what I called earlier a reconstructive methodology applies whether or not there is a bill of rights, and he has emphasized that every legal order worthy of the name has on

⁵⁵ For an illuminating discussion of similar ideas, see Pavlos Eleftheriadis, 'Law and Sovereignty' (2010) 29 *Law and Philosophy* 5, 535–69.

his account a constitution, whether written or unwritten.⁵⁶ I believe this point to be altogether consistent with his claim that the US Bill of Rights articulates and protects better the ideal of equal concern and respect than do legal orders that have not yet emulated the USA.⁵⁷ For Dworkin also argues that those legal orders have inherent in them a constitutional morality best expressed in the ideal of equal concern and respect. As he says, '[a]ny claim about the place the Constitution occupies in our legal structure must ... be based on an interpretation of legal practice in general, not of the Constitution in some way isolated from that general practice'.⁵⁸ And he adds that those 'scholars who say that they start from the premise that the Constitution is law underestimate the complexity of their theories', because, as I have already indicated, they are relying on the 'idea of a law behind the law'.⁵⁹

Where legal philosophers divide, then, is not over the idea that there is law beyond the positive law. Rather, they divide over the claim that such law amounts to a constitutional *morality* underpinning all legal orders that is both the basis of the order's authority and is not identical with or reducible to the bill of rights, if there is one. Hence, if there is a written constitution, its authority will be explained by the same features of the legal order that tell us why its law in general has authority, that is, because both are interpretable in accordance with the constitutional morality of legal order. 'Morality' here means a set of moral norms or principles that are constitutive of legality and that explain the legitimacy of acts that comply with legality, why law's claim to authority is justified.

Legal positivists such as Hart and Kelsen deny precisely this claim, while Fuller and Dworkin defend their own versions of it. For the legal positivists, the idea that there is a higher law beyond the law is consistent with the enactment of particular laws that are best explained as the instrument of an obnoxious political ideology, totally at odds with any respectable candidate for the title of constitutional morality.⁶⁰ For such positivists, the higher law is the basis of the law's claim to authority – to be obligation creating. But the fact that the claim will be made, and is made in the right way, that is, in accordance with the criteria to be found in the higher law, does not tell one whether the claim to authority is in fact justified.

⁵⁶ See, for example, Ronald Dworkin (n 32) 16.

⁵⁷ *Ibid*, 81–3.

⁵⁸ Ronald Dworkin, 'The Forum of Principle' in Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge, MA, 1985) 33, 37.

⁵⁹ As Dworkin put it in reference to Hart's rule of recognition, *ibid*, 37.

⁶⁰ Negative prescriptivism thus manifests itself in their accounts in a general thesis about there being no necessary connection between law and any set of moral values, but which is meant above all to demonstrate that there is no necessary connection between law and liberal morality.

Thus, in the most elaborate positivist account of the authority of law, Joseph Raz says that the law must claim to have legitimate authority over those subject to it.⁶¹ But he argues that the law will in fact have such authority only when its content meets the requirements not of mere legal validity, but also of morality. These are the requirements set by the ‘normal justification thesis’ that the law has legitimate authority only when its subjects would in fact better serve their interests by complying with the law than by deciding for themselves.⁶² It follows that the law of a particular legal order has legitimate authority or not depending on conditions set by moral criteria that are external to law.

On the one hand, then, law has to be understood as an authoritative system, and thus cannot be reduced to a system of the commands backed by threats issued by a legally unlimited commander – the command model of law Hart attributed to Bentham and Austin. On the other hand, the authority of law is morally inert unless the content of the law happens to correspond with what sound morality requires.

As I will now argue, this combination of claims in contemporary legal positivism creates a profound ambiguity on the question of law’s authority. Both Hart and Raz cannot in fact decide whether the basis of law’s claim to authority is in or outside the legal order and that produces a structural and illuminating correspondence with the problems faced by proponents of the idea of constituent power.

Is authority in or outside the legal order?

The ambiguity is best exemplified in the distinction Raz makes between *de facto* authority and legitimate authority.⁶³ For with that distinction, he raises the question whether legal theory explains only the characteristics that make a legal order capable of claiming authority or in addition those characteristics that justify its claim to have legitimate authority. On his account, legal theory sets out the non-moral conditions for a legal system to claim authority, but it is also the case that all claims to authority are perforce claims to legitimate or justified authority. Raz has to be right in the latter regard. It would be odd, to say the least, for me to claim authority

⁶¹ Joseph Raz, ‘Authority, Law, and Morality’ in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994) 194.

⁶² *Ibid.*, 198.

