



Translating popular sovereignty as unfettered constitutional amendability

Title	Translating popular sovereignty as unfettered constitutional amendability
Author(s)	Daly, Eoin
Publication Date	2019-12-03
Publisher	Cambridge University Press
Repository DOI	10.1017/S1574019619000415

Translating popular sovereignty as unfettered constitutional amendability

Eoin Daly

National University of Ireland, Galway

Abstract

Popular sovereignty translated as unfettered constitutional-amendment power— weakness of constituent power as justification for unfettered amendability – alternative concept of sovereignty as unaccountability of constituted power – popular sovereignty as unaccountability of the referendum verdict – sovereignty emerging at end-point, not inception of constitutional-amendment process.

Keywords: popular sovereignty, constitutional amendment, referendums.

Introduction

There is a recent global trend towards limiting the scope of constitutional amendment – whether by explicit textual limits or through judicial interventions to protect constitutional identity’ the ‘basic structure’ and so forth.¹ And while the concept of unamendability is defended with reference to various ideas of human rights, counter-majoritarian stability and so on, in this paper I am concerned, rather, with the lesser-explored justification of the opposite, outlier position – the principle of unfettered constitutional amendability. And specifically, I will consider how the political theory of popular sovereignty has been translated (or mistranslated) within judicial doctrines of unfettered constitutional amendability.

The standard rationale for unfettered amendability typically assumes that the constitutional-amendment process is an expression par excellence of sovereignty, and that the constitutional-amendment *referendum* is an expression par excellence of *popular* sovereignty. In most instances, the constitutional-amendment referendum is understood as a sovereign – and therefore, as a substantively unfettered mechanism – because it is interpreted as a process through which the people *authors* or *creates* constitutional norms, imposing its will over and above the organs of state in the form of fundamental law. That is to say, most doctrines of unfettered amendability rely on some version of the theory of *constituent power* – ostensibly a repurposed form of popular sovereignty – according to which the people exercises an originitive and extralegal power to create and remake a constitution.

However, I argue, on the one hand, that theories of constituent power offer an implausible justification for unfettered constitutional amendability, because they exaggerate the level of popular empowerment that constitutional referendums – or indeed voting exercises of any kind – can offer. In the constitutional-referendum context, the people acts not as a constitutional author and creator – as somehow freestanding and spontaneous – but rather, in a negative or reactive role, as check or control on the

¹ For an overview see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017), Part I.

powers of representative organs.² The people, in this setting, is better viewed as a *constituted* component of a ‘mixed constitution’ rather than as an ethereal, extralegal agent.

Nonetheless, I will argue, doctrines of unfettered unamendability find some support in older, lesser-theorised concepts of ‘sovereignty’, which reside in *constituted* rather than *constituent* power. In fact, it is only once we understand the ‘people’ more modestly, as a *constituted* power, that its ‘sovereign’ claims become more plausible. Popular sovereignty, in this sense, refers to decisional finality and unaccountability, rather than in the more mythological terms of authorial or originative power. The idea of the ‘sovereign’ people as claiming unlimited power of constitutional amendment makes more sense, then, once we abandon certain distorting mythologies of constituent power.

I will begin, in the first section, by describing how popular sovereignty has been invoked to justify as a principle of unfettered constitutional amendability in the jurisprudence of constitutional-amendment referendums, focusing on France and Ireland as examples of jurisdictions where such referendums have been understood as ‘sovereign’ or ‘constituent’ exercises. In the second section, I will argue that theories of constituent power offer an implausible explanation for the ‘sovereign’ character of the constitutional referendum, given how popular power is pre-constituted and constrained within the constitutional-amendment process. In the third section, nonetheless, I will argue that the principle of unamendability can more coherently be understood with reference to an alternative historical understanding of sovereignty as being defined by the finality and the *unaccountability* of a constituted power – and that moreover, this can be distinguished from political ‘command’ or supremacy as such. Accordingly, I will argue that the focal point of sovereignty lies not at the inception, but at the end point of constitutional change.

I. The jurisprudence of unfettered constitutional amendability

In constitutions where the scope of amendability is left unclear – that is to say, where there are no explicit limitations on amendment – the issue is typically left to judicial determination, based usually on various normative and prudential desiderata that are often linked to theoretical questions of sovereignty and constituent power. On the one hand, limits to amendability are often inferred based typically on a concern to protect ‘constitutional identity’, the ‘basic structure’, human rights, or various fundamentals of whatever kind.³ Crucially, however, limits on amendability also tend to be justified by denying the amendment power itself any ‘sovereign’ or ‘constituent’ status. Thus the constitutional-amendment power can be limited, in this view, because it is deemed either a form of derived or secondary constituent power, and thus subordinate to the primary or originative constituent power, or alternatively as a form of constituted power – and therefore, similarly, as inferior to the status of the genuine constituent power.⁴ Indeed Maria Cahill argues that for a peculiar strand of French constitutional thought, limits on the scope of amendment power are themselves *necessary* in order to protect the primacy of the primary or originative constituent power.⁵

² On the complex relationship between the people as ‘constituent’ power and the constituted organs of government, see generally Andreas Auer, ‘Editorial – The people have spoken: abide? A critical view of the EU’s dramatic referendum (in)experience’ (2016) 12 *European Constitutional Law Review* 397, 402; Yaniv Roznai, ‘The Newest-Oldest Separation of Powers’, (2018), 14(2) *European Constitutional Law Review* 430-441.

³ See generally Roznai (n 1), Chapter 2.

⁴ Roznai (n 1), Chapters 4-6.

⁵ These theorists, according to Cahill, ‘emphasised a close link between constituent power and limits on the power of amendment.’ Thus ‘since the Constitution prescribes the procedure that must be used to amend the Constitution, including limits on the power of amendment, failure to respect the limits on constitutional amendment not only compromises the values enshrined by those limits, but also constitutes

Conversely, then, doctrines of unfettered constitutional amendability may be justified by recognising the constitutional-amendment power as itself being either a ‘sovereign’ or ‘constituent’ power,⁶ and thus as being incapable of judicial constraint. In particular, the amendment-process, where effectuated via referendum or plebiscite, may itself be understood as an expression of popular sovereignty.⁷ In this understanding, constitutional amendment, as much as constitutional creation, is an expression of popular sovereignty, and sovereignty implies an absence of oversight or restraint that is inconsistent with any power of judicial review over proposed amendments.⁸ Critically, then, doctrines of unfettered amendability will typically reject any strong normative hierarchy between extra-legal or revolutionary constitutional change on the one hand, and the pre-constituted, procedural power of constitutional amendment on the other.

I will focus here on two European jurisdictions where such doctrines have arisen – France and Ireland. In both jurisdictions, the rejection of limits on amendability implicitly eschews any strong distinction, of the kind noted above, between the normative status of the amendment power and that of the original power of constitutional authorship. Both powers are “sovereign”, and by necessity unfettered. Both jurisdictions, then, essentially reject the idea that the creative power of the people can be domesticated or constrained (at least substantively) *within* the functioning of the Constitution, post-enactment. This is arguably one version of a theory of “open” constituent power. Each jurisdiction implicitly rejects any dualism of ‘original’ versus ‘derived’ constituent power of the kind earlier described,⁹ of the kind which is used to justify limits on amendment power based on the supposedly special status of an originative act of constitutional creation.

France

In France, Article 89 of the 1958 Constitution ostensibly introduces a limit on amendability in affirming that ‘the republican form of Government cannot be the subject of an amendment.’ However, the *Conseil Constitutionnel* has declined to enforce any such limit on amendability, referring specifically to the overarching normative authority of the people within the amendment process.

