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Constituent Power and Constituent Authority

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Essay

Constituent Power and Constituent Authority

MIKOLAJ BARCZENTEWICZ

My aim in this Paper is to analyze Professor Richard Kay’s notion of ‘constituent authority’ within H. L. A. Hart’s model of foundations of legal systems. I thus elucidate the relationship between constituent power, Kay’s constituent authority, and Hartian rules of recognition. I begin by distinguishing two understandings of constituent power: de facto and de jure. In general, constituent power is a power to bring about constitutional change that is not a legal power and is not constituted by (grounded in) any legal power. On the first view, constituent power is a factual capacity (e.g. a kind of social “power”) to bring about constitutional change. On the second view, constituent power is a normative (e.g. moral) power to bring about constitutional change. I stress that anyone aiming to apply a normative conception of constituent power needs to grapple with the difficult questions in moral and political philosophy entailed by the necessity of choosing a normative framework.

I then introduce Professor Kay’s notion of “constituent authority,” which— unlike that of constituent power—can account for change of reasons that people have for acceptance of the authority of a constitution adopted at some point in the past. Elucidating Kay’s constituent authority, I argue that it is best understood as a kind of a normative social practice of acceptance of the authority of the makers of (1) an existing constitution or (2) a potential future constitution.

The remaining key definitional question about both constituent powers and constituent authority is: what kind of constitutional change results from an exercise of either kind of a power? Can constituent power (authority) bring about any constitutional change, or is there some definitional restriction? Without giving a definite answer, I show various possible answers to this dilemma. I also argue that one potentially attractive possibility, tying the definition of constituent power or constituent authority to changes of rules of recognition, should be rejected. It should be rejected because it leads to a concept which is likely to be both under- and overinclusive.

Finally, I discuss the possibility of lawful exercises of constituent power (and constituent authority). As I argue, it can even be that a constitutional change
through a change of the rule of recognition is both, in a sense, a result of an exercise of a constituent power, and entirely lawful.
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Constituent Power and Constituent Authority

MIKOLAJ BARCZENTEWICZ

INTRODUCTION

In this Paper, written for the symposium celebrating the scholarship of Professor Richard Kay, I will focus on Professor Kay’s contribution to the debate on the roles of power and authority in constitutional change. I share Professor Kay’s perspective on the relationship between constitutional law and legal theory (general jurisprudence):

If by legal theory we mean considered reflection on the nature and sources of law, no field of law more insistently engages questions of legal theory than constitutional law. Constitutional law regularly involves the application of rules that are fundamental in the sense that they control and authorize other law but are, themselves, neither controlled nor authorized by any other law. The interpretation and elaboration of those rules necessarily requires attention to the very basis of a legal system, to the stuff that makes law law.¹

Thinking about those vexed questions, I also share his preference to employ H. L. A. Hart’s model of foundations of legal systems as a framework.² My specific aim in this paper is to analyze Professor Kay’s notion of “constituent authority” within the Hartian model of foundations of legal systems. I thus elucidate the relationship between constituent power, Kay’s constituent authority, and Hartian rules of recognition.

I begin, in Section 2, by distinguishing two understandings of constituent power: de facto and de jure. In general, constituent power is a power to bring about constitutional change that is not a legal power and is not constituted by (grounded in) any legal power. On the first view, constituent power is a factual capacity (e.g. a kind of social “power”) to bring about constitutional change. On the second view, constituent power is a normative (e.g. moral) power to bring about constitutional change. I stress that anyone aiming to apply a normative conception of constituent


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power needs to grapple with the difficult questions in moral and political philosophy entailed by the necessity of choosing a normative framework.

In Section 3, I introduce Professor Kay’s notion of “constituent authority,” which—unlike that of constituent power—can account for change of reasons that people have for acceptance of the authority of a constitution adopted at some point in the past. Elucidating Kay’s constituent authority, I argue that it is best understood as a kind of a normative social practice of acceptance of the authority of the makers of (1) an existing constitution or (2) a potential future constitution.

The remaining key definitional question about both constituent powers and constituent authority is: what kind of constitutional change results from an exercise of either kind of a power? Can constituent power (authority) bring about any constitutional change, or is there some definitional restriction? Without giving a definite answer, in Section 4, I show various possible answers to this dilemma. I also argue that one potentially attractive possibility, tying the definition of constituent power or constituent authority to changes of rules of recognition, should be rejected. It should be rejected because it leads to a concept which is likely to be both under- and overinclusive.