⁶³ For discussions of some of the difficulties that arise, see Ronald Dworkin, ‘Thirty Years On’ in Dworkin, *Justice in Robes* (Belknap Press, Cambridge, MA, 2006) 187, 198–211. One criticism Dworkin makes of Raz is that there is something odd about the personification involved in saying that ‘the law claims ...’. I will sidestep this issue because my interest in this essay is not so much the merits of Raz’s argument but its structure.

but to limit my claim to saying: ‘I am capable of exercising authority because I fulfill the non-moral conditions for being a *de facto* authority and have issued a directive which you must obey because I am a *de facto* authority, even though my directives are not legitimate’. In short, a claim to authority is always a claim to legitimate authority. One should, therefore, say that just as law’s claim to authority is part of the concept of law, so too is the claim that the authority is justified. Law necessarily claims legitimate authority, even though, as positivists will hasten to add, whether or not that claim is vindicated will depend on moral tests external to law.

However, if it is an essential characteristic of law that it claims legitimate authority, and the success of the claim turns on moral criteria external to law, then if law’s claim to authority fails by those criteria, we have not merely the failure of the authority claim made by the law, but a failure to be law. On this version of his theory, Raz would put forward perhaps the strongest version of natural law in the history of legal philosophy, much stronger, for example, than Gustav Radbruch’s ‘Formula’ according to which extreme injustice is no law.⁶⁴

The problem Raz encounters is not new. It is no different from the problem Hart encountered when he decided that legal positivism had to ditch what he took to be John Austin’s model of law as the commands backed by threats of a legally unlimited or ‘uncommanded’ commander, both because such a model could not explain law that obliges even when no sanction is threatened and because the capacity to make law is itself legally regulated. These flaws are dramatically illustrated for Hart in the fact that, on his account of law, the officials of a legal order consider themselves under an obligation to continue the social practice of the rule of recognition – the rule that ultimately regulates the production of all law – in the absence of any command to do so, let alone one backed by a threat. The officials continue in that practice, according to Hart, because they take the ‘internal point of view’, that is, they consider their conduct to be the right thing to do.⁶⁵ And thus at the foundation of law’s authority – its capacity to create obligations – is a social practice the continuation of which the officials of the system consider rightful.⁶⁶

But, Hart emphasized, ‘right’ in this context does not mean morally right, in the sense that the officials should be taken to endorse the content

⁶⁴ Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’, translated by Bonnie Litschewski Paulson and Stanley L Paulson (2006) 26 *Oxford Journal of Legal Studies* 1, 1–11.

⁶⁵ See (n 44) 88–91.

⁶⁶ See (n 44) chap. 5 and 6.

of the rules of their legal order. He also emphasized that the internal point of view could be confined to officials, that is, the population as a whole might comply with the law only because they feared sanctions attendant on non-compliance. So for him it suffices for law to have authority that the bulk of the population comply with the law, for whatever reason, and that officials both maintain the rule of recognition and enforce the rules of whose validity it provides the ultimate test.

Hart was also concerned that an early version of Raz's argument that officials must claim legitimate authority for the law they enforce undermines the positivist distinction between law and morality.⁶⁷ And I would venture that the possibility that the normal justification thesis strips immoral laws of their claim to be law, let alone to have authority, would have been of even greater concern to Hart, since his general worry is that this kind of import of moral language into the concept of law undermines our ability to say: 'This is law but too immoral to be obeyed'.⁶⁸ For the flip side of the coin of the claim that 'This is not law because it is immoral' is 'This is a law and therefore it is moral'.

These differences between Hart and Raz might seem minor, but they manifest within legal positivism an ambivalence about the ultimate basis of law's authority that is a product of that tradition's theoretical commitments. Does law's authority come from within or without the law? As I will now argue, Hart did not appreciate that the difficulties he detected in Austin's command model of law come about because Austin rightly regards legal positivism as a theory that must locate the basis of law's authority outside of the positive legal order in a higher law that is not reducible to the validity conferring rules of a positivistically conceived legal order, that is, in a quasi-legal notion of constituent power.⁶⁹

⁶⁷ HLA Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Clarendon Press, Oxford, 1982) 153–61.

⁶⁸ I say 'this kind' because Hart always noted that law and morality necessarily share some vocabulary, obligation, duty, and so on. Indeed, this fact and others are now the basis for suggestions by a new generation of legal positivists that Hart did not support the positivist claim that there is no necessary connection in the way he specified between law and morality. They may be right that Hart despite himself could not maintain his distinction but why this would be considered a virtue of a model avowedly premised on the distinction is a little bewildering. Similarly, I am aware that a new generation of legal positivists created an 'inclusive' version of legal positivism, according to which moral standards incorporated by the positive law could be said legally to determine answers to questions about what the law requires and that Hart suggested in the Postscript to the second edition of *The Concept of Law*, 250–4, that he endorsed this version, rather than the 'exclusive' one propounded by Raz. But again I find it bewildering why a sense that a theory has to be adapted in a way that undermines its most fundamental commitments should be considered a sign of success rather than failure.