In 1962, President de Gaulle attempted to amend the Constitution by invoking Article 11 of the Constitution, which permitted referendums on the ‘organisation of public power’, thus bypassing the parliamentary amendment-mechanism specified in Article 89. Most scholars considered this as procedurally invalid given that constitutional amendment appeared to fall outside the remit of Article 11. However, the *Conseil* ruled a challenge inadmissible.¹⁰ On a procedural point, the *Conseil* held it had no competence to rule on constitutional amendments effectuated by the people as distinct from parliamentary legislation. However, it also referred to the ‘sovereign’ status of the

a failure to respect the constituent power which adopted those provisions.’ Maria Cahill. ‘Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power’ (2016) 75 *Cambridge Law Journal* 245, 248.

⁶ Of course, there may be other, typically prudential reasons for rejecting a judicially enforceable limit on constitutional amendability. Most obviously, there will likely be intractable disagreement as to what ‘fundamental’ principles should be designated as immutable, and concerns over the empowerment of judges to interpret any such vague provisions.

⁷ See Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press, 2016), 249.

⁸ See further in Part III.

⁹ See generally Roznai (n 1).

¹⁰ Decision 62-20 of 6 November, 1962

popular vote: it described the referendum as ‘a direct expression of national sovereignty.’¹¹

This rather terse ruling left unsettled the question of whether the ‘sovereignty’ of the people was to be expressed purely procedurally, through the process of constitutional amendment and indeed of voting in general, or whether alternatively, it was encapsulated in certain substantive constitutional principles which themselves were therefore incapable of revision. In other words, it had yet to consider whether the ‘sovereign’ power of constitutional amendment was by its nature self-limiting.

These weightier questions were addressed in the 1992 ruling of *Maastricht II*.¹² The *Conseil* rejected the argument that the amendment permitting the Maastricht Treaty had undermined the essential conditions for the exercise of sovereignty. Moreover, echoing the 1962 ruling, the *Conseil* held, tersely: ‘the constituent power is sovereign’ – thus emphasizing the procedural rather than substantive constitutional expression of sovereignty. It also conflated the concepts of sovereignty and constituent power, identifying constituent power in the act of constitutional amendment as well as that of constitutional creation. More importantly, however, it went on to reject any understanding of sovereignty as being encapsulated in specific substantive provisions or principles, again identifying sovereign power purely with the *process* of amendment, which, on this logic, is substantively unfettered. The ‘constituent power,’ it said, is free ‘to repeal, amend or amplify provisions of constitutional status in such form it sees fit [and] that there is accordingly no objection to the insertion in the Constitution of new provisions which derogate from a constitutional rule or principle.’¹³ Notably, however, it also said that this was subject to ‘limitations relating to periods during which amendments cannot be engaged or pursued [and] to the requirement of respecting the prescriptions of Article 89 ...’¹⁴ Ostensibly at least, this seemed to modify the earlier stance which eschewed any restrictions on the *form* of amendment adopted by the constituent power via referendum, in a sense *reconstituting* or proceduralising the ‘constituent’ power of amendment.

This stance was elaborated upon in a third ruling concerning a 2003 amendment providing for the decentralized organization of the Republic.¹⁵ The *Conseil* simply reiterated its lack of competence to decide on the validity of constitutional amendments as distinct from parliamentary legislation. In this light, it is worth emphasizing that the jurisprudence of the *Conseil* is, in some senses, not concerned with the idea of unamendability *as such* – as it effectively recognizes the sacrosanct status of the republican principle – rather, its emphasis is primarily on the substantive justiciability of constitutional amendments, based on the technical distinction between amendments and parliamentary laws.

In summary, then, French constitutional doctrine has rejected any concept of constitutional unamendability specifically by referring to the status of the people, within the amendment process, interchangeably as a ‘sovereign’ and ‘constituent’ power.¹⁶ What is perhaps most significant is that, at least in one ruling, unfettered amendability applies partly to the procedure as well as the substance of amendment, implicitly, perhaps, because of an understanding that the constituent power may act extra-legally.

¹¹ *ibid*, para 2

¹² Decision 92– 312 of 2 September 1992,

¹³ *ibid*

¹⁴ *ibid*

¹⁵ Decision 2003-469, 26 March 2003.

¹⁶ As Albert, Nakashidze and Olcay put it, “the court equates the constitutional amendment power to constituent power, and interprets constitutional amendments as direct expressions of popular sovereignty.” Richard Albert, Malkhaz Nakashidze and Tarik Olcay, ‘The Formalist Resistance to Unconstitutional Constitutional Amendments’ (2019) 70 *Hastings Law Journal* 639, 664.

Ireland

Unusually in European terms, the Constitution of Ireland (1937) declares that ‘any provision’ may be amended through a referendum initiated by parliament.¹⁷ The question of immutable principles, as distinct from unamendable articles, is left unclear, although there is a good deal of reference to ‘natural rights’ and even to principles that are ‘antecedent and superior to positive law’.¹⁸ However, despite such apparent textual scope for a theory of unamendability, the Irish Supreme Court has repeatedly invoked the sovereignty of the people in rejecting the existence of any substantive limits on the amendment power.¹⁹ This is grounded partly on what is ostensibly a rather unremarkable assertion of popular sovereignty in Article 6, which states:

‘All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.’

The Supreme Court has consistently understood constitutional-amendment referendums as the expression *par excellence* of popular sovereignty, and in turn, has understood the sovereignty principle as precluding any substantive constraints on the people’s power of amendment.²⁰ The Court invoked popular sovereignty in dismissing diverse arguments as to the supposed immutability of various fundamental principles, particularly precepts of natural law. In *Finn v Attorney General*,²¹ the Supreme Court held that ‘the people *intended to give themselves full power to amend any provision of the Constitution*’²² (a formulation which, incidentally, leaves open the possibility of a distinction between primary and derived constituent powers, with both substantively unfettered). In *Slattery v An Taoiseach*, similarly, the court asserted clearly that ‘a proposal to amend the Constitution *cannot per se be unconstitutional*.’²³

Some of these judgments pitted the sovereign people against ‘natural law’, which had previously been acknowledged as the philosophical cornerstone of the constitutional order.²⁴ In *Riordan v An Taoiseach (No.1)*,²⁵ the Supreme Court rejected the argument that the fifteenth amendment, permitting divorce, had violated implicitly immutable principles relating to the status of the family. Barrington J insisted: ‘there can be no question of a constitutional amendment properly before the people and approved by them *being itself unconstitutional*.’²⁶

¹⁷ Article 46, Constitution of 1937.

¹⁸ See e.g. Article 41.1.°

¹⁹ See further Aileen Kavanagh, ‘Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic’ in Eoin Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional, 2012).

²⁰ In *Byrne v Ireland*, the Supreme Court asserted: ‘the State is the creation of the people and is to be governed in accordance with the provisions of the Constitution which was enacted by the people *and which can be amended by the people only* [as] *the sovereign authority*.’ [1972] IR 241, 262, emphasis added

²¹ [1983] IR 154.

²² [1983] IR 154, 163, emphasis added.

²³ [1993] 1 IR 286

²⁴ See e.g. *McGee v Attorney General* [1972] IR 264.

²⁵ [1999] 4 IR 321

²⁶ [1999] 4 IR 321, 330

While this permissive approach seemed to contradict the previous understanding of natural law as an overarching constraint on political power, this apparent paradox was conclusively addressed in the *Abortion Information* reference in 1995. The Court definitively rejected the idea that the amendment power could be judicially limited based on principles of natural law. It had been argued that the fourteenth amendment of the Constitution, permitting the dissemination of abortion information, was invalid because inconsistent with the natural right to life of the ‘unborn’. However the Court affirmed that: ‘the Constitution ... is the fundamental and supreme law of the State representing ... the will of the People’.²⁷

There are some important differences in the French and Irish doctrines; most notably, the concept of constituent power, which is historically important in French juristic thought, is effectively absent in the Irish discourse. Equally, the French doctrine hints, at least, at the possibility of extra-legal expressions of the constituent power – as in the 1962 scenario – whereas the Irish judgments strongly emphasize the highly proceduralised, constituted character of the sovereign power.