Finally, in Section 5, I discuss the possibility of lawful exercises of constituent power (and constituent authority). As I argue, it can even be that a constitutional change through a change of the rule of recognition is both, in a sense, a result of an exercise of a constituent power, and entirely lawful.

I. CONSTITUENT POWER: DE JURE AND DE FACTO

I begin with the most general, or fundamental, “power” of constitutional change, the famous pouvoir constituant. “Primary constituent power,” as used by Yaniv Roznai, means a specific kind of a power to make a new constitution or to alter the current one. Constituent power is said to be unlimited “at least in the sense that it is not bound by previous constitutional rules and procedures,” and to be possessed only by “the people.”

Constituent power is not simply a power of constitutional change, because that can plausibly be provided for under pre-existing constitutional

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4 Id. at 109.

rules, as Roznai admits.\(^6\) Hence, it must be a kind of power that cannot be limited by any pre-existing rules, even when such rules purport to regulate replacement of the current constitution. To put it in other words, it must be a power that cannot be conferred by a pre-existing constitutional (legal or non-legal) rule, or at least by a rule that belongs to the constitutional order being changed (replaced).

Unlike constituent power, amendment power (or constituted power) is a kind of legal power. Amendment power is a legal power to change the constitution. Importantly, as I use the term, amendment powers are not only powers to change the text of a codified constitution. Amendment powers are also powers to change any constitutional rule, which may in some legal systems include, for instance, statutory rules of election law and so on. In Hartian terms, amendment powers are conferred by rules of change, i.e. legal rules that confer legal powers to change the law.\(^7\) Some think that (lawful) constitutional change takes place only if it is a result of an exercise of a pre-existing amendment power.\(^8\) I dispute this in my other work.\(^9\)

Back to constituent power: what kind of a power is it? There are two main possibilities. First, it could be a brute, \textit{de facto}, capacity to bring about constitutional change.\(^10\) For example, a conquering army may be able to exercise such a capacity by coercing the conquered society. An exercise of such a constituent power may, of course need not, be entirely illegitimate from every moral perspective. It may be difficult to identify in advance whether anyone possesses a \textit{de facto} constituent power. We are more likely to know that only after the fact, when we can observe that someone has indeed succeeded in bringing about constitutional change. That said, even after the fact it may be controversial to whom should agency (authorship) be attributed.\(^11\)

Second, it could be a normative (e.g. moral), \textit{de jure} power to make constitutional change. If someone possesses a constituent power in the normative sense, it means that, if they exercise that power, then through that exercise they change what other people \textit{ought} (in the relevant sense of ‘ought’) to accept as their constitution. The power of a second kind can

\(^6\) Roznai, supra note 3, at 122.
\(^8\) Id. at 216–26.
\(^9\) Id.
\(^10\) Richard S. Kay, \textit{Constituent Authority}, 59 AM. J. COMP. L. 715, 719 (“[T]he constituent power is often described in terms of raw force, physical, psychological and emotional.”).
only exist in reference to some notion of normativity, of what ought to be done. There are many possible understandings of normativity, including, for example, the social (conventional) sense (what the given society at a given time considers to be due, obligatory, etc.). Another possibility is some kind of “brooding omnipresence in the sky,”12 e.g., a pre-modern natural law conception of normativity.

However, by definition, one kind of normativity is never (directly) determinative of existence and shape of constituent powers: legal normativity. Constituent powers are not created by law and cannot be limited by law. This is not to deny that there may be relationships between the law and, for example, the social sense of morality. But the point is that if law has any effect on existence and limits of constituent powers, such effect is mediated by the relevant kind of normativity.

In most circumstances, anyone discussing constituent powers in any practical context should specify which kind of normativity they adopt. Otherwise, any such discussion risks being radically indeterminate in a key dimension and thus of little practical relevance. This is so because there may be a world of difference between, e.g., some author’s favored conception of morality and the social morality of the community of which he or she is writing. If the author doesn’t specify which kind of normativity defines his or her understanding of constituent power, then we may be learning very little about what this notion of constituent power entails. Of course, explicit reference to some kind of normativity opens any author to criticism regarding that very choice, but this is a feature, not a bug. It rightly focuses our attention on the fact that questions of constituent power (other than in a de facto sense) necessarily engage questions of moral and political philosophy and that rigorous treatment of the former requires rigorous engagement with the latter.