⁶⁹ See Eleftheriadis (n 55). I summarize in the next few paragraphs my argument in 'Austin, Hobbes, and Dicey', (2011) 24 *Canadian Journal of Law and Jurisprudence* 2, 411–40.

Moreover, Hart's failure in this regard has the result that despite his efforts to set a new direction for legal positivism, his own version of that doctrine not only exhibits a striking continuity with Austin but also reproduces Austin's predicament on the question of law's authority.

Austin and Hart share what I call a *transmission account* of law – an account of law in which the marks of law make particular laws into an efficient transmitter of determinate content from legislators to subjects.⁷⁰ Moreover, and despite everything that Hart said in his construction of Austin's model of law as a foil for his own, a transmission account of law requires that there are public criteria for identifying valid law, maintained by legal officials, and that nothing can count as law unless it complies with those criteria. Put differently, Austin (like Hobbes and Bentham before him) knew full well that there have to be public criteria for identifying what counts as law such that nothing counts as an act of legislation unless it complies with those criteria. For the most part, what Austin means when he says that the sovereign is legally unlimited is that the supreme positive law-making body, that is, parliament, can always overrule past law by enacting a new law, an ability that would extend to making changes in what Hart was later to call the rule of recognition.

The main difference between Austin and Hart is that Austin vacillates between treating parliament and a complex idea of 'We, the people' as the sovereign, and seems sometimes to suppose that the latter is not bound to comply with any legal criteria. AV Dicey thought that Austin had simply confused two senses of sovereignty, the legal and the political, and that lawyers need concern themselves only with the legal sense.⁷¹ Hart also thought that Austin was thoroughly confused on this score, and that the confusion would be sorted out by attending to the way in which the ultimate law-making body has to comply with the rule of recognition.

But both Dicey and Hart failed to see that what Austin was after was an idea of the constituent power as the ultimate source of law's authority. For Austin, law's authority comes about because when parliament makes law, it does so in virtue of a trust placed in parliament by the sovereign. In

⁷⁰ For detailed discussion, see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2nd edn, Oxford University Press, Oxford, 2010), chap. 8 and 9. Consider in this regard the fact that for Raz it is of the essence of both law and of an authoritative directive that their content be identifiable without relying on moral argument. Hart somewhat reneged on this commitment when he appeared to join the inclusive legal positivists, but this move is akin to Austin perceiving the need to take into account the fact that in some legal orders the political sovereign is constrained by positive law. That is, at such points theories must succumb to evidence.

⁷¹ AV Dicey, *An Introduction to the Study of the Law of the Constitution* (8th edn, MacMillan, London, 1924), 68–72.

Britain, Austin considered this political sovereign to be the ‘numerous body of the *commons* ... as share the sovereignty with the king and the peers, and elect the members of the commons’ house’.⁷² This sovereign delegates to parliament the powers that it has and it delegates them not absolutely but in terms of an implicit trust that the parliament will not use the powers in violation of the trust, for example, it will not attempt ‘to annihilate the actual constitution of the supreme government’.⁷³

The trust is enforced by constitutional law, which is to say enforced by mere ‘moral sanctions’. Hence a violation of the trust is a violation of ‘positive morality’ – ‘the principles current in the political community’. But even if these principles have been enacted into the positive law, the only sanctions when the supreme authority violates the principles are ‘moral’ – the principles are ‘merely guarded ... by sentiments or feelings of the governed’.⁷⁴ Thus, an exercise of power by the supreme law-making body trumps the constitutional morality of the people, unless the people rise up in revolt, which is why Austin adds that all ‘constitutional law, in every country whatever, is ... in that predicament’.⁷⁵

But while Austin at times seems to suggest that the sovereign is a pre-legal, political entity, it is not at all clear that this was his intention.⁷⁶ He says that in Britain during the period for which the members of parliament are elected ‘sovereignty is possessed by the king and the peers, with the members of the commons’ house, and not by the king and peers, with the delegating body of the commons’. It follows, he adds, that ‘if the commons were sovereign without the king and the peers, their present representatives in parliament would be the sovereign in effect, or would possess the sovereignty free from trust or obligation’. Thus they could extend the life of the parliament or ‘annihilate completely the actual constitution of the government, by transferring the sovereignty to the king or the peers from the tripartite body wherein it resides at present’.⁷⁷ It also follows from the fact that only parliament can enact a law that the commons cannot itself, or indeed, with the king and the peers, make any law. Thus parliament as presently constituted could enact a law vesting sovereignty in the king. It would be ‘absurd’ to say the law was illegal for parliament

⁷² John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (5th edn, John Murray, London, 1885, reproduced by Verlag Detlev Auvermann KG, Glashütten im Taunus, 1972), vol. 1, 245, his emphasis.