On the other hand, however, an important commonality is that both essentially reject the authority of a fossilized, ‘past’ people over the present one. The French doctrine is a little more ambivalent in this respect: jurists commonly distinguish primary and derivative constituent power, and the jurisprudence admits to a principle of non-amendability in principle, declining challenges, instead, based on issues of competence and justiciability. Yet it also refers to the ‘sovereign’ character of the constituent power in the process of constitutional amendment as much as constitutional creation, and so, like the Irish doctrine, *temporalises* the ‘people’ (or ‘nation’) that is assigned the sovereign power.²⁸ Effectively, this rejects the theory whereby the constituent power of a past people constrains the amendment powers of the present one. One way of framing this is to understand the *original* constituent power not as dormant but as continually ‘live’, and that it is free to undertake unlimited constitutional revision *both* through extralegal or revolutionary acts on the one hand, but also through the ordinary revision process on the other.²⁹ On the one hand, the attribution of something akin to *constituent* power to the people *within* the constitutional-amendment context seems inconsistent with the extra-legal, originative or extraordinary character of constituent power. Where the people acts in this capacity, its authority is not originative but rather is derived from previously existing legal rules. Yet it is sometimes pointed out that nothing should prevent the constituent power from acting, if it chooses, through already-constituted processes. Through the constituted, formalised amendment process, the people simply becomes a ‘domesticated version’ of the constituent power.³⁰ It seems ‘the sovereign moves uneasily inside and outside the Constitution’, assuming a more-or-less institutionalized form depending on circumstance.³¹

²⁷ *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 I.R. 1.

²⁸ By contrast, Barshack describes an alternative concept of ‘transcendent’ sovereignty which is temporally ‘open’ and extends to ‘ancestors and offspring – a concept which, he suggests, serves to ‘safeguard human life’ from the ‘sovereign power over life and death.’ See Lior Barshack, ‘Time and the Constitution’ (2009) 7 *International Journal of Constitutional Law* 553.

²⁹ As Roznai phrases this argument, ‘even though the [primary constituent power] may be ‘lawless’, it may choose so to speak, to be exercised within the constitutional framework.’ Yaniv Roznai, ‘Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures’ in Richard Albert, Xenophon Contiades and Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart, 2017), 36. See also Mark Tushnet, ‘Comment on Doyle’s Constraints on Constitutional Amendment Powers’, in Albert et al, *ibid*.

³⁰ Cahill (n 5), 251

³¹ See Thomaz Pereira, ‘Constituting the Amendment Power: A Framework for Comparative Amendment Law’ in Albert et al (n 29).

In summary, then, both the Irish and French doctrines, then, reject an alternative account, discussed earlier, according to which constituent power is instantiated and embodied in the substantive principles originally enacted at some past point, and whose authority is projected forwards temporally until some unspecified revolutionary juncture. Rather, ‘sovereign’ constituent power lies purely in the power of revision itself, which is conceptually indistinct from the original act of creation (although this is less clear in the French theories).

II. Sovereignty and constituent power in constitutional referendums

Notwithstanding the anomalies and inconsistencies of the judicial doctrines outlined, a consistent idea is that the people’s amendment power is unfettered because the amendment-process itself is understood as an exercise of *sovereignty*. But what features of the amendment power – and specifically, of constitutional amendment *referendums* – serve to realise ‘sovereignty’? This seems difficult in many respects, not least, as already noted, because of the apparently derivative or pre-constituted nature of constitutional-amendment powers that seems inconsistent with an idea of sovereignty as being itself originative or supreme.

Typically, constitutional referendums are understood as realizing popular sovereignty because they grant the people a power of *authorship* or *creation* with respect to constitutional content. Thus, constitutional referendums are understood as a ‘sovereign’ exercise because they are understood as a mechanism of *constituent power*. This understanding is ostensibly present in the judicial doctrines outlined; the referendum is a ‘sovereign’ act because it renders constitutional law in accordance with ‘the will of the People’, giving the people an authorial role with respect to constitutional law. And, indeed, this arguably accords with what Tuck identifies as an historical adaptation of the idea of sovereignty to the circumstances of mass society, whereby for Rousseau, in particular, ‘sovereignty’ entails no claim to command, in the Hobbesian sense – or even to govern, as such – but rather to *authorize* government and constitute the state by the enactment and revision of fundamental laws. The people, in this adjusted Rousseauian sense, is a constitutional legislator, and thus bears a form of constituent power in this capacity.³² In Kalyvas’ words, the role of the sovereign as this ‘founding legislator’, is ‘not to exercise power, but to design the higher legal norms and procedural rules that will regulate this exercise of power.’ Sovereignty, in this sense, is framed ‘not as the ultimate coercive power of command’, but rather instead as ‘the power to found, to posit, to constitute.’³³ Thus the domain of sovereignty was thus paired back to the domain of constitutional inception and change, rather than to governance as such – and while in France this began with the revolution, it was consolidated with the rise of liberalism under various 19th century regimes.³⁴ As Laferrière put it in the 19th century, constituent power is a ‘relative and temporary’ form of sovereignty that entails a power to ‘create forms, authorities, institutions.’³⁵

³² See also Joel Colón-Ríos, ‘Rousseau, Theorist of Constituent Power’ (2016) 36 *Oxford Journal of Legal Studies* 885.

³³ Andreas Kalyvas, ‘Popular sovereignty, democracy and the constituent power’ (2005) 12 *Constellations* 223, 225

³⁴ In the Second Republic, for example, constituent power became ‘the main conceptual tool through which to conceive and implement the very idea of popular sovereignty.’ Lucia Rubinelli, ‘Constituent power in nineteenth-century French political thought’ (2018) 44 *History of European Ideas* 60.

³⁵ Quoted in Lucia Rubinelli, ‘How to think beyond sovereignty: On Sieyès and constituent power’ (2019) 18 *European Journal of Political Theory* 47.

However, this idea of the constitutional-amendment referendum as an exercise of ‘constituent’ power – or at least, specifically, that it gives the people authorial or creative power with respect to constitutional law – is implausible in several respects. Most obviously, perhaps, it overlooks the degree to which popular power is constrained or pre-constituted within the constitutional-referendum process;³⁶ **it elides, in particular, the necessary existence of an antecedent and genuinely ‘constituent’ step in which a prior compact or decision renders the majority of the voting people authoritative with respect to the corporate ‘people’ considered as a whole.**

The idea that a singular agent called the ‘people’ creates, authors or enacts a constitution is a consistent theme running through the political theory of constituent power, spanning Schmitt, Arendt, and to some degree, Sièyes.³⁷ In turn, this understanding has been absorbed, more or less, by judicial doctrines that frame the people as the ultimate authors or creators of the constitution – a status that is thought to be realized as much in the process of constitutional amendment as in the original act of constitutional creation itself.

Yet this ubiquitous idea has an air of unreality, to say the least. It is empirically and sociologically unfounded. It attributes implausible coherence, intentionality and indeed unity to an entity that is diffuse and uncoordinated by its nature.³⁸ In reality, of course, constitutions are authored and created by lawyers, civil servants and politicians, under the influence of diverse factors and contingencies.³⁹ Thus for Michelman, an authorial view of constitutional origins is ‘the sheerest banality, a view as simplistic as it is inevitable, a commonplace vernacular notion that cannot withstand critical examination.’⁴⁰ Even Rousseau arguably envisages the people only as *approving* constitutional laws drafted by others, rather than literally originating or authoring them.⁴¹ The ‘people’, insofar as it exists as such, may have approved or selected some of these architects or framers, and/or approved the subsequent text by a majority – **in an exercise whose deliberative qualities are questionable or variable, to say the least.**⁴² But neither of these roles meaningfully amounts to an act of creation or authorship, at least of the kind the people is usually ascribed. While this much seems self-evident, its significance is routinely elided in constitutional thought.