It seems to me that in today’s literature, as exemplified by Roznai’s work, the latter, normative conception of constituent power tends to be widely accepted.13

II. KAY’S “CONSTITUENT AUTHORITY”

In principle, whether some historical event involved an exercise of a constituent power is settled at the time the event took place. Nothing that happens afterwards can change whether someone (or some group of people) had a constituent power at that time and whether they validly

12 S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting). See also Kay, Constituent Authority, supra note 10, at 716 (explaining why Justice Holmes’s characterization is an “artifact”).

13 ROZNAI, supra note 3, at 109, 122.
exercised that power then and there. This is certainly true for de jure constituent powers, but in a sense also for de facto constituent powers.\textsuperscript{14}

However, both in law and in broader reflection about constitutional change we sometimes observe that ex post attributions of constitution-making power (or authority) are more fluid than that. It may be that several decades after some constitutional change took place, the polity in question comes to accept that the change was made by some authority which, from a historical perspective, was not really an authority of the relevant kind at that time (i.e. did not have constituent power). Take, for example, a constitution made by a monarch (let’s stipulate that he had constituent power in the relevant sense), but where a century later the polity comes to accept that the constitution was really authoritatively made by “the people” (let’s stipulate that the people clearly did not have constituent power in the relevant sense at the time the constitution was made). In other words, polities may adopt narratives about authorities behind past acts of constitution-making, which in one sense are fictional.\textsuperscript{15} Such narratives are fictional from the perspective of the normative reality at the time of the historical change.

Professor Kay in his Constituent Authority has shown how important are such ex post stories about past authority.\textsuperscript{16} They are key for continued existence (effectiveness) of constitutions created in the past.\textsuperscript{17} In fact, the historical truth of who really possessed and exercised the constituent power (of some kind) to make our constitution is at most only indirectly relevant to the currently much more practically important fact that we accept this constitution today. It is only relevant to the extent our current social practice of acceptance of that constitution is somehow related to this historical truth. But any such relationship is contingent and could conceivably not exist at all (e.g. due to a kind of collective amnesia or due to a conscious decision to reject some aspects of the past).

\textsuperscript{14} It is just that for de facto constituent powers the relevant event of the exercise of the power is likely to be extended in time, because it is an element of a definition of a de facto power that its exercise is successful and a successful constitutional change is one that is effective at least for some time. Hence, extension of any exercise of a de facto power depends on the length of that necessary period of effectiveness. However, on any workable view this definitional requirement must be limited (otherwise we would never know whether some constitutional change was brought about by an exercise of a de facto constituent power, because it could be that even though effective today it will cease to be effective at some uncertain later date). The key point here is that when this period ends, it becomes settled that an exercise of a de facto constituent power took place—nothing that happens after can change that.

\textsuperscript{15} Barczentewicz, Who Made the United States Constitution?, supra note 11, at 43–45; Barczentewicz, I Am Not Your (Founding) Father, supra note 11, at 75–82.

\textsuperscript{16} Kay, Constituent Authority, supra note 10, at 752–55.

\textsuperscript{17} Kay limited his discussion to “constitution in the modern sense, an identifiable text or set of texts containing rules at the highest level of the formal legal hierarchy.” Id. at 715. Thus, Kay excluded the U.K. constitution from his project. Id.
To capture the phenomenon of reasons for current acceptance of a constitution, Kay introduced his concept of “constituent authority” to refer to “the things that a given people in a given time and place understand as competent to make a binding constitution.”\(^{18}\)

Now, this formulation may suggest that one people at one time accepts one constituent authority. But I don’t think that this is the best understanding of that concept precisely due to the possibility of changing views on past authority. I think that Kay implicitly accepts (and in any case should accept) that any given people could, at the same time, have one view of constituent authority behind their current constitution and a different view of constituent authority required to replace this constitution.\(^{19}\) For example, the people of the U.S. today could accept that the current constituent authority for future radical constitutional change is with “the people,” while accepting that the constituent authority behind the U.S. Constitution was a group of “extraordinarily gifted statesmen.”\(^{20}\) And it could be that the latter view of constituent authority is a kind of a fiction because it was false at the time the Constitution was made.