⁷³ *Ibid*, 245–7.

⁷⁴ *Ibid*, 267.

⁷⁵ *Ibid*, 246–7.

⁷⁶ Here my account of Austin and the question of constituent power departs from that given in Eleftheriadis (n 55).

⁷⁷ See (n 72) 245–6.

‘is the author ... of all of our positive law, and exclusively sets us the measure of legal justice and injustice’.⁷⁸ Such a law could properly be termed ‘unconstitutional’, since it changes the constitution, or ‘irreligious’ or ‘immoral’, but it is perfectly valid.⁷⁹

In sum, Austin’s problem is not, as Hart alleges, that he fails to see that the sovereign must comply with a rule of recognition in order to make valid law. Rather, Austin sees that such compliance is an inadequate basis for law’s authority. He will not, however, locate that authority in either natural law theories or social contract theories. Such theories, he argues, take the true basis of political obedience in calculations of utility and turn it into a doctrine ‘darkly conceived and expressed’⁸⁰ that seeks the ‘extension of the empire of right and justice’ – a justice that is ‘absolute, eternal, and immutable’ not a ‘creature of law’, but ‘anterior to every law; exists independently of every law; and is the measure of or test of all law or morality’.⁸¹ Thus, Austin is compelled to locate authority both inside the positive law, in the supreme positive law-making body, and outside of the legal order in a complex idea of the people. But Austin finds himself unable to give any coherent account of how the people might exercise that authority.

His best attempt is perhaps in his discussion of the acquiescence of the people, manifested in the ‘habit of obedience’, which is a necessary condition both for the existence of a legal order and for its authority. That is, the people will exercise their authority by withdrawing acquiescence and turning to revolt. But Austin supposes that all that legal theory needs to take into account when it comes to obedience to law is the motivation to obey provided by sanctions for disobedience, although he also notes that there is likely a general sense in the population of the utility of government, no matter how bad, over the uncertainty of the situation that follows disobedience.⁸²

Thus we find in Austin a profound ambivalence. On the one hand, there is his sense that authority is located outside of the positive legal order, in a

⁷⁸ See (n 72) 268 and the note at that page.

⁷⁹ See (n 72) 247–8. Austin also supposes that parliament could enact a law that would permit enforcement of the terms of the trust against parliament, that is, by judicial remedies. But then parliament could abrogate the law ‘without the direct consent of the electoral body’ and the electoral body could not ‘escape from that inconvenience, so long as its direct exercise of its sovereign or supreme powers was limited to the election of its representatives’. That in turn permits him to claim that he has demonstrated that there can be no legal limitation on sovereignty since parliament could at any time free itself of that limit by simply enacting another law.

⁸⁰ See (n 72) 302.

⁸¹ See (n 72) 301.

⁸² See (n 72) 294–5.

constitutional morality made up of the moral sentiments of ‘We, the people’, who entrust the supreme positive-law making body with the power to make laws that do not violate that trust. On the other hand, he also argues that from a perspective within the positive legal order, all that legal theory has to take into account when it comes to the constitutional morality is the acquiescence of the bulk of the population, explained by fear of sanctions, and the validity-producing mechanisms of positive law. Authority ends up located both within and without the positive legal order.

Once these aspects of Austin’s thought come into view, the continuity between his thought and Hart’s becomes palpable. Hart says that it is true that

if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary co-operation, thus creating *authority*, the coercive power of law and government cannot be established.⁸³

In this sense, he elaborates, ‘it is true that the coercive power of law presupposes its accepted authority’.⁸⁴

Here Hart adds to the Austinian picture the claim that there must be at least some group, perhaps confined to the officials, who take the internal point of view, thus creating its authority. And the internality of that point of view might seem to move the basis of authority from outside the legal order to inside of it, with the result that the authority of law is located in the reasons officials consider it is right to maintain legal practices, thus bringing these reasons within the scope of juristic thought. However, just as Austin supposes that one can understand rule compliance on the part of the general population without reference to any prior obligation to obey the law, so Hart supposes that the internal point of view of voluntary acceptance by officials of the system does not entail any sense of moral right. There can even, he says, be voluntary acceptance when ‘those who accept the authority of the system ... decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so’.⁸⁵

The only difference between Austin’s account of the acquiescence of the population and Hart’s account of the internal point of view of officials is that in the latter there is no common denominator of sanction to rely on. This absence does not perturb Hart, since he relies on the suggestion that

⁸³ See (n 44) 201, his emphasis.

⁸⁴ See (n 44) 203.