Why, then, is constitutional theory so eager to recognize the existence of such a power – to indulge itself, so to speak, in this particularly egregious fiction? Arguably, the best explanation is that, historically, the idea originates as a technique of legitimation in real politics – as a way, discursively and rhetorically, of rationalizing a given kind of

³⁶ Indeed it is also constrained and structured within the constitution-making process; on this point see Andrew Arato, *Post-sovereign Constitution Making* (Oxford: Oxford University Press, 2016).

³⁷ Ackerman argues that a popular will can emerge through the sustained acts of a ‘mobilised majority’ in favour of constitutional change. Bruce Ackerman, *We the People 2: Transformations* (Cambridge, MA: Harvard University Press, 1998)

³⁸ For a critical engagement with concepts of peoplehood in constitutional theory, see Zoran Oklopčič, *Beyond the People* (Oxford: Oxford University Press, 2018).

³⁹ See generally Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolution?* (Cambridge: Cambridge University Press, 2017).

⁴⁰ Frank Michelman, ‘Constitutional authorship by the people’, (1999) 74 *Notre Dame Law Review* 1604, 1604. Similarly, as Chambers puts it, ‘The ‘people’ as a corporate body that speaks in one voice is not an empirical reality’ – Simone Chambers, ‘Democracy, Popular Sovereignty and Constitutional Legitimacy’ (2004) 11 *Constellations* 153. See also Zoran Oklopčič, ‘Constitutional Theory and Cognitive Estrangement: Beyond Revolutions, Amendments and Constitutional Moments’, in Albert et al (n 29).

⁴¹ Ethan Putterman ‘Rousseau on the people as legislative gatekeepers, not framers’ (2005) 99 *American Political Science Review* 145

⁴² For an argument against referendums as instruments of constitutional decision-making on this and other grounds, see Ludvig Beckman, ‘Democratic legitimacy does not require constitutional referendum. On ‘the constitution’ in theories of constituent power’ (2018) 14 *European Constitutional Law Review* 567.

political order. Sièyes in particular – a key actor in the French revolution – arguably conceived the concept primarily to tame and limit popular politics, while solving at an abstract level the problem of legitimacy. Thus his theory of constituent power ‘cannot be understood outside the social struggles on the part of the young French bourgeoisie for political primacy.’⁴³ The people, in Sièyes’ account, would originate the constituted order by voting and bestowing legitimacy on a constitution, but then disappearing off the political stage, confined to a more or less dormant role. This serves precisely to disempower the people in practical politics, by confining its ‘sovereign’ expressions to a foundational or ratificatory, and thus, to a very limited domain. And the great flaw of constitutional theory, arguably, is to have mistaken this political legitimation strategy – essentially, an act of storytelling – as analytically useful. An idea that should be properly historicized and contextualized, approached as a political and rhetorical instrument, is taken, rather too earnestly, as a descriptive theory.⁴⁴ Or as Sagar puts it, terms like sovereignty ‘feature as attempts at legitimation in power struggles, rather than revealing a fundamental site of decisive authority.’⁴⁵

While the legitimation strategy of constituent power is most readily attributable to Sièyes and his intellectual heritage, it is worth noting that Sièyes adopted not an *authorial*, but rather an *authorizing* or ratificatory view of constituent power. That is, as Rubinelli puts it, he:

maintained that the people, as holders of constituent power, authorise the constitution but do not create it themselves. Rather, they elect extraordinary representatives to write the constitutional text and, once the latter is ready, they ratify it, authorising its entrance into force. Hence, the exercise of constituent power does not coincide with the writing of the constitution, which is delegated to representatives, but with its authorisation and approval by the nation.⁴⁶

Similarly, indeed, Lenowitz has analysed a tradition of constituent power in the 18th century North American colonies which identified the constituent moment in ratification referendums, where the power lies in the approval rather than the drafting of constitutions.⁴⁷ On the one hand, while an *authorizing* view of constituent power seems politically more realistic as an account of the role the people actually plays, it is difficult to understand how a relatively passive power of mere authorization meets the demanding claims of ‘constituent’ power – a power that ostensibly has no antecedent or superior. This gap is sometimes filled through an unrealistic depiction of the framing process as itself being under popular control, specifically as the idea that ‘the right sort of framers in the right conditions can embody the majority will.’⁴⁸ And it is especially difficult to see this ‘authorisation’ as truly ‘constituent’ as in the context of a constitutional-amendment referendum, as distinct from a ratification plebiscite, where typically the framers are ordinary representatives rather than specific constitution-framing delegates.

Regardless, on the other hand, it is, in any event, the more ambitious *authorial* account of constituent power that is found in the judicial doctrines considered. And notwithstanding Sièyes’ relatively modest account of popular power, it is the ambitious

⁴³ Oklopcic (n 40), 126.

⁴⁴ For an argument along these lines see, in particular, Oklopcic, ‘Three areas of struggle: A contextual approach to the ‘constituent power’ of the people’ (2014) 3 *Global Constitutionalism* 200

⁴⁵ Paul Sagar, ‘Of the People, for the People’, *Times Literary Supplement*, 15 June, 2016, 12.

⁴⁶ Rubinelli (n 35), 70

⁴⁷ Jeffrey A. Lenowitz, ‘“A trust that cannot be delegated”: The invention of ratification referenda’ (2015) 109 *American Political Science Review* 803. See also Jeffrey Lenowitz, *Why Ratification? Questioning the Unexamined Constitution-making Procedure* (PhD Thesis, Columbia University 2013).

⁴⁸ Lenowitz, ‘“A trust that cannot be delegated”, *ibid.* 810

authorial view that has nonetheless been absorbed and endorsed to a surprising extent in contemporary theoretical literature. Stephen Tierney, for example, argues that constitutional referendums are distinctive because they involve, the determination, by the sovereign ‘people’, of both ‘constitutional identity’ and the ‘second-order rules’ for the legal system.⁴⁹ They are, he says, ‘*conduits of popular determination*.’⁵⁰

These kinds of analysis portray constitutional referendums, in particular, as being – at least potentially – a pure, originitive, and especially an unmediated form of popular expression, of a kind that accordingly confers legitimacy on the constituted order that subsequently emerges. However, such analyses ignore the various ways in which referendums are mediated, orchestrated and constrained, the ways in which they are embedded within pre-constituted institutional processes, and particularly the ways in which the processes of referendum initiation undermine any claim for referendums to fulfill the extra-legal or originitive claims of constituent power. While referendums might well express popular demands or influence, ultimately the voting ‘people’ cannot express itself independently of prior constraint, of intermediary bodies and initiative powers.

