On The Dispensability of The Concept of Constituent Power

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"God does not reveal himself *in* the world."

Ludwig Wittgenstein, *Tractatus*, 6.432

I. Introduction

The first sentence of the preamble of the Constitution of Japan of 1946 reads, "We, the Japanese people, acting through our duly elected representatives in the National Diet...do firmly establish this Constitution". With this declaration, the Japanese people seem actually to perform the establishment of their Constitution. In this regard, this first sentence of the preamble appears to be a 'performative utterance' in the Austinian sense.[1] The sentence implies that this declarative action of the people invests the Constitution with validity and legitimacy. If this understanding is correct, this first sentence leaves unanswered a couple of important questions. When did the Japanese people acquire their constituent power?[2] Can the Japanese people act only through their 'duly elected representatives', or can they act directly?[3] And were the Japanese people, their country occupied by the Allied Forces, living under appropriate conditions to exercise their constituent power when their constitution was established?[4]

In this paper, I argue that reducing the basis of the validity and legitimacy of a constitution to the question of competence, that is, to the question of constituent power, leads to a dead end.[5] Moreover, I argue that

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1. As Austin himself points out [John Langshaw Austin, *How to do Things with Words,* 2nd ed. (Oxford University Press, 1976), Lecture II], there must exist accepted conventional rules indicating how and by whom a speech act must be executed for the speech act to be properly performed. Since the making of a new constitution is a rare occurrence, such accepted conventional rules cannot be expected to emerge for new constitution-making to proceed properly in a given society.
2. Constituent power was regarded as residing with the Emperor under the former constitution of 1889.
3. Carl Schmitt, a German jurist, political theorist and Professor of Constitutional Law, asserts that the sovereign, constituent power cannot be represented.
4. The draft constitution that the government submitted to the National Diet in June 1946 drew heavily on the draft the occupying forces had prepared. For the process and justifiability of the making of the Constitution of 1946, see, for example, Yasuo Hasebe, 'The August Revolution Thesis and the Making of the Constitution of Japan', *Rechtstheorie*, Beiheft 17 (1997), pp. 335-342.
5. On the other hand, Carl Schmitt says that "[t]o answer questions of competence by referring to the material is to assume that one's audience is a fool", Carl Schmitt, *Political Theology*, trans. by George Schwab (University of Chicago Press, 2005), p. 33.

the validity and legitimacy of a constitution can be approached without recourse to the concept of constituent power. The concept may be dispensed with in constitutional law scholarship.

II. The People Present, not Represented

If we assume, for the sake of argument, that the first sentence of the Constitution of Japan is an Austinian performative utterance, then who precisely are the 'Japanese people' to whom it refers, and what kind of competence is their constituent power?

Carl Schmitt offers an answer to this question. Schmitt argues that "the constituent power is not bound by any legal formalities and procedures" and that "the same applies no less to the contents of its political decision". Though for Schmitt all the constituted powers are based on constituent power, "it is inconceivable that the constituent power organises itself in terms of the constitution".[6] As the bearer of the constituent power, "the people stand outside of and beyond any constitutional constraints".[7] Only through decisions by the constituent power does the constitution acquire validity and legitimacy.

As is well known, this Schmittian conception of constituent power derives from that of Emmanuel Sieyès. According to Sieyès, the constituent power of the nation "always remains in the state of nature", and "it is not, or cannot be bound by the constitution". For the will of the nation to be expressed, "it suffices that the nation just wills", irrespective of any formalities.[8]

In regard to the Schmittian conception of constituent power, Stephen Holmes offers the following criticism:

> "Like many less cynical theorists, he [Schmitt] subscribed to the myth of a fundamental opposition between constitutional limitations and democratic government: *"the entire effort of constitutionalism was aimed at repressing the political."* Because *das Volk* is the ultimate constituent power, he claims, it must be conceived as an unstructured *'Urgrund'* or even as *'das formlos Formende'*, which cannot be pre-committed by constitutional procedure. Schmitt's democratic mysticism, not to mention its practical consequences, suffices to discredit this entire approach. It is meaningless to speak about popular government apart

6. Carl Schmitt, *Verfassungslehre* (Duncker und Humblot, 1928), p. 79. The translation in the text is mine, though I have consulted Jeffrey Seitzer's translation, *Constitutional Theory* (Duke University Press, 2008).
7. *Id.* at 242.
8. Emmanuel Sieyès, *Qu'est-ce que le tiers état?* (Librairie Droz, 1970), pp. 182-83.