⁸⁵ Ibid.

there are many possible reasons, so no common one needs to be found.⁸⁶ But that suggestion locates the reasons for the voluntary acceptance that creates authority both within the legal order in the overlap of reasons that constitute the internal point of view and without the legal order in the slew of possible reasons that motivate officials to adopt the internal point of view. And so the ambivalence in Austin's theory is reproduced.⁸⁷

Raz's contribution can in this light be understood, on the one hand, as relocating authority outside of the positive legal order, though not in any idea of the constituent power of the people. Rather, authority is located in right reason – the correct judgment about whether the law serves one's interests better than deciding for oneself – and thus in the reasoning of the autonomous, rational individual.⁸⁸ But, on the other hand, there is also *de facto* authority, which it seems all legal orders possess, an effect of their internal attributes that make it possible to use particular laws as the instrument to transmit content to legal subjects.

Hart, recall, was concerned that Raz sought to build into the positivist account of legal authority the idea that law claims legitimate authority. He rightly saw that the import of the idea of justified authority into the positivist concept of law leaves legal positivism in a surprising dilemma between an extreme natural law position – immoral laws are not law because they fail the test of justification set by moral criteria external to law – and an extreme authoritarianism – as long as a law is valid by the internal technical criteria of the rule of recognition it is also justified.

But we should also recall that a major theme of Hart's work is that the dictates of individual conscience always trump the dictates of the law.⁸⁹ No less than Raz, Hart creates the conundrum of law that has authority just in virtue of being valid and law that has no authority because it is judged immoral by some test external to law. Hart's concern should therefore be one about the positivist paradigm, not about Raz's particular

⁸⁶ However, Hart might well not have balked at the suggestion of a common denominator similar to Austin's claim of a general sense of the utility of government, no matter how bad, over the uncertainty that would follow the collapse of legal order, if there were no voluntary cooperation even amongst the minority of officials. Consider that his discussion of the 'minimum content of natural law' (n 44, 193–200, at 193) begins with the Hobbesian premise that people accept the terms of association with others at least to ensure survival.

⁸⁷ For a recent discussion of Hart's vacillations in this regard, see Michael A. Wilkinson, 'Is Law Morally Risky? Alienation, Acceptance and Hart's Concept of Law', (2010) 30 *Oxford Journal of Legal Studies* 3, 441–66.

⁸⁸ For the application of this argument to constitutional authority, and thus for the claim that a constitution may get its authority from the fact that its makers had moral authority, see Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Alexander (n 4) 152, 158–60.

⁸⁹ See, for example, Hart (n 44) 206–12.

take on how to deal with the question of law's authority within that paradigm.

Hart and Raz thus perpetuate a feature of Austin's legal theory that Dworkin has recently called the 'two-systems picture' of law and morals, according to which the problem for philosophy of law is the relationship between two separate systems.⁹⁰ Dworkin describes how that picture leads to circular, question-begging arguments for both legal positivism and its critics,⁹¹ and he advocates replacing it with an 'integrated one-system theory of law'.⁹² My argument so far supports Dworkin's claim. It does so by showing the difficulties legal positivists experience in preserving the boundaries between the two systems when it comes to articulating a basis for law's authority, a struggle that manifests itself in a profound ambivalence about whether that basis is within or without the legal order.

That same ambivalence is reproduced in the debate about the authority of constitutions by those who seek to locate that authority in an exercise of constituent power by an entity outside the legal order, one which should then retain the legally unlimited authority to remake the constitution. But as we have seen in both Grimm and Kay, in liberal democratic theories the founding moment becomes notional, and is displaced onto the validity-producing mechanisms of the legal order. That leads to the equation of authority with technical validity, an equation that Schmitt correctly pointed out makes constitutionalism altogether vacuous.⁹³

In contrast, the idea of constituent power is superfluous to a one-system theory, since such a theory sees the authority of law, and of any legal instrument such as a bill of rights, as wholly internal. Let me offer one perhaps surprising example from the history of political thought.

Thomas Hobbes is commonly regarded as a social contract theorist who made use of the idea of the social contract to construct an account of sovereignty in which those subject to sovereign power are obliged to obey the commands of their sovereign, whatever the content of the commands. He thus seems to offer a highly authoritarian version of legal positivism, since in one system – that of rational argument – he provides a justification for treating in another system – that of civil society – as authoritative the

⁹⁰ Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, Cambridge, MA, 2011), 400–2.

⁹¹ *Ibid.*, 403.

⁹² *Ibid.*, 409.

⁹³ Schmitt (n 30) 63–4. Hans Kelsen might be the exception here, a positivist who adopts a one-system picture, depending on how robust one takes his 'principle of legality' to be, an exercise that requires one to ignore much of what he officially had to say on this topic. Compare David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Clarendon Press, Oxford, 1997) 149–57 with Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, Oxford, 2007), chap. 3.

commands of the person or body of persons who happen to have power over the subjects of that power.