Indeed a critical, often overlooked question is that of the initiative power and its normative significance, of ‘who gets to call the referendum’⁵¹ and thus of who controls the terms on which the people may speak. It seems that in Rousseau’s thought, for example, that power is itself a necessary facet of sovereignty, such that for popular sovereignty to exist, it must be possible for the people to regularly assemble itself. By contrast, ‘under contemporary political conditions that power rests not with the people at large but with their governments.’⁵² Indeed Tierney acknowledges that under contemporary conditions, at least, ‘the people is too large and diverse a body to manifest itself without the intervention of representational forces’⁵³ – **while, indeed Sièyes understands constituent power as being necessarily exercised by representation rather than directly.**⁵⁴ But this makes such referendums difficult to understand as meaningfully being expressions of ‘constituent’ power. While Tierney suggests that at least some kinds of extraordinary plebiscites or constitution-framing votes involve the people transcending the ordinary processes of institutional mediation,⁵⁵ it is difficult to see how the extra-legality of a plebiscitary process renders it as an authentically *authorial* exercise of popular power, given the intractable problems of representation and mediation that nonetheless arise, because of those mediating mechanisms that, far from giving the people direct voice, ‘may actually prevent [them] from expressing themselves clearly.’⁵⁶ The same problem arguably arises even where the initiative process itself is popularized, because the role of the people *as such* remains reactive rather than creative.⁵⁷ **And much the same observations apply, in turn, to any innovations of democratic participation in the constitutional-revision process – such as Ireland’s experiment with Citizen’s Assemblies⁵⁸ – simply because democratic influence in the constitution-making process, no**

⁴⁹ Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012), 15.

⁵⁰ Stephen Tierney, ‘Constitutional referendums: a theoretical inquiry’ (2009) *Modern Law Review* 360, 364, emphasis added.

⁵¹ Sagar (n 45), 12

⁵² *ibid*

⁵³ Tierney (n 49) 128.

⁵⁴ **For discussion see Martin Loughlin, ‘On the Concept of Constituent Power’ (2014) 13 *European Journal of Political Theory* 218**

⁵⁵ *Ibid*, 13

⁵⁶ Sherman Clark, ‘A populist critique of direct democracy’ (1998) 112 *Harvard Law Review* 434, 436.

⁵⁷ Tierney himself acknowledges that such exercises ‘come at the end of a process that was not necessarily from the beginning a self-consciously constitutive one.’ Tierney (n 49), 15.

⁵⁸ **Eoin Carolan, ‘Ireland’s Constitutional Convention: Behind the hype about citizen-led constitutional change’ (2015) 13 *International Journal of Constitutional Law* 733.**

matter how necessary or significant, does not live up to the lofty *authorial* claims of the kind that are actually found in the judicial doctrines discussed.

While it may be arguable to what extent the people as such may gain an influential or even a co-authorial role with respect to the referendum-amendment process, its power in this context should, in any event, be firmly classified as a *constituted* one, as being embedded within a mixed constitution, as a highly checked and proceduralised power. It might even be best classified as an ad hoc constitutional legislature with negative legislative powers.⁵⁹ And once we understand the people as a ‘constituted’ authority within the established order of state power, referendums are, then, better understood not as an exercise of originative, authorial or creative power, but more modestly, as a checking mechanism by which the people exercise some measure of influence or control over the powers of intermediary bodies, executive and legislative, in the domain of constitutional change.⁶⁰ But crucially, this power, as benign as it might seem, hardly corresponds with any sense of ‘sovereignty’, whether it be a power to constitute or to command. Therefore, since the people is not meaningfully acting in a creative role in the amendment process, it appears that ‘sovereignty’ – when understood as a constituent power – offers a weak justification for excluding judicial review or other checks on the amendment proposal.⁶¹

III. Sovereignty as unaccountability

I have argued that the conceptual grammar of constituent power offer a weak justification for attributing a “sovereign” status to constitutional-amendment referendums, because such accounts exaggerate the degree of creative popular empowerment that constitutional referendums can offer. And conversely, if constitutional referendums are conceived of more modestly as a checking or limiting power – as constituted power within a mixed constitution – it seems this can hardly be understood as ‘sovereignty’ in the sense of supreme power.

Nonetheless, there is an alternative sense in which constitutional-amendment referendums can be understood as a “sovereign” exercise. There is an alternative, lesser-theorised sense of sovereignty as a power which arises, and is exercised *within* the constitutional order itself, and which is defined by the finality and *unaccountability* of power. In this understanding, constitutional referendums are a ‘sovereign’ exercise not because they grant the people a ‘constituent’ or authorial power, but simply because their verdict is unaccountable, **primarily in the sense that the verdict cannot be overturned by any authority, whether judicial or otherwise.** This more modest understanding – of *sovereignty as unaccountability* – avoids both the awkward mythologies and foundation-myths associated with doctrines of constituent power, as well as the troubling absolutism or omnipotence associated with early-modern doctrines of ‘command’ sovereignty. **It also leaves scope to retain some parallel understanding of a primordial or power-generative ‘sovereignty’, of a legitimating power than is antecedent or extra-legal, but that does not necessarily enter or guide juristic analysis.**

⁵⁹ Thus in Italy, for example ‘mandatory referendums have a functional similarity with multicameral decision-making’ and amount to a ‘negative legislative power’. Sergio Fabbrini, ‘Has Italy rejected the referendum path to change? The failed referenda of May 2000’ (2001) 6 *Journal of Modern Italian Studies* 38, 53.

⁵⁹ See Bill Kissane, ‘Is the Irish referendum majoritarian?’ In Wilfried Marxer (ed.), *Direct Democracy and Minorities* (Springer, 2012), 153.

⁶⁰ Eoin Daly, ‘A republican defence of the constitutional referendum, (2015) 35 *Legal Studies* 30.

⁶¹ **As to the merits and otherwise of popular participation in constitutional change, see particularly Xenophon Contiades and Alkmemé Fotiadou, *Participatory Constitutional Change* (London: Routledge, 2018).**

Since at least the French revolution, popular sovereignty – in the repurposed form of constituent power – has, to a great extent, been typically associated with a creative power of founding a new order, and so, by the same measure, has been dissociated from ordinary processes of constituted government. And from this perspective, it arguably makes little sense, on the one hand, to translate popular sovereignty as a power of unfettered amendability within the established process of constitutional amendment, that is, *within* the constituted order. From this perspective, the amendment power seems to have little association with ‘sovereignty’, because of the ways in which it is legally proceduralised and constitutionally contained.

Is it possible, nonetheless, to make sense of unfettered amendability based on an older concept of sovereignty which is understood as a supreme or final power *within* the constituted order, rather than one of founding or creation? On the one hand, it is difficult to understand unfettered amendability based on a Hobbesian concept of sovereignty as supreme authority, given that unfettered amendability applies within a limited jurisdiction of constitutional amendment: it lacks the omnipotence associated with the Hobbesian sovereign. It is difficult to attribute the faculties of Hobbesian sovereignty to an undifferentiated, diffuse “people” (as distinct from a popular assembly), partly because it dissolves the relation of authority between sovereign and subject, and partly for empirical and pragmatic reasons relating to the people’s incapacity to act in an executive sense.⁶² Indeed the ‘sovereign’, in this Hobbesian tradition, is defined partly with reference to its authority *over* the people, as a response to the problem of order and authority.⁶³ Conversely on the other hand, the kind of omnipotence implicit in the Hobbesian sovereign is widely considered unsuited to the diffuse and complex structure of modern states, which lack a single pinnacle of authority. Indeed, Rubinelli convincingly argues that, rather than viewing constituent power as a repurposed form of popular sovereignty, Sièyes actually understood it as supplanting outright an idea that he saw as archaic and unworkable – as posing a conceptual problem because it ‘implicitly entailed an absolute and unlimited understanding of political authority.’⁶⁴ **It is in not a dissimilar spirit that Andrew Arato has tried to dissociate the theory of constituent power in constitution-making processes from the taint of Schmittian theories of legally unconstrained sovereign power.**⁶⁵

However, within the history of thought of sovereignty it is worth distinguishing the idea of supremacy or omnipotence as such from a more subtle concept of finality or *unaccountability* in the exercise of a defined power. Take, for example, the (perhaps idiosyncratic) sense in which the British parliament is ‘sovereign’. It is a constituted authority – and subject, it is increasingly assumed, to the background authority of an inchoate popular sovereignty. And rather than being an omnipotent ruler, its ‘sovereignty’ applies only within a limited, legislative domain.⁶⁶

Arguably it is a similar sense that the ‘people’, at least in jurisdictions like France and Ireland, is ‘sovereign’ in the constitutional-amendment context. Its power is pre-constituted, and its ‘sovereignty’ applies in a defined, relatively modest domain – in relation to the approval of legislative proposals for constitutional amendment. It is ‘sovereign’ in this sense because it serves as a *final authority* of constitutional lawmaking,

⁶² Peter Steinberger, ‘Hobbes, Rousseau and the Modern Conception of the State’ (2008) 70 *The Journal of Politics* 598.