> from some sort of legal framework which enables the electorate to have a coherent will."[9]

Holmes here raises the practical consideration that for a people to organise a government through constitution-making, they need in advance a legal framework that enables them to express their will coherently. Absent such a framework, 'the people' are merely so many individuals. To express 'the people's will' requires rules to constitute 'the people' and to regulate how they express their will. This does not imply the obviously erroneous belief that the actions of a people unbound by any formalities cannot destroy an existing political regime. This has indeed occurred from time to time in revolutions. Holmes denies that the actions of a people unbound by any formalities can establish a new constitution. Even Sieyès argued that representatives of the nation would exercise constituent power in the process of making a new constitution.[10]

Nonetheless, Schmitt insists that since the people exists as a political unity with an unmediated self-identity and can act as such, the people need not and cannot be represented.[11] "Because only something that is not present can be represented, it is not possible that the people is represented", Schmitt argues. "Only the people who actually assembles is the people that produces the public by its presence. ... Only the people who actually assembles can execute what distinctively belongs to it; they can acclaim. ... At street demonstrations and public festivals, or in theatres and stadiums, this acclaiming people is present, and at least potentially, is a political entity."[12]

III. Are Corporations Real?

But can 'the people' be understood to exist in this way? In maintaining that they can, Schmitt commits the same fallacy as do the *realists* about corporations. According to the realists, a corporation is inherently equipped with its own personality, and leads its own life without being represented by any specific individuals. In this sense, a corporation is *real*, and the state cannot but affirm its real personality. The personality of a corporation is not

9. Stephen Holmes, *Passions and Constraint* (University of Chicago Press, 1995), p. 167.
10. Sieyès, *Qu'est-ce que le tiers état?, supra* n. 8 at 187. For Sieyès's distinction between the destructive stage and the constitutive stage of constitution-making, see Olivier Beaud, *La puissance de l'État* (Presses universitaires de France, 1994), pp. 224-33. Contrary to Hans Lindahl's observation ('Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, eds. Martin Loughlin and Neil Walker (Oxford University Press, 2007), p. 24, treason in itself is not a constituent act. It can merely be its preparatory stage.
11. Schmitt, *Verfassungslehre, supra* n. 6 at 205.
12. *Id.* at 243-44.

a fiction that the state confers upon it, nor is its personality created by law.

With this conception of the corporation, the realists deny Thomas Hobbes' classical theory of personality.[13] As Hobbes points out, the concept of *person* derives from that of the *persona* in drama. As a character is revealed when an actress performs in her persona, a human being carries somebody's personality by acting with the latter's persona:

> "And from the Stage, hath been translated to any Representer of speech and action as well in Tribunalls, as Theaters. So that a *Person*, is the same as that an *Actor* is, both on the Stage and in common Conversation; and to *Personate*, is to *Act*, or *Represent* himselfe, or an other; and he that acteth another, is said to beare his Person, or act in his name; and is called in diverse occasions, diversly; as a *Representer*, or *Representative*, a *Lieutenant*, a *Vicar*, an *Attorney*, a *Deputy*, a *Procurator*, an *Actor*, and the like."[14]

Hobbes identifies three categories in which personality functions.[15] In the first, a natural person may carry her own personality. When a human being leads an ordinary life, she still assumes a persona; what the persona represents is that human being herself.

In the second, she may stand proxy for someone else. In doing so, she adopts the persona of an author, and her actions are attributed to that author.