To the extent constituent authority is concerned with power to bring about future constitutional change, it is I think synonymous with constituent power. Kay’s own description created an interesting ambiguity as to whether it is a kind of de facto or de jure constituent power. On one hand, he has written:

I refer to the observed quality in a person or persons that enables them to produce an effective positive law constitution. I do not intend to consider what, in light of one or another universal political morality, might be argued properly to invest a person or persons with that capacity. In this essay, I am interested in practical authority, the kind that actually does produce a constitution that is regarded as binding for an extended period in the population governed by the legal system that the constitution purports to control.\(^{21}\)

This seems to suggest that he has in mind a kind of a de facto power. However, he likened constituent authority to H. L. A. Hart’s rules of recognition, which I think is both telling and helpful.\(^{22}\) Kay also has written that:

\(^{18}\) Id. at 716. For other uses of “constituent authority,” see JOHN FINNIS, Introduction to PHILOSOPHY OF LAW: COLLECTED ESSAYS VOLUME IV 1, 12 (2011); ROZNAI, supra note 3, at 118.

\(^{19}\) Kay, Constituent Authority, supra note 10, at 749.

\(^{20}\) Id. at 749 n.183.

\(^{21}\) Id. at 720 (footnotes and emphasis omitted).

\(^{22}\) Id. at 721 (Kay likens constituent authority to H. L. A. Hart’s conception of the rule of recognition—that it exists “only as a complex, but normally concordant, practice of the courts, officials, and private persons.”).
In the case of a constitution, it will be essential that there exists an explicit or implicit determination by some significant part of the population that the makers of the constitution are or were an appropriate source of constitutional rules.\textsuperscript{23}

And that:

[constituent authority] is a certain kind of fact, one that includes the collective critical judgments of some number of individuals in certain times and places. It is this continuing normative attitude that distinguishes constituent authority from simple constituent power.\textsuperscript{24}

It follows that constituent authority is, in a way, a kind of a normative social practice of acceptance: \textsuperscript{25}

(1) \textit{for an existing constitution}: that the current constitution is legitimate due to being made by some specific person or group (with or without some additional features or procedural conditions);

(2) \textit{for future constitutions}: that a (future) constitution made by some specific person or group (with or without some additional features or procedural conditions) will be legitimate.

Of course, it may very well be in some society at some time that (1) and (2) are the same. I distinguish them here only because there is a possibility (not a necessity) of divergence.

The second, future-oriented, mode of constituent authority is identical with \textit{de jure} constituent power where normativity is understood as social normativity. It is the first, past-oriented, mode that is performing a distinct job from the concept of constituent power (\textit{de jure} or \textit{de facto}) and as such is a very important notion to include in our thinking about constitutional change and constitutional legitimacy.\textsuperscript{26}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 721.
\item \textit{Id.} at 722.
\item Usefulness of such a past-oriented concept of constituent authority can be also illustrated by analogy with Joseph Raz’s argument regarding the role of \textit{legal} powers in the foundation of the state of Israel. Raz argued that the existence of legal powers to make even the most basic constitutional laws may be recognised ex post. Whenever such ex post recognition is alleged, it is important to pay attention to the time-perspective from which such ascriptions of legal powers to past events are made. \textit{See Joseph Raz, Voluntary Obligations and Normative Powers, 46 Proceedings of the}\textsuperscript{27}
\end{enumerate}
\end{footnotesize}
Professor Kay rightly stressed that “the identification of constituent authority is an inherently time-bound phenomenon.”\(^{27}\) This is also true of constituent power as I argued earlier. For both constituent power and constituent authority we must be very clear about the time-perspective from which we look at the phenomena. There can only be constituent power at time \(t\) in a community \(c\), or constituent authority at time \(t\) in a community \(c\)—if those terms are not indexed to specific times and communities, they are without practical relevance.

### III. What Kind of Constitutional Change Results from Constituent Power?

I will now turn to the key remaining aspect of the concept of a constituent power (and of constituent authority), namely: is it a power to bring about any constitutional change or only some specific kinds of constitutional change? There is no doubt that constituent power is a power to make a new constitution, especially in the sense of enactment of a new codified constitutional text which is a wholesale replacement of the previous one. This is true about Professor Kay’s constituent authority as well.\(^ {28}\) But can a constituent power be exercised to bring about something short of making a new constitution in this sense? Kay seems to deny such a possibility, whereas authors like Roznai and Loughlin lean the other way.\(^ {29}\)

I will not attempt to give a detailed answer to the question just posed. I do have significant sympathy to a view that constituent power is defined more by who possesses it and, perhaps, the basic shape of a procedure in which it should be exercised (e.g. conventions? referendums?). In other words, I don’t think that constituent power is limited in what sort of constitutional change it can achieve. I’m willing to accept that even a seemingly small constitutional change (significantly short of constitutional replacement) could also be brought about by constituent power.