⁶³ Neil Walker, ‘Sovereignty Frames and Sovereignty Claims’ in Rawlings et al (eds.), *Sovereignty and the Law* (Oxford University Press, 2013), 20, emphasis added

⁶⁴ Rubinelli (n 35), 7.

⁶⁵ See Arato (n 36) and (n 39).

⁶⁶ On this point see Thomas Poole, ‘Devotion to Legalism: On the Brexit Case’ (2017) 80 *Modern Law Review* 696; Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81 *Modern Law Review* 969.

since in the absence of judicial review, it is free of any form of accountability or oversight. The people is sovereign, in this context, due to its role at the *end point* of constitutional change rather than at its *inception*, as **many** theories of constituent power would suggest. Partly because the people enter the frame only at the end point of the constitutional-amendment process, they cannot meaningfully be assigned a power of creation, as opposed to more modest, reactive power of veto. But precisely for the same reason, this renders them sovereign in a different, and much more conceptually useful sense, in that they are designated as a locus of final authority within the constitutional order of the state.

This sense of sovereignty-as-unaccountability is arguably present not only in the formalised constitutional-referendum processes used in jurisdictions like France and Ireland, but also, less obviously, in the contested shape of the UK Constitution following the Brexit referendum. While the referendum outcome is strictly speaking advisory as a matter of law,⁶⁷ **some scholars** have argued that constitutional conventions have now emerged both requiring both that referendums be held on certain matters, and that referendum verdicts be upheld by parliament.⁶⁸ **(Although it is arguably parliamentary statute itself, and not constitutional convention, that has stipulated certain referendums as mandatory).**⁶⁹ Popular ‘sovereignty’, in this view, is constitutionally, albeit not legally enshrined, because of the recognised unassailability of the referendum outcome. Parliament has been understood as ‘sovereign’ because of empirical patterns of official conduct that uphold the legal unassailability of statutes,⁷⁰ but similar patterns – the internalised obeisance of popular verdicts, may render the people ‘sovereign’ in a separate dimension and jurisdiction.

This idea of the sovereign people as being an arbiter, rather than an instigator of constitutional change, not only finds support in the history of political thought, also but better accords with the dynamics of modern politics, and particularly in the politics of referendum usage. O’Cinneide argues that popular sovereignty – although often used ‘as a purely symbolic signifier’ – is in some instances ‘left with a residual role as the final arbiter of serious constitutional crises.’⁷¹ He cites, as an example, de Gaulle’s use of the referendum during the French decolonization crisis. Yet this sense of the people as the final arbiter, rather than the originator of constitutional change is pertinent as much *within* the ordinary amendment process as it is in such extraordinary political moments. This applies notwithstanding the people’s purely negative legislative power, and its

⁶⁷ The Supreme Court, in *Miller*, reaffirmed the orthodox view that the referendum result was purely advisory, partly because the sovereign parliament did not ascribe it binding status. *R (Miller) v Secretary of State for Exiting the European Union* [2017] 1 All E.R. 158, [22].

⁶⁸ As for the requirement that referendums be held, see Vernon Bogdanor, ‘Brexit, the Constitution and the alternatives: (2016) 27 *King’s Law Journal* 314, 314-5. Relatedly, Phillipson argues: “it is time to consider whether a convention should now be recognised to the effect that parliament and government will abide by the results of referendums”. *ibid* 322. Phillipson applies the ‘Jennings test’ to argue this constitutional convention is established. As Phillipson puts it: “nearly all MPs plainly regarded themselves as bound to implement the result of the referendum, even where they passionately disagreed with it. They thus appeared to recognise a powerful norm binding on them.” Tuck puts the case more strongly and suggests that while “technically they are merely consultative ... the idea that [referendums] could be disregarded seems to most people about as fanciful as the idea that the Queen could actually use the power ... to veto a Parliamentary statute.” Richard Tuck, “Brexit: A prize in reach for the left”, 17 July 2017, <<https://policyexchange.org.uk/pxevents/brexit-a-prize-in-reach-for-the-left/>>, last accessed 28 February 2019.

⁶⁹ See e.g. *European Union Act 2011*.

⁷⁰ As TRS Allan puts it, “parliament is sovereign because the judges acknowledge its legal and political supremacy” “TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 10.

⁷¹ Colm O’Cinneide “The People are the Masters’: the Paradox of Constitutionalism and the Uncertain Status of Popular Sovereignty within the Irish Constitutional Order’ (2012) *Irish Jurist* 249, 256

passive role that is activated at the discretion of other state organs. This arbitral, appellant and vetoing role is hinted at, for example, in the designation of the Irish people, in Article 6 of the Constitution, as ‘deciding all matters of national policy ... *in final appeal*’. The same provision affirms that all powers of government ‘derive ... from the people’; thus the people might *both* be a constituent sovereign in this abstract sense – an antecedent, extra-legal and foundational agent – as well as a *constituted* sovereign in the sense of enjoying an unaccountable ‘final say’ over constitutional amendments. Indeed ‘sovereignty’ might refer simultaneously to quite different legal and political statuses that operate in separate dimensions and domains. While there might be separately constituted popular sovereigns – constituted and constituent – a similar duality arguably operates in the UK Constitution, where traditional Diceyan orthodoxy regards the parliament as a legal, and thus a constituted sovereign, but the people as sovereign in a separate ‘political’ domain that is not legally cognisable.⁷² Indeed in the aftermath of the Brexit vote, Les Green suggests a distinction between parliamentary ‘sovereignty’ as an ‘institutional device’, on the one hand, and the foundational ‘moral ideal’ that popular sovereignty represents, on the other.⁷³ **In a recent article, Loughlin and Tierney similarly refer to the ‘power-generative’ dimension of sovereignty that standard theories of parliamentary sovereignty are lacking.**⁷⁴ And while parliamentary sovereignty as a procedural-institutional principle is separable from the originative, authorising moral force of popular sovereignty, similarly we might conclude that the ‘constituted’ institutional sovereignty of the people, of the kind I have analysed, is separable from its foundational moral – perhaps even its ‘constituent’ claim. Thus my argument about constituted popular sovereignty is not inconsistent with Daniel Lee’s argument that popular sovereignty represents an ‘extraordinary or extralegal power’, held ‘in reserve’⁷⁵ – because this different sense of sovereignty may well coexist with the constituted version of sovereignty-as-unaccountability. **While Arato argues that the theory of constituent power should be freed of the taint of sovereignty, I am in a sense arguing the reverse – that the theory of popular sovereignty, in the constitutional-amendment process, is better understood without reference to theories of constituent power that may, admittedly, have importance and relevance within other dimension of, and for other purposes within, constitutional theory.**

‘Constituted’ sovereignty without command

While my argument re-emphasises a form of *constituted* sovereignty as an analytical framework for constitutional theory, this is not to accept Kalyvas’ dichotomy between a ‘constituent’ sovereignty on the one hand, and a ‘constituted’ sovereignty, on the other, that he describes as ‘the traditional notion of sovereignty as the *higher and final instance of command*’.⁷⁶ My argument is partly that ‘constituted’ sovereignty need not rely on any

⁷² For analysis of Dicey’s views on popular sovereignty, see James Kirby, A. V. Dicey and English constitutionalism, (2018) *History of European Ideas*, Published online ahead of print, DOI: 10.1080/01916599.2018.1498012

⁷³ Les Green, “Should parliamentary sovereignty trump popular sovereignty?”, <https://ijmgreen.com/2016/11/03/should-parliamentary-sovereignty-trump-popular-sovereignty/>, last accessed 28 February 2019.