But Hobbes is better understood as having a one-system theory of authority in which consent to authority is to be inferred from actual subjection. The social contract is thus for him a reconstruction of the conditions under which one may reasonably be taken to have consented. Of course, this may seem only to strengthen his reputation for authoritarianism. However, I think that Hobbes would have agreed with Dworkin's famous comment about John Rawls that 'hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms', since a 'hypothetical contract is not simply a pale form of an actual contract, it is no contract at all'.⁹⁴ For Hobbes supposes that among the conditions is that there is in place a legal order, made up of general stable laws that have to be interpretable by judges in accordance with a lengthy list of the laws of nature; and the laws of nature are for Hobbes the moral/legal principles (including one of equality) that are intrinsic to legal order.⁹⁵ On this view, the regulative idea of the social contract, or better regulative ideal, is not instantiated in a hierarchy within positive law. Rather, it is to be found in the principles of legality that together make up a constitutional morality of legal order, whether or not they and other fundamental moral commitments are articulated in a written constitution.

Hobbes's discussion of the role of law in constituting a just political order illustrates the flaw in legal positivist reasoning that also manifests itself in contemporary accounts of constitutionalism that rely on the idea of constituent power. Such accounts suppose that the idea of constituent power is an adequate substitute for both the ancient idea of natural law and the modern idea of social contract, but then equate the idea with technical validity. They understand the history of political and legal ideas as one in which social contract theory does away with the idea of natural law with a divine source, because the contract theorists recognize that political and legal order is a human creation and so has to appeal for its justification to the reason of the individuals who find themselves in a particular order. Since these individuals, as it were, produce the world in which they live, they will have to understand themselves as the authors of that world, and thus the political, public institutions of their society as their agents.

⁹⁴ Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London, 1977) 151.

⁹⁵ These are to be found in chapters 14 and 15 of Thomas Hobbes, *Leviathan*; see Ian Shapiro (ed) *Leviathan* (Yale University Press, New Haven, CT, 2010). For discussion see David Dyzenhaus, 'Hobbes's Constitutional Theory', *ibid*, 453 and 'How Hobbes met the "Hobbes Challenge"' (2009) 72 *Modern Law Review* 3, 488–506.

But positivists then infer from the fact the fact that law is a human not a divine creation that law is no more than positive law and that legal order is no more than the conditions that have to be in place in order to make possible the production of positive law. The idea of the social contract gets reduced to the moment in which a concrete commitment is made to introduce a hierarchical distinction within the positive law of a legal order between the law of the written constitution and all other law. But, as Hobbes shows us, one can just as well and indeed better infer from the fact that law is a human creation that it will include principles of legality that condition the content of positive law in a way that explains why people would consent to be governed by law rather than by some other means.

Of course, there is some distance between the idea of consent to be governed by law and the idea of self-government, in which one consents to be governed only by law that is the product of institutions of representative government. But there is much to Jürgen Habermas's thought that the 'idea of the rule of law sets in motion a spiraling self-application of law, which is supposed to bring the internally unavoidable supposition of political autonomy to bear'.⁹⁶ That is, and contra Hobbes, there is a normative affinity between, on the one hand, the idea that all the individuals within a political order are themselves the authors of all the law the sovereign makes,⁹⁷ and, on the other, the political institutions of democracy, and, correspondingly, a tension between the former and the claim that monarchy is the best form of rule.⁹⁸

One can make the same point by using the terminology that Dworkin has developed for solving the mysteries of the 'communal' reading of democracy, a reading that, as I suggested, might otherwise make it seem as though he too subscribes to the idea of constituent power.

That is, the rule of law goes a long way to establishing one of the conditions presupposed in Dworkin's 'constitutional conception of democracy' – the idea of 'genuine membership in a moral community'.⁹⁹ For the rule of law signals to those subject to the law that they are promised the first condition of 'stake' – the requirement that political decisions must be consistent with equal respect for all – and so invites challenges in public forums to official decisions that seem to undermine equal respect. But with stake in place, one is also on the path to the other two conditions that

⁹⁶ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge, MA, 1996) 39.

⁹⁷ Hobbes (n 95) chap. 18, 108.

⁹⁸ It is worth noting that Schmitt was well aware of this kind of train of thought, as he blamed Hobbes for setting in motion the events that resulted in the establishment of liberal democracy – *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, translated by George Schwab (Greenwood Press, Westport, CT, 1996).

⁹⁹ Dworkin (n 63) 23–4, his emphasis.