If a constitutional change in question is not a wholesale replacement, then how would we know that a constituent power had been exercised at

\(^{27}\) Kay, *Constituent Authority*, supra note 10, at 716, 748–49.

\(^{28}\) *Id.* at 732 (according to Kay, constituent authority is exercised when a constitution’s identity is destroyed, thus establishing a new constitution).

\(^{29}\) *Id.* at 732; *see* Martin Loughlin, The Concept of Constituent Power, 13 *European J. Pol. Theory* 218, 232 (2014) (arguing that constituent power “continues to function within an established regime”); *see also* Roznai, *supra* note 3, at 121–22 (“[T]he constitution-making process is often exercised in continuity with historic or existing laws or in accordance with pre-determined rules . . . . [C]onstituent power is never purely original.” (footnote omitted)).
all? One possible strategy for answering this question would be to study who, according to what the people broadly accepted at the time of change, would have had the constituent power to replace the constitution entirely (and in what procedure). In other words, to study the normative social practice of acceptance that I discussed in the previous section.

An auxiliary method that may sometimes be available is to look at whether the constitutional change in question was lawful. If it was unlawful and yet it was readily accepted as legitimate, this may suggest that it was a result of an exercise of a constituent power. This method is not universally applicable because it may very well be that exercises of constituent power will happen to be lawful.

IV. NECESSITY OF A CHANGE OF THE RULE OF RECOGNITION?

Professor Kay has written: “When we are able to say that the underlying sanction for all lawmaking (the rule of recognition) has successfully changed, it is proper to say that the agent of that change has exercised constituent authority.”

This could be understood in at least two alternative ways. First, that whenever a constitutional change that involves a change of the rule of recognition is a result of someone’s agency, the agent exercised a constituent authority. Second, that exercises of constituent power take place only if they lead to a change of the rule of recognition (this may seem to be in line with the idea that constituent authority is for making new constitutions). The first view does not exclude the possibility of an exercise of a constituent authority that does not result in a change of the rule of recognition; the second view entails such exclusion.

Analogously, we can pose two hypotheses regarding constituent power:

30 See Kay, Constituent Authority, supra note 10, at 756 (arguing that the force of the constitution depends on acceptance. According to Kay, acceptance is comprised of “some minimum part of the relevant population . . . find[ing] the constitution’s substantive rules satisfactory” and the population’s “regard [for] the constitutional rules as having issued from a legitimate source.”).
31 See supra Section II (describing that Kay’s concept of constituent authority refers to the understanding of the people at a certain time and place which makes a binding constitution).
33 Kay, Constituent Authority, supra note 10, at 731.
34 Id. at 732.
35 See Oran Doyle, Populist Constitutionalism and Constituent Power, 20 GERMAN L.J. 161, 162 (2019) (discussing that constituent power can explain how new constitutions can be created without existing legal authority).
every change of the rule of recognition which is a result of someone’s agency is a result of an exercise of a constituent power;

(2) every effective exercise of a constituent power necessarily results in a change of the rule of recognition.

My view is that (1) and (2) are mistaken, both for constituent powers and for Kay’s constituent authority. It is only the case that some exercises of constituent power or constituent authority result in changes of the rule of recognition and that some changes of the rule of recognition that are the result of someone’s agency are a result of an exercise of a constituent power or constituent authority.

Also, we have to be very careful when talking about any relationships between exercises of powers (or authority) and changes of social rules like the rule of recognition. This is because, strictly speaking, social rules like the rule of recognition cannot change directly by an exercise of a normative power (or even de facto power).\(^{36}\) Loose talk about such relationships often misrepresents the nature of how social rules change. I will come back to this issue in the next section.

I see several reasons why, contrary to claims like (1) and (2), there are no necessary connections between changes of rules of recognition on one hand, and exercises of constituent power or constituent authority on the other.

First, very significant constitutional change (including constitutional replacement) may happen without any changes of the rule of recognition. Consider a simplified scenario, in which it is universally accepted in some society that the king’s enactments are the ultimate and supreme source of law. Let’s stipulate that this does not change over time. We could then have a first constitution enacted by the king, which is then replaced by a later second constitution also enacted by the king (and introducing radical changes compared to the first constitution). This constitutional replacement took place without any change in the (ultimate) rule of recognition, which was exactly the same at the moment the first constitution was adopted and at the moment the second constitution was adopted. To give another example, on one interpretation, \textit{Marbury v. Madison}\(^{37}\) counts as precisely

\(^{36}\) \textit{See} Barczentewicz, Constitutional Change and the Rule of Recognition, \textit{supra} note 7, at 150–57 (arguing that social rules cannot be changed directly by exercises of normative powers); JOSEPH RAZ, \textit{PRACTICAL REASON AND NORMS} 98–104 (2d ed. 1990) (discussing what it means to have a normative power and distinguishing “normative” and “causal” ways of bringing about a normative change).