In the third category fall things that cannot be an author but which can be represented fictitiously. Irrational 'Children, Fooles, and Mad-men', or inanimate objects like corporations and property, may be such things. Such inanimate objects can be equipped with personality only by being represented by human beings. As Hobbes argues, "There are few things, that are incapable of being represented by Fiction" in this way. The reason that the 'multitude of men' can assume a unitary personality is also that it is represented by one man or one personality. The unity of the representative person realises the unity of the represented body.[16]

It should be noted that the membership of the representing organ of a corporation may be exactly the same as the membership of the corporation

13. My argument in this section draws heavily on David Runciman, *Pluralism and the Personality of the State* (Cambridge University Press, 1997), in particular, Ch. 11.
14. Thomas Hobbes, *Leviathan,* ed. Richard Tuck (Cambridge University Press, 1996), p. 112.
15. *Id.* at 112-13.
16. *Id.* at 114. See also David Runciman, 'What Kind of Person is Hobbes's State?: A Reply to Skinner', *Journal of Political Philosophy*, Vol. 8, pp. 268-78 (2000).

itself. A corporation may decide its will through a majority decision at an assembly of its entire membership. However, for the plenary assembly to express the will of the corporation, it must be authorised to do so, and the rules regulating its procedures and competence must be posited in advance, at least implicitly.[17] A body as an organ must be distinguished from a body as its author. Both Jean-Jacques Rousseau, in asserting that the sovereignty of the people cannot be represented,[18] and Schmitt, in asserting that the constituent power of the people cannot be represented,[19] fail to distinguish between the body represented and the body representing, both being composed of the same members. The people's assembly expressing the sovereign will still represents the sovereign people.

Some may object that Hobbes' analysis of personality is flawed. Realists like Otto von Gierke and Frederic W. Maitland, for instance, assert that a corporation can act without being represented by an organ whose competence is constituted and constrained in advance. In their view, the corporation is a *real* entity that can act by itself. The question must be raised, however, of whether this is genuinely the case. A natural person can act, deciding herself how to lead her life, and then leading it regardless of how her representative performs. Can a corporation do the same?

David Runciman points out[20] that if a corporation is endowed with its own life, and leads it independent of representation, it must be the case that the corporation can contradict what its representative organ decides, and can assert that the actions of its organ do not represent it. If I may return to the analogy of dramatic actors and characters, the realists are in effect arguing that a character can act on its own, without being played by an actor. One cannot but agree with Runciman that the realist argument is incoherent in this regard.[21]

IV. Is the Concept of Constituent Power Necessary?

If my analysis thus far is sound, what exists is not the mythical constituent power as *das formlos Formende* (formless former), but only that

17. These constitutive and regulative rules may not always be articulated in a clear legal text.
18. Jean-Jacques Rousseau, *Du contrat social*, L. 3, Ch. 15 (in *Œuvres politiques*, ed. Jean Roussel (Bordas, 1989), p. 321. According to Rousseau, the sovereignty of the people 'est la même, ou elle est autre ; il n'y a point de milieu' *(id).*
19. Schmitt, *Verfassungslehre*, *supra* n. 6 at 205 & 243.
20. Runciman, *Pluralism and the Personality of the State, supra* n. 13 at 242-43.
21. In other words, the corporation can contradict what its representative organ decides only through actions by its other representative organs.

competence which is bound and circumscribed beforehand.[22] This raises the question of why the concept of constituent power is necessary in the first place. Do we really need it?

One argument for its necessity runs as follows. Ordinarily, the question of why a positive law should be obeyed is answered in a technical way; that is, the positive law is posited within a competence duly authorised by a higher legal authority. Under challenge, this means legitimating a law leads upward, eventually reaching the highest norm of a given legal system, typically the constitution. Even if the chain of legitimacy is pursued to former constitutions, one eventually arrives at the historically first, original constitution. The legitimacy of this first constitution cannot be questioned; it is *original* only because we cannot question its legitimacy. If this first constitution were not legitimate, the legitimacy of the entire legal system would collapse.

As is well-known, in approaching this problem, Hans Kelsen argues that the descriptive science of positive law becomes possible only when the legitimacy of this first constitution is assumed.[23] To explain why people regard themselves as bound by positive laws requires one to reason that people presuppose that the historically first constitution must be obeyed. In his pure theory of law, Kelsen thus does not deal with the question of whether the first constitution is actually legitimate, but rather pushes it aside.

