The View from Nowhere in Constitutional Theory: A Methodological Inquiry

Dr Silvia Suteu, Lecturer in Public Law, University College London

Introduction

This chapter begins from the premise that constitutional