\(^{37}\) \textit{See} Marbury v. Madison, 5 U.S. 137, 173–74 (1803) (holding that the Constitution vests the whole judicial power of the United States in one Supreme Court and inferior courts as Congress chooses to establish); \textit{see also} Douglas E. Edlin, \textit{The Rule of Recognition and the Rule of Law: Departmentalism and Constitutional Development in the United States and the United Kingdom}, 64
that kind of constitutional change (changing the rule of recognition) without an exercise of constituent power (or even a legal power of constitutional amendment).

Second, no change of the (ultimate) rule of recognition is a constitutional change at all if we understand a constitution as “an identifiable text or set of texts containing rules at the highest level of the formal legal hierarchy,” as did Professor Kay. To claim otherwise is to commit a category error: the rule of recognition is a social rule, it is a different sort of a thing, with different criteria (mode) of existence, than any constitutional text. Hence, no change of the rule of recognition can be the same as a change of the textual constitution. There may be other, contingent relationships between such events: correlation, perhaps even causation—but never identity.

Third, not every change of the (ultimate) rule of recognition is in any way accompanied or associated with a change of a constitution understood as a codified constitutional document. I do believe that every change in the rule of recognition is a constitutional change, but I do so because I work with a broad (“material”) sense of a constitution, which includes customary constitutional rules and non-legal constitutional rules. Some changes of rules of recognition are not accompanied by any changes in codified constitutions, so if someone adopts a narrower text-focused notion of a constitution, then they must reject such changes as changes of the constitution that they are interested in.

Fourth, not every change of the (ultimate) rule of recognition is a significant constitutional change. If someone prefers to limit the notions of constituent power or constituent authority only to some kinds of constitutional change (significant change, constitutional replacement, etc.), then it is clear that at least some changes of the rule of recognition may not rise to that standard.

Fifth, some who arguably have a de facto capacity to cause a change of the rule of recognition tend not to be seen as holders of constituent power. Perhaps the best example is U.K. Parliament, which through enacting statutes arguably could cause changes that, if effective, would amount to changes of the U.K. rule of recognition (e.g. abolition of the common law as a source of law). Despite that, U.K. Parliament tends not to be seen as a holder of constituent power (rather, as an agent of the holder of that power: the people).
Thus, neither the concept of constituent power nor that of constituent authority should be defined by reference to any relationship with change of the rule of recognition. It would be, I think, a mistake to define constituent power (or constituent authority) as even a de facto capacity to change the rule of recognition.42 For the reasons given above such a definition would likely be underinclusive, overinclusive, or both.

It is, however, still very much meaningful to debate what kind of constitutional change (by definition, necessarily) results from an exercise of constituent power or constituent authority. Some may want to limit it to a replacement of a codified constitutional document.43 Some may prefer a notion of a significant change, which may fall short of full replacement.44 Others may require relevant constitutional change to happen unlawfully, through violation of some legal (constitutional) rules.45 Finally, some—like myself—may argue that both constituent power and constituent authority can in principle be exercised to bring about any constitutional change.46

V. EXERCISES OF CONSTITUENT POWERS MAY BE LAWFUL47

By any view of constituent power, at least some exercises of constituent powers can be unlawful. In fact, actions seen by some as exercises of constituent power may be not only not recognized as legally effective but be expressly legally prohibited, even criminalized.48 The events around the Catalan unilateral declaration of independence provide a vivid illustration of how a legal system (Spanish law) may see it as sedition or even treason for a group of its subjects to purport to exercise constituent power to secede.49 The success of Catalan independence, in the current

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42 There could not be a normative (de jure) power to change the rule of recognition for the reasons explained in the next section. See infra Section V.
43 Kay, Constituent Authority, supra note 10, at 731–32 (noting that the convening of constituent authority expresses the belief that the constitution requires a replacement).
44 See Richard Albert, Constitutional Amendment and Dismemberment, 43 YALE J. INT’L L. 1, 2–3 (2018) (discussing that various techniques can be used to substantially change the constitution).
45 Kumm, supra note 32, at 701 (noting that action outside of established law can be classified as constituent power or illegal).
47 In this Section, whenever I mention constituent power it should be understood as including constituent authority as well.
48 Kumm, supra note 32, at 701.
legal context, would involve the emergence of a new, independent political community, with a new legal system and new ultimate rules of recognition.