Dworkin describes, ‘independence’ and ‘part’.¹⁰⁰ Indeed, there is a tight connection between stake and independence, which is secured by putting in place circumstances that encourage individuals to ‘arrive at beliefs ... through their own reflective and finally individual conviction’,¹⁰¹ since for an individual to make a legal challenge against public authority she must be capable of making a provisional judgment that the authority’s decision is inconsistent with equal respect. The connection between stake and ‘part’ – that each person must have a part in any collective decision – is, I think, less tight, since it requires a further independent argument to support the claim that the decision must not only be one that treats the individual with equal respect, but also is one that has its source ultimately in some law in whose making the individual could be said to have a part.¹⁰²

Put differently, stake and independence are brought into being when government is according to law or subject to the rule of law and they serve to explain why law has a basis to claim justified authority even if we think that more is needed to fully sustain that claim, for example, the conditions of political life that ensure part. Legal positivists might say that all three are important to legitimate any legal authority, but my claim is that the first two are not external criteria for testing the legitimacy of legal authority, but are intrinsic to legal order and thus constitutive of legal authority.

Moreover, that the rule of law in putting in place the condition of stake also puts a legal order on the *path* to securing the other two conditions indicates a better understanding of constitutionalism than the one Grimm, Schmitt and legal positivists share, namely, of constitutionalism as an ‘achievement’. Far better, I will now suggest, is a conception of constitutionalism as a project, and moreover, just one of the paths available for taking forward the overarching project of the rule of law.¹⁰³

Constitutionalism as project

Recall Grimm’s concern that the object of constitutionalism is disintegrating, namely, the absolutist state that concentrated ‘all prerogatives on a certain

¹⁰⁰ Dworkin (n 32) 25–6.

¹⁰¹ *Ibid.*

¹⁰² Consider, for example, that the category of legal subjects is much broader than the category of citizens, and that it is an assumption of the rule of law that general laws apply in the same way, with some clearly defined exceptions, to non-citizens as they do to citizens.

¹⁰³ For the idea of project, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006). For a recent discussion of the importance of not treating constitutionalism as something finished, as an achievement, see Christopher F. Zurn, ‘The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy’ (2010) 16 *Legal Theory* 3, 191–227.

territory in one hand'.¹⁰⁴ The disintegration is both internal, as private bodies take over public functions, and external, as states find themselves subordinated to international and transnational bodies. Thus the achievement of constitutionalism is under threat.

However, this diagnosis goes somewhat awry, in my view, because it reifies both the object of constitutionalism and the constitution itself. One reason is that the object of constitutionalism – a state in which all acts of public power are manifested in such a way that they are capable of being regulated by law – did not precede constitutionalism, but was the ideal to which constitutionalism aspired, as it had been for centuries before been the ideal of the rule of law. That ideal encounters at least three difficulties: identifying what is properly public and therefore subject to legal regulation; determining the content of the legal and what content is appropriate to different public regimes; finding appropriate institutional mechanisms for the enforcement of the content of legality. These difficulties manifest themselves differently as social and political conditions change and they present perennial problems for legal orders to attempt to solve. It is thus misleading to think either that there is an object that makes possible the achievement, or that there ever is a moment of achievement. Rather, one should think of things in terms of an unfinished and unfinishable project.

Another reason that the diagnosis goes awry is that it is too confident in its assumption that a written constitution marks a special advance in this project, let alone its achievement. The examples of the United Kingdom, Australia and New Zealand show that the jury must still be out on whether a written constitution enhances the extent to which public power is properly regulated by law, or, a rather different topic, whether the democratic ideal is better served by parliamentary supremacy or by entrenching a bill of rights. In other words, written constitutionalism is just one path a country might adopt in order to try to live up to either the ideal of the rule of law or the ideal of democratic self-government.

It seems to me then that the idea of constituent power is at best a distraction for legal theory, at worst, when it is deployed by the likes of Schmitt, subversive of the very ideals professed by those who invoke it to understand constitutionalism. Far more promising is an inquiry that seeks to understand law's authority as a matter internal to legal order, an inquiry on which positivists such as Kelsen and Hart make a start, but then find themselves unable to follow through because their theoretical commitment to understanding law as the fiat of positive law proves an insurmountable obstacle.

¹⁰⁴ Grimm, 'The Achievement of Constitutionalism' 11 (n 10).

In particular, this commitment gets in the way of a conception of authority as a reason-giving practice, one that was wonderfully described in a well-known essay on authority by Carl J Friedrich, in which, following Theodor Mommsen's analysis of the Roman root in the verb *augere* or 'to augment', he argues that the characteristic of authority is that it 'supplements a mere act of will by adding reasons to it'.¹⁰⁵ It is this view, says Friedrich, that leads to assigning judges 'such a central position in a legal system':

he, as a man 'learned in the law', is conceived as lending the statutory 'decisions' of an elected legislature an additional quality, by relating them to the basic principles of the law and thus making them authoritative. Only by fitting the willed statutory law into such a broader framework of 'reason' does it become fully right, that is to say, authoritative.¹⁰⁶