In contrast, Schmitt seems to argue in his theory that the legitimacy of the first constitution is based on the legitimacy of constituent power. Since it is constituent power, the source of all legitimate political power, that establishes the constitution, the validity of its fundamental decisions would appear to be beyond question. However, as I argue above, the people in whom constituent power resides is unable to enact a constitution as *das formlos Formende*. Without the legitimating effect of *das formlos Formende*, the significance of constituent power deflates dramatically. It must be noted that Schmitt himself offers no specific answer to the question of why we should obey fundamental decisions by the constituent power. He merely asserts, without explanation, that we must.

22. This is also the position taken by Raymond Carré de Malberg. See his *Contribution à la théorie générale de l'État*, tome 2 (Sirey, 1922), pp. 490-91. In his view, the creation of a state is not susceptible to legal analysis. Therefore, the only notion of constituent power that legal science can address is that of the power of amendment, authorized and constrained by the constitution (*id.* at 492-93).

23. Hans Kelsen, *What is Justice* (University of California Press, 1957), pp. 261-63; *Reine Rechtslehre*, 2nd ed. (Verlag Franz Deuticke, 1960), pp. 204-09; cf. Joseph Raz, 'The Purity of Pure Theory', in *Revue internationale de philosophie*, No. 138 (1981), p. 445. The presupposition in Kelsen that people should obey the historically first constitution is his hypothetical basic norm (*Grundnorm*).

If the concept of constituent power is to be employed in answering this question, the way to do so would seem to be that of Shirô Kiyomiya[24] and Nobuyoshi Ashibe[25] in post-World War II Japan. Their approaches presume a constituent power of which the competence is authorised and legitimated by extra-legal basic norms (*Grundnormen*) prescribing that human rights should be protected, world peace should be pursued, and democracy should be consolidated. Since the Constitution of Japan of 1946 in particular was established by a constituent power constrained and legitimated by these basic norms of 'universal political morality', it should be obeyed.

Even if this argument holds, however, constituent power is still dispensable, because the coherence of the constitution vis-à-vis the basic norms that presumably underlie the emasculated constituent power can be questioned directly. If all the legitimating force of the constituent power derives from, and all its works are done by, extra-legal 'universal political morality', the concept of constituent power is unnecessary and redundant.

A. Justifying force of consent

The objection might be raised that, at the very least, the constituent power of the people provides a binding force for an established constitution that is independent of the legitimacy of the political morality underlying the constituent power. That is to say, the people should obey their constitution because they themselves established and consented to it. Indeed, Schmitt's conception of the constituent power of the people may be understood in this way.

However, this line of argument is not as plausible as it at first appears. It may be the case that I should act as I consent to act, particularly in areas where the principle of autonomy typically applies. For example, if I agree to play tennis on a particular day, I should show up to play tennis on that day as I promised. But if such consent is the basis for obeying the constitution, then only those who actually participated in its enactment process should be constrained to obey it. Those who are too young to have participated would have no obligation to do so.

On the other hand, it may be argued that if those who did not participate in the enactment process were to deliberate rationally, they would

24. Kiyomiya Shiro, *Constitutional Law I (Kenpô I)*, 3rd ed. (Yuhikaku, 1979), pp. 33-35. One of the leading public law scholars of his day, Kiyomiya (1898-1989) taught constitutional law at Seoul Imperial University (1927-1941) and Tôhoku University (1941-1962).

25. Nobuyoshi Ashibe, *Constituent Power (Kenpô-Seitei-Kenryoku)* (University of Tokyo Press, 1983), Chs. 1 and 3. Ashibe (1923-1999) was Professor of Constitutional Law at the University of Tokyo (1963-1984). In his argument on the 'constrained conception of constituent power', Ashibe draws on post-World War II German doctrines such as those of Theodor Maunz and Ulrich Sheuner.

conclude that they should consent nonetheless to the current constitution, because their obeying the constitution would not only cohere with their long-term prudential interests but would also be the fairest course with regard to their fellow citizens. However, this conception of 'fictional consent' has no legitimating force whatsoever. According to this line of reasoning, the entire work of legitimating a constitution for non-participants in its enactment is done by the argument that 'their obeying the constitution would not only cohere with their long-term prudential interests but also be the fairest course with regard to their fellow citizens'. The phrase, 'they would conclude that they should consent nonetheless', can be deleted from the argument with no weakening of the argument for their being required to obey the constitution.[26] Ultimately, recourse must be made to some substantive morality, not to the fictional concept of consent.