However, unless we exclude this possibility by definition (and I don’t think we should), there is no good reason to deny that it is possible for exercises of constituent power and of constituent authority to be *lawful*. For instance, if a constitution provides that it may be changed by a referendum and if this kind of referendum is a genuine exercise of a primary constituent power, then it could very well be that resulting constitutional change will be constitutional and lawful, and it will also be a genuine exercise of a constituent power.

Another, though more controversial, potential example is the famous Article 146 of the German Basic Law. This constitutional provision explicitly allows for replacement of the Basic Law with a constitution to be adopted by the German people in a “free decision.” It is at least possible that if such circumstances ever arise, the creation of a new German constitution to replace the Basic Law will be rightly seen as a lawful constitutional change, despite being a wholesale constitutional replacement. And, of course, such an act of constitution-making will likely be seen as a legitimate exercise of constituent power.

Several simple propositions follow from the definitional separation between constituent power and the law. The lawfulness of any constitutional change tells us nothing about whether that change was a result of an exercise of a constituent power. However, *unlawfulness* also tells us nothing. The law is simply irrelevant to our assessment of whether a constituent power was exercised or not. What is, independently, an exercise of a constituent power, may also happen to be lawful or unlawful. An exercise of a constituent power may involve exercises of legal powers of constitutional amendment, but whether it does is of no consequence on whether it counts as a genuine exercise of the constituent power.

In my view, which I develop elsewhere, there are two ways in which legal change (and thus any change in legal constitutional rules) may be law-governed (lawful): it may be an exercise of a pre-existing legal power to change the law or it may be merely recognized by a pre-existing rule of recognition. Both grounds for lawfulness of legal change may apply to constitutional changes which also, independently, happen to be genuine

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50 GRUNDGESETZ [GG] [BASIC LAW], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html. See also Kay, Constituent Authority, supra note 10, at 726–27 (“It is unclear how the constituent authority that [Article 146] recognizes fits with Article 79 stipulating the process of constitutional amendment.”).
51 Kay, Constituent Authority, supra note 10, at 727.
52 Barczentewicz, Constitutional Change and the Rule of Recognition, supra note 7, at 226–31.
exercises of constituent powers. This is true even of constitutional change involving a change of ultimate rules of recognition.

There cannot be a legal power to change an ultimate rule of recognition, because legal powers work without the intermediation that would be required in the case of ultimate rules of recognition (e.g. intermediation of an actual change in the social practice underlying an ultimate rule of recognition). This is true of non-legal normative powers as well—like *de jure* constituent power. However, some legal philosophers insist that to deny the role of legal powers in a change of ultimate rules of recognition is to fail to account properly for the internal perspective of committed participants of legal practices. For example, Grant Lamond has written:

> In the operation of a legal system the rule of recognition is treated as a binding law that may be subject to legal alteration or clarification, but not to modification simply at the will of officials.

How could it then be that the rule of recognition cannot be changed normatively through an exercise of a legal power and yet at the same time is perceived as amenable “to legal alteration or clarification”? The answer, I say, is that there can be legal abilities to change ultimate rules of recognition, and the operation of such abilities can meaningfully be characterized as “legal alteration.” For someone to have a standing ability to change the law by doing *X*, it means that the legal officials are under a legal duty to accept *X* as affecting valid legal change (a duty imposed by a rule of recognition).

What explains the tendency to speak of some changes in ultimate rules of recognition as “made” or “affected” by someone is the fact that the actions of that someone are among the reasons that people have for acceptance of the rule. A legal official might say—“I accepted that change because parliament made it”—about a legal change that is, perhaps unbeknownst to the official, a change in an ultimate rule of recognition.

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53 An exercise of a law-making power must result in, or must end in, a change in the law. This is not a trivial requirement. It excludes all the cases where an apparent law-maker merely influences someone else who then changes the law or when she contributes to a bottom-up process of legal change where no one can take the credit, legally speaking, for making the change. See id. at 150–57; see also Lars Lindahl & David Reidhav, *Legal Power: The Basic Definition*, 30 RATIO JURIS 158, 177–78 (2017) (“[A]n agent’s practical ability to achieve legal result[] does not imply the agent’s legal power to achieve [that result].”); Raz, *supra* note 26, at 80 (“I have a legal power only if it is my act which is recognized by law as effecting a legal change.”).