⁷⁴ Loughlin and Tierney (n 66).

⁷⁵ Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought*

⁷⁶ Andreas Kalyvas, ‘Popular sovereignty, democracy and the constituent power’ (2005) 12 *Constellations* 223, 226, emphasis added.

understanding of the sovereign as having a power of ‘command’; it is even consistent with a certain kind of passivity or reactivity, and with ‘sovereignty’ being exercised as part of a process where other actors exercise initial discretion. Indeed if sovereignty arises or resides in the domain of constitutional change, the people can hardly ‘command’ a process that it does not itself initiate. Sovereignty can be dissociated from ‘command’ because, given the inevitably divided and dispersed nature of the decisional process – rendering impossible any single apex of authority – sovereignty, then, is expressed not in a crude idea of supremacy as such but rather in the finality and unaccountability of the sovereign’s judgement.

Finality, in this sense, refers to the impossibility of further appeal or review – except by the agent itself. **In modern constitutions it is likely to be expressed primarily, although not exclusively in a principle of non-justiciability of constitutional amendments.** And this is consistent with the idea that sovereignty is not, crudely speaking, omnipotence or supremacy, but rather, something that emerges at the end-point rather than the inception of a decisional process. The people, in the constitutional-amendment process, is certainly subject to greater procedural constraints than the parliamentary ‘sovereign’ in the UK, since its legislative power is purely negative. However, if sovereignty is dissociated from omnipotence or supremacy per se, we can understand that the commonality between these parliamentary and popular sovereigns lies in their unaccountability *albeit within a defined procedural jurisdiction*.

Sovereignty, then, might reside simply in the finality of legislative power, *notwithstanding* its sometimes negative or reactive character. This sidesteps Maistre’s objection that the people ‘are a sovereign that cannot exercise sovereignty’,⁷⁷ as an entity that lacks faculties of intentionality, coherence and so on. If the people is a pre-institutionalised or pre-constituted power, such constraints seem self-evident. This model dissociates sovereignty from any idea of an absence of constraint *simpliciter*, whether in the constituent or constituted versions. And this also helps to dispel the traditional liberal and conservative objections to popular sovereignty not only as being conceptually incoherent, but as politically *dangerous* – for example in the Madisonian account – as a potential source of tyranny, despotism and so on⁷⁸ – as ‘spectacles of turbulence.’⁷⁹ Indeed it was this vaguely Hobbesian understanding of sovereignty, as encompassing faculties of command and supreme rule, that led post-revolutionary French theorists to vest sovereignty in the abstract ‘nation’ precisely to deny the real ‘people’ (or indeed any other agent) the kind of supreme political authority that Hobbesian sovereignty had entailed.⁸⁰ As Malberg noted, this stemmed from a concern to prevent ‘sovereign’ authority being located in *any* definite body or authority, however democratic.⁸¹ As Schmitt similarly argues, theorists of the bourgeois *Rechtsstaat* sometimes located ‘sovereignty’ in the constitution itself, or more precisely in abstract norms of justice, so

⁷⁷ O’Cinneide (n 71), 256

⁷⁸ While this view was commonly espoused during and after the French revolution, Philip Pettit apparently adopts a similar perspective. See Philip Pettit, *On the People’s Terms: a Republican Theory and Model of Democracy* (Cambridge University Press, 2013),

⁷⁹ Federalist no 10, (Clinton Rossiter, 1961), 81.

⁸⁰ See Declaration of the Rights of Man and of the Citizen, 1789, Article 3: ‘The principle of sovereignty resides essentially in the nation. No section of the people, nor any individual, may arrogate to itself its exercise’. (*Le principe de la souveraineté réside essentiellement dans la nation. Aucune section du peuple ni aucun individu ne peut s’en attribuer l’exercice*). This rhetorical shift of emphasis stemmed from a concern to eschew populist tyranny or class-based factionalism: the ‘people’ might be understood as a discrete, embodied social class whereas the ‘nation’ represented a more transcendent, abstract corpus. Félicien Lemaire, *Le principe d’indivisibilité de la République; mythe et réalité* (Presses Universitaires de Rennes, 2010), 56

⁸¹ *ibid*, 73.

as to deprive the idea of any real political force.⁸² Indeed, Lee claims that historically, assigning sovereignty even simply to the ‘people’ itself was a strategy of ‘risk avoidance’, of ensuring it was ‘depersonalized’.⁸³ As Rubinelli notes, Sièyes argued that the ‘royal superstitions’ of the *ancien régime* had vested the concept of sovereignty with ‘pompous attributes and absolute powers’ – thus ‘if the sovereignty of the great kings was so powerful and terrible, the sovereignty of a great people should be even more so.’⁸⁴

In another perspective, however, in the 18th century the idea of sovereignty *itself* had already been adapted, by Rousseau (and arguably much earlier, since Bodin), so as to recognise the impossibility of sovereignty as a crude idea of omnipotent rule. For Rousseau, in particular, sovereignty as a power was limited in that it applied to legislative and not executive matters, as a faculty not of ‘action’ but of ‘will’. While such conceptual evolutions recognise the dispersed decisional processes of modern states – without a single conclusive apex of power – they also explain the plausibility of a modest understanding of sovereignty as a *jurisdictionally limited unaccountability*, an unaccountability that is limited, in this case, to the domain of constitutional change.

And while this alternative account of constituted sovereignty is, on the one hand, better attuned to the polycentric character of the contemporary state, it also has historical roots dating to antiquity. These have perhaps been obscured by the ‘command’ model of sovereignty, ascendant in the early-modern period, that is associated with Hobbes to an extent, but especially, later, Bentham and John Austin, who both emphasised the sovereign’s capacity to coerce, in particular. By contrast, Hoekstra argues that the modern concept of sovereignty has important antecedents in the ancient Greek idea of tyranny, because both are understood in terms of *unaccountability*: the sovereign, like the tyrant, is the entity that is answerable to no other earthly or constituted agent.⁸⁵ The continuity between the ancient and modern account lies in the idea that sovereignty ‘must be immune from review, veto or punishment.’⁸⁶ And this is precisely the concept of sovereignty – the unaccountable authority of last resort, against whom no appeal is possible – that helps to make sense of the jurisprudence I have discussed. For Bodin, Hoekstra argues, the sovereign is unaccountable in that it is ‘above all but divine review and punishment’⁸⁷ – an understanding echoed in the ancient idea of tyranny. The faculties of tyranny, she argues, were not repudiated but rather appropriated by the Athenian ‘people’, when they deposed personal tyrants.⁸⁸ **Again, in modern constitutional settings, this *unaccountability* is most likely to be translated as a principle of non-justiciability of popularly effected constitutional amendments, simply because constitutional courts are the most commonplace ‘check’ against popular or majoritarian power. However, it might also have other institutional translations – arguably, for example, in the positive duty of the British government and parliament (by constitutional convention) to effect the referendum decision of the British people.**

⁸² Carl Schmitt, *Constitutional Theory*, J Seitz (trans.), (Duke University Press, 2008) Chapters 12-14.