It bears consideration, too, that consent at the stage of the establishment of a constitution is in actuality given by, at most, a majority of voters who actually participate in the constitution-making. Only those belonging to this winning majority genuinely consent. Members of the losing minority might argue that they do not have to obey the constitution because they did not consent to it. The argument that the losing minority have still accepted that they would consent to the result of the majority decision reduces to an argument based on a kind of fictional consent. The minority might at any time assert that they did not agree to obey the results of majority decisions. Moreover, the plausibility of the fictional consent argument depends on explaining why it is legitimate to require obedience to the results of majority decisions. Since those who are expected to obey the constitution are not limited to actual participants in the establishment procedure, the only explanation available is that majority decisions will, more often than not, bring about substantively fair and justifiable results for the society as a whole, including minority voices as well as future generations.[27] Hence, the real issue seems not to be whether people give their consent or not, but whether the contents of the constitution are justifiable or not.

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26. My argument here follows that of David Schmidtz in his discussion of hypothetical consent as justification of the State. See his 'Justifying the State', in *For and Against the State*, eds. John T. Sanders and Jan Narveson (Rowman & Littlefield, 1996), pp. 85-89.

27. Several kinds of argument have been offered to support this point. One of them makes use of the Condorcet's jury theorem to show that a majority decision, under some conditions, tends more often than not to reach objectively valid answers to questions of public interest. See Bernard Grofman & Scott Feld, 'Rousseau's General Will: A Condorcetian Perspective', *American Political Science Review*, Vol. 82, No. 2 (1988).

I should emphasize that I am not arguing here that it is inappropriate or unnecessary to organise referenda or to convene special parliaments in the event of establishing new constitutions. Such measures make constitutions more responsive to the current opinions and aspirations of societies, and insulate and immunise the constitution-making process from ordinary day-to-day political conflicts, to broaden consensus about the contents of constitutions. However, since such measures are required to make the contents of a constitution substantively better, describing them as invocations of constituent power does not contribute to a clear understanding of constitution-making.

B. Constituent power as implementing authority

Another argument for the necessity of the concept of constituent power runs as follows. Even if the basic norms of political morality to which, for example, Kiyomiya and Ashibe refer, have legitimacy sufficient to accord binding force to a constitution, such norms are too abstract to determine its concrete contents. That individuals should be respected, peace should be pursued, government should operate democratically, and basic rights should be guaranteed does not tell us whether parliament should be composed of one house or two, constitutional review of the judiciary should be instituted, or specific constitutional rights should be guaranteed.

To explain the relation between abstract moral principles and positive laws, John Finnis draws an analogy to constructing a house.[28] For the successful construction of a house, general concepts like 'window', 'door', 'door-knob', and 'wall' are not sufficient. A door is undoubtedly necessary, but to construct a house, knowledge of the size, material, colour, and position of the door must also be determined. The construction of a house is controlled but not fully determined by general concepts like door. An artificer must make a number of *determinatio,* in other words, specific decisions, to implement general concepts. Thus, with basic norms alone, a constitution is still underdetermined in the specific contents required in its claim for authority. Constituent power is needed to make specific decisions to implement the basic norms.