55 *Id.*

56 *Id.*

The introduction of the notion of legal abilities to change the law allows more fully to account for the role of reasons for acceptance of a legal change. Relying merely on the standard concept of a legal power entails treating statements like the one in the example just given as erroneous or even incoherent.

Consider, for example, the issue of whether the U.K. Parliament has a standing ability to change at least some ultimate rules of recognition of U.K. law. As I defined it, if one has a standing ability to change the law then the legal officials are under a legal duty to accept exercises of that ability as affecting valid legal change. The officials legally should accept the change. This, in my view, is sufficient to see that even a change of an ultimate rule of recognition in response to an exercise of such an ability is meaningfully lawful (law-governed).

In that sense, an official can have legal reasons to change what they accept as the content of their duty of recognition of law. Arguments about such reasons may be legal arguments. Thus, it does not follow that all arguments “for or against” ultimate rules of recognition “are necessarily extralegal.”58 Of course, I am not denying that it is also possible to make extra-legal arguments about what should be the content of ultimate rules of recognition.

Richard Albert claimed that codified constitutions can “attempt to direct how constituent power can be validly exercised.”59 His example is one of the procedures for constitutional change from Article V of the U.S. Constitution, a method he sees as similar to the one used for adoption of the Constitution itself (a proposal is to be made by a constitutional convention, then ratified by three-quarters of the states in conventions). Article V seems, straightforwardly, to ground both a legal power to change the constitution (an amendment power) and a non-ultimate rule of recognition imposing a duty to accept the changes as law.60 Could it be a genuine exercise of a constituent power?

If someone accepts that constituent powers can only be exercised unlawfully, then the question would be what sort of unlawfulness could be at play. On one understanding, any violation of some legal duty would be

enough (e.g. a duty of public officials specifically not to engage in any non-Article V constitutional change). However, if we see a change as unlawful only if it is legally invalid, then violation of any legal duties is irrelevant because legal powers can be effectively exercised while violating legal duties (only legal disabilities block the effectiveness of legal powers).° The question would then be whether the Article V power somehow contains limitations other than the requirement of following one of the procedures it expressly provides (e.g. that it does not allow a creation of a new constitution). I am skeptical of claims about such implicit limitations. And if there is no such limitation, even a wholesale constitutional replacement through Article V would count as a valid and lawful exercise of an amendment power, and thus not an exercise of a constituent power (on a view of constituent powers that requires unlawfulness of constitutional change).

However, on any broader view of constituent powers, Albert can be perfectly correct in saying: “The four procedures in Article V give political actors the tools to exercise the full scope of powers to change the Constitution . . . from outside the constitutional order, in order to found a new constitution that leads to legally discontinuous constitutional change.”°

Even if Article V really gives “the full scope of powers,”° then there is space for constituent power to be genuinely manifested when Article V is properly used. Any such change could then be seen as both coming from within the constitutional order and from outside (as an exercise of a primary constituent power, which is more fundamental than the constitutional order).

CONCLUSION

In several places in my discussion, instead of arguing for one definite view, I limited myself to canvassing the options. I did so regarding (1) the choice between de facto and de jure conceptions of constituent power, (2) which normative framework to adopt for a de jure conception, and (3) what kind of constitutional change (by definition) results from an exercise of constituent power or constituent authority. The third issue is, I think, also a question pertinent to the concept of constituent authority.


° Albert, supra note 59, at 23.

° Id.
The first and the third choices call for a resolution according to methodological, pragmatic considerations. In other words, to decide between the various options we should ask the question: what is the concept of constituent power (constituent authority) for? This means that different understandings may be acceptable in different contexts (e.g. in different research projects with different goals).

However, I want to stress that once someone adopts a de jure conception of constituent power and aims to apply it to any real-life or hypothetical scenario of constitutional change, then they will most likely be unable to get away with bracketing out the complex first-order normative (“what should be done?”) and meta-normative (“how to understand, classify, etc. claims of what should be done?”) issues. Given the significant role a concept like constituent power (or constituent authority) may play in the political life of a community, it is, I think, incumbent on scholars invoking that concept to grapple with questions like: “is this (understanding of) constituent power really legitimate?” or even more fundamentally “what does it mean for something like that to be legitimate?”.