Friedrich takes as an example the parent-child relationship, which might seem counter-intuitive because, as he notes, it is a relationship initially of absolute power. But, he argues, the relationship becomes authoritative as children become capable of responding to reason, which leads him to the suggestion that the communications of an authority have to possess the 'potentiality of reasoned elaboration': they have to be "worthy of acceptance".¹⁰⁷

On this view, *de facto* power may become authoritative if it is exercised in a particular way, that is, by offering reasons of a certain sort to those who are subject to the authority. A practice of legal authority is one in which among the sources of reasons are: the public record of legal instruments, for example, statutes; a written constitution if there is one; regulations made by administrative bodies; the public record of the interpretation of these instruments, whether this be in the recorded judgments of a common law system or the academic treatises in a civil law system, or both; the record of comparative law and international law, where relevant; and the principles of the rule of law or legality.

That the legislature has decided X, or that this is the text of the constitution decided at the constitutional convention, are events that of

¹⁰⁵ Carl J Friedrich, 'Authority, Reason, and Discretion' in Friedrich (ed), *Authority, Nomos I* (Harvard University Press, Cambridge, MA, 1958) 28, 30.

¹⁰⁶ *Ibid.*, 31.

¹⁰⁷ *Ibid.*, 35, emphasis removed. The quote within the quote is from Morton White in a seminar both Friedrich and White attended. Note that in his most recent work, Dworkin relies on an example of a controversy within a family about the children's obligations in light of the family's history to support his one-structure account – Dworkin (n 90) 407–9. For a rich account of moral obligation in terms of authority relations, see Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press, Cambridge, MA, 2006).

course have a tremendous impact on the practice of reason-giving. But the fact remains that what was decided has to be presented to the legal subject as a justification acceptable to someone who is entitled to be treated with equal respect and is capable of making that judgment for herself, that is, as someone with both ‘stake’ and ‘independence’. That the person also has political rights guaranteed to her that give her the opportunity to participate in collective decision-making – Dworkin’s ‘part’ – supplies her with a further reason, but one that does not seem to me to be a reason internal to the practice of legal authority in the same way that stake and independence are. Since the requirements of the rule of law put in place the minimum conditions for stake, it is those requirements that form the unwritten constitutional morality of legal order.

The mistake, then, that the proponents of the idea of constituent power make is in supposing that fiat by itself supplies an authoritative reason. For any particular fiat, whether it is the decision about the content of a bill of rights, or the decision of a front-line administrative official, has to be justifiable to those subject to it in a way that fits appropriately within the general resources of reason available in the legal order, including the requirements of the rule of law or legality.

This mistake is similar to the one Dworkin alleged is made by political philosophers who rely on the idea of a hypothetical social contract. The theorists of constituent power hypothesize an event – a decision of ‘We, the people’ – when historical inspection will show that an alien power decided (as was the case in postwar Germany and Japan), or a back-room negotiation (as in South Africa), or an elite of politicians at a constitutional convention. Since the event as characterized never takes place, attention has to get displaced onto something else, either onto the content of the constitution, which then requires one to evaluate it by external standards of political morality, or onto the validity-producing mechanisms of the legal order, which are then said to be accepted by some significant group, whether legal officials or the population at large or both. In this process, as Schmitt frankly recognized, ‘We, the people’ is transformed into a perspective that is tantamount to acquiescence during normal times, and at most acclamation in times of exception. The people, as Schmitt said, can never decide; at most they can say ‘Yes’.¹⁰⁸ But then the collective person that says ‘Yes’ is an already constituted artificial entity.

Much work remains to be done by legal philosophers on the relationship between the rule of law and democracy and on the way in which constitutionalisation might assist or hinder the project of attempting to achieve the ideals of both the rule of law and the democracy. But within

¹⁰⁸ Schmitt (n 34) 131.

that field of inquiry, it is (or so I have argued) not productive to rely on the idea of constituent power. For if in order to understand law, including the role of written constitutions in legal order, we need to understand why a claim to authority is always also a claim to legitimate authority, legal theory has to engage with the question of what justifies the claim as a matter internal to law. It does not thereby follow that legal positivism is a spent line of inquiry within the field. However, legal positivists would have to give up what Dworkin calls the two-system picture of legal theory. They would then find that lifting the veil of positive law does not reveal the Gorgon head of power. Rather, what comes into view are principles of legality that condition the exercise of power, indeed, constitute power in such a way that it becomes authoritative.¹⁰⁹

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¹⁰⁹ See Dworkin (n 90) 409–10. I take a large part of Jeremy Waldron’s work on the rule of law over the last few years to be along these lines. See Jeremy Waldron, ‘The Concept and the Rule of Law’ (2008) 43 *Georgia Law Review* 1, 54–61 and ‘Can There Be a Democratic Jurisprudence?’ at <<http://ssrn.com/abstract=1280923>>.