⁸³ Lee (n 75), 15

⁸⁴ Rubinelli (n 35), 7

⁸⁵ Kinch Hoekstra, ‘Athenian Democracy and Popular Tyranny’, in Richard Bourke and Quentin Skinner (eds), *Popular Sovereignty in Historical Context* (Cambridge: Cambridge University Press, 2016).

⁸⁶ *ibid*, 17

⁸⁷ *ibid*, 20-25

⁸⁸ Thus, ‘it may be objected ... that if it is the people who seize sovereignty, then that is enough to change the character of sovereignty essentially. The tyrant is singular, and that is much of the problem, whereas the people is necessarily multiple and diverse, and so in taking over supreme power no longer holds it in a single locus. It is striking, however, how ready Athenian writers were to treat the demos as singular, willing as they were to attribute characteristics of an individual or personality to a polis, or to personify the people as a whole.’ *ibid*, 24-25

Unaccountability without arbitrariness

This idea of the constituted popular sovereign as being defined by its unaccountability (or at least, its unaccountability *within the state*) might seem to contradict our understanding of what it means to be a *constituted* power. To be constituted usually means to be limited in some way – to draw one’s power from a limited legal mandate – while unaccountability suggests impunity or arbitrariness. And conversely, to be constitutionally limited in some way ostensibly seems inconsistent with the nature of ‘sovereignty’. Thus Eleftheriadis, for example, argues that ‘sovereignty ... when taken seriously ... is ... the unlimited power to be free of any legal restriction, contrary to any doctrine of constitutional government or indeed the rule of law ... If we take sovereignty seriously, we cannot have constitutional law.’⁸⁹

But unaccountability has a narrower meaning once we understand it as applying within a defined, restricted domain – say, within a procedurally constrained constitutional-amendment process. This mitigates what Arendt considered as the seemingly arbitrary quality of the constituent popular sovereign – the fact that ‘those who get together to constitute a new government are themselves unconstitutional.’⁹⁰ By contrast, the unaccountability of the constituted sovereign itself has a legal-constitutional mandate, precisely because it is not itself necessarily the expression of an originative, power-generative or ‘constituent’ claim. Therefore, although the sovereign people is unaccountable in the constitutional-amendment context in the sense that its decision cannot be challenged or appealed, this does not amount to arbitrariness in any meaningful way because unlike its constituent relation, the constituted popular sovereign has a procedurally limited jurisdiction – it can only pronounce in the context of a constitutional procedure which inevitably confers the power to initiate referendums on intermediary organs such as parliament. In fact, it is precisely this feature of constituted popular sovereignty that is distorted where the people – say, in the Irish and French jurisprudence – is sometimes depicted as having a freestanding creative role. Indeed where the sovereign people’s role is reactive or resistive in this sense, it defeats Maistre’s paradox – that of popular sovereignty making the people sovereign ‘over themselves’⁹¹ – because ‘sovereignty’ in this sense is exercised over or against the constituted state organs, rather than the people themselves as subjects. Sovereignty, in this adjusted sense, is no longer a relation of submission between ruler and subject, and so the apparent contradictions of (constituted) popular sovereignty begin to dissolve. Far from entailing arbitrariness, with its images of chaos and disorder, the unaccountability of the people’s verdict provides for a principled locus of decisional finality, and thus potentially for stability, in the matter of constitutional form.

Post-revolutionary French theorists, conscious of Jacobin excesses, reworked or adapted popular sovereignty so as to ‘reconceptualise the people’s supremacy in terms of the popular authorization of government rather than the immediate retention of power in the hands of the multitude’.⁹² Crucially, however, this ‘authorization’ may be understood as having a reactive or resistant character – not dissimilar from the historical

⁸⁹ Pavlos Eleftheriadis, ‘Law and Sovereignty’, (2010) 29 *Law and Philosophy* 535, 557.

⁹⁰ Hannah Arendt, *On Revolution* (London and New York: Penguin, 1963), 183.

⁹¹ Martin Loughlin ‘The concept of constituent power’ (2014) 13 *European Journal of Political Theory* 218, 220.

⁹² Richard Bourke, ‘Introduction’, in Bourke and Skinner (n 85), 11. See also Bryan Garsten, ‘From popular sovereignty to civil society in post-revolutionary France’, in Bourke and Skinner, *ibid.* O’Cinneide suggests: ‘The sovereign ‘people’ originated as an eighteenth-century theoretical and political construct, which served the useful purpose of filling the gap left by the deposed sovereign who had previously served as the fount of authority.’ O’Cinneide (n 71), 251.

sense of resistant sovereignty detailed by Daniel Lee – rather than as having a mythologically ‘constituent’ force.⁹³ And while this power is in some ways a contained and highly modest one, it gives the ‘people’ a concrete role in real politics, rather than relegating to the background, ethereal role of ‘constituent’, as essentially an ideological legitimator⁹⁴ (even though, as I have argued, this ‘constituent’ sense of sovereignty may well have some parallel, separate role). Of course, recourse to constitutional referendums may be discretionary, not just in the ad hoc British constitutional framework that allowed the Brexit vote, but also in a more typical codified system such as France’s, where the parliamentary-amendment route is available as an alternative. And while this discretionary use of the popular constitutional-amendment route may seem inconsistent with its purportedly ‘sovereign’ character, constitutional conventions may have emerged, especially in the UK, requiring that referendums are held on certain kinds of constitutional change – particularly the divestment of governmental powers infranationally or supranationally.⁹⁵

Walker argues that ‘our modern notion of sovereignty derives from the medieval figure of the sovereign – *the ruler who holds absolute authority over his subjects and who is under no legal obligation to any higher power.*’⁹⁶ Effectively, then, my argument is that a suitably ‘modern’ concept of ‘constituted’ sovereignty can be based on the latter component of unaccountability, while omitting the component of absolutism or omnipotence.

Conclusion

Neil Walker has already argued that ‘much of the contemporary confusion ... over sovereignty’ stems from ‘a failure to distinguish between sovereignty as a deep framing device for making sense of the modern legal and political world ... and the particular claims which are made on behalf of particular institutions, agencies, rules, or other entities to possess sovereignty.’⁹⁷ Essentially I have sought to develop this claim by applying it to the jurisprudence of constitutional referendums. I do not claim to dismiss outright the value of constituent power, which may have some value as a conceptual device, historical and political, for understanding constitutional creation and legitimacy. Rather, my argument, in one sense, is that we should disaggregate different senses of popular sovereignty that might be applied to constitutional law. Within constitutional jurisprudence, the people must be understood as a constituted authority with a defined, and necessarily limited jurisdiction which is dissociated from the omnipotence and extra-legality implied by constituent power. And it is through this adjusted, more *modest* concept of sovereignty that we might make sense of a principle of unfettered constitutional amendability. Theories of constituent power, then, have served only to obscure the only meaningful sense of popular sovereignty in the constitutional-amendment process. Equally, this suggests that Kalyvas’ dichotomy of ‘constituent’ and ‘command’ sovereignty need not be understood as exhaustive. The people cannot be understood as ‘sovereign’, in the constitutional-amendment process, by virtue of possessing an imagined power of constitutional authorship or creation. However, to meaningfully be understood as sovereign, neither need it possess faculties of omnipotence or command within the constituted order. Rather, its sovereignty lies solely

⁹³ Lee (n 75)

⁹⁴ On this point see Zoran Oklopčic (n 40)

⁹⁵ See Bogdanor (n 68).

⁹⁶ Neil Walker (n 63)

⁹⁷ *ibid.*, 18

in the unaccountability and finality of its voice.

Acknowledgments

I acknowledge the efforts of the editor and anonymous peer reviewers in helping to improve the manuscript. This paper was first presented at the Irish Jurisprudence Society in April 2019, and I acknowledge valuable comments received from the participants.