The ground of authority for a constitution in this argument is little different from that of the authority of law in general. According to 'the normal justification thesis' formulated by Joseph Raz, in the function of authority, "the alleged subject is likely better to comply with reasons which apply to

28. John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), pp. 284-85; cf. Gerald Postema, *Bentham and the Common Law Tradition* (Clarendon Press, 1986), p. 43.

him if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly."[29] Similarly, the law has authority over people because people are likely to comply better with reasons which apply to them if they accept the directive of the law as authoritatively binding and try to follow it, rather than by trying to follow the reasons which apply to them directly. Raz argues that this thesis typically applies where the government "solve[s] co-ordination problems and extricate[s] the population from prisoner's-dilemma type situation[s]",[30] and provides various public goods such as a minimal level of social welfare, public education, and national defence, which are unlikely to be provided properly if left to individual initiative.

Similarly, the constitution can justifiably claim authority when it successfully guides and co-ordinates social interactions, which it can do only when it is equipped with specific contents. Constituent power is thus necessary to the specification of the abstract principles of political morality prescribed by basic norms.

This brings us to the argument as regards the self-validation of Constitutions. It is questionable, however, whether constituent power is necessary to realise social co-ordination. All that seems strictly necessary is a functioning constitution, the contents of which are specific enough to co-ordinate social interactions within the boundaries of the moral requirements of basic norms. If a functioning constitution actually exists, it accomplishes the co-ordination of people's social interactions. In this respect as well, the concept of constituent power seems redundant.

Raz maintains that a constitution is valid by virtue of the fact that it *is* there within the boundaries set by moral principles: "Constitutions are valid just because they are there, enshrined in the practices of their countries."[31] The constitution is self-validating in this sense; according to Raz, "there is no need to worry as to the source of their authority ... The constitution of a country is a legitimate constitution because it is the constitution it has."[32]

29. Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986), p. 53.
30. *Id.* at 56. See also Andrei Marmor, *Interpretation and Legal Theory*, 2nd ed. (Hart, 2005), pp. 134-35.
31. Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', in *Constitutionalism*, ed. Larry Alexander (Cambridge University Press, 1998), p. 198.
32. *Id.*

Obviously, the constitution that Raz says is self-validating is not necessarily one that conforms to the literal meaning of a constitutional code, but rather is one that is actually practiced and guides people's courses of action.[33] In this sense as well, the legitimating force of constituent power, the function of which is to enact a constitutional code, is questionable. Even if a functioning constitution conforms strictly to the literal meaning of a constitutional code, what matters is that it actually functions, not that it conforms to the code. A constitutional code that is not obeyed does not function as a constitution. It is of no relevance to ask whether it is legitimate or not. Such a code is irrelevant.

C. Limits of Constitutional Amendment

As my argument thus far has shown, the concept of constituent power plays no role in the answer to the question of why people should obey a constitution. In this sense, the concept is dispensable. However, the objection might still be raised that the concept is needed to define the limits of constitutional amendment.[34] It is not, as I shall briefly explain.

First, if the so-called limits of amendment are the principles of political morality that constrain the range of possible constitutional provisions, the principles can be addressed directly. There is no need to approach them indirectly through recourse to the concept of constituent power.

Second, if the so-called limits are the Schmittian fundamental decisions of constituent power, it must be borne in mind that, as argued above, Schmitt himself does not explain why decisions of constituent power should be respected. Moreover, it is not clear why such decisions can be understood to function as the limits of constitutional amendment.

This is not to argue that there are no limits of constitutional amendment. However, such limits exist only as Hartian practical custom. As the ultimate rule of recognition exists only as a cluster of practices of the public officials in charge of applying and interpreting valid positive laws,[35] the limits of constitutional amendment exist only as a practical custom followed by those who are in charge of the amendment process. The concept of constituent power is unnecessary to explain the existence of such limits. Whether or not such limits are justifiable can only be determined by substantive considerations of political morality, not by the maker of the decision.

33. *Id.* at 174-75.

34. The argument is sometimes raised that whether or not limits of constitutional amendment exist depends upon whether or not one presupposes the existence of constituent power. Apparently Ashibe subscribes to this argument. See Nobuyoshi Ashibe, *Constituent Power,* above note 25, Ch. 3. However, as I show in this section, this argument is without foundation.

35. Herbert Lionel Adolphus Hart, *The Concept of Law,* 2nd ed. (Clarendon Press, 1994), Ch. VI.

V. The Incompatibility of Constitutionalism and the Concept of Constituent Power

At this point in my argument, the reader may question the depth of my engagement with Schmitt's mythical conception of constituent power. According to Schmitt, "the concrete existence of the politically unified people is prior to any norm"[36], and "[t]he constituent power will never be used up and eliminated once it is exercised. ...This political will remains alongside and above the constitution".[37] Surely, any refutation of Schmitt's conception must take the potential of his theory seriously.

I have argued that it is difficult to accept Schmitt's theory on constituent power as a coherent legal argumentation; the validity and legitimacy of a constitution can be supported without recourse to this mythical concept. For the sake of argument, however, let us suppose that we accept Schmitt's theory as healthy and sound. Let us then imagine how the people of a given regime, as bearers of unconstrained original power, co-exist alongside and above the constitution.

In such a regime, a constitution as usually conceived cannot exist. Should a constitutional code exist, the sovereign people could at any time, by resorting to their original, unbound power, fundamentally rewrite or discard the code legitimately. In other words, only constituent power can exist; there can be no constitution which constrains the competence of state organs. It would make little sense to call the power of the people in such a regime 'constitution-making' power.

That 'regime changes' sometimes occur cannot be denied. But recourse to the concept of constituent power sheds little light upon such changes. Rather, the occurrence of such changes is better explained in terms of political science and history.[38] The question of whether such changes are justifiable must be answered in light of political morality. It is of no use to approach such questions through pseudo-legal science.

Hans Kelsen points out that even if the preamble of a constitution declares, 'we, the people' establish this constitution, 'the people—from whom the constitution claims its origin—comes to legal existence first through the constitution. It can therefore be only in a political, not in a juristic sense that

36. Schmitt, *Verfassungslehre*, *supra* n. 6 at 121.
37. *Id.* at 77.
38. See, for example, Philip Bobbitt's analysis of the interrelationship of the dominant strategies and constitutions of pivotal states in various periods of history in *The Shield of Achilles: War, Peace, and the Course of History* (Anchor Books, 2002).

the people is the source of the constitution'.[39] The 'political' in this sentence is used in a pejorative sense; Kelsen says, we should not take such a declaration too seriously.[40]

In contrast, Schmitt comments suggestively, "All significant concepts of the modern theory of the state are secularised theological concepts".[41] The concept of constituent power is analogous to that of a theistic god, which is posited to explain the existence of the world. As proof of the existence of this world through recourse to a creator god cannot be coherent–since the creator god must exist prior to the creation of the world, it is questionable how such pre-existence before and beyond the world can be 'existence' at all–the concept of constituent power cannot provide any coherent explanation for the validity and legitimacy of constitutions. Not only is the concept irrelevant to the original questions, it raises its own questions that are far more difficult to answer, such as, what is constituent power, finally? And on what grounds can it claim its unbound authority? [42]

In this paper, I have thus tried to show that this mythical concept is dispensable. Without recourse to it, constitutional scholarship can approach the validity and legitimacy of a constitution. All that is necessary is a functioning constitution, which is self-validating.

39. Hans Kelsen, *General Theory of Law and State,* trans. by Anders Wedberg (Harvard University Press, 1945), p. 261.
40. Compare Lindahl, *supra* n. 10, at 10-17. While Lindahl suggests that Kelsen's move may expose him to '[John] Searle's objection: the self of self-rule refers to a 'We', which is irreducible to an 'I' or an aggregation of 'I's', Kelsen would retort that there is no need to 'explain the first-person plural stance of a 'We' as a unity in constituent action' (*id.* at 14). As Lindahl himself indicates later (*id.* at 19-20), in Kelsen's theory, this 'We' can be explained only retroactively from within the established legal system; Kelsen would insist that it is not necessary or appropriate to describe his point in terms of constituent power.
41. Schmitt, *Political Theology*, *supra* n. 5, at 36. The original phrase translated as 'all significant concepts' is *alle prägnanten Begriffe.*
42. I do not deny that the concept of constituent power might bring about psychological effects giving a constitution a grandiose aura. But such effects are to be analysed by socio-psychologists, not by constitutional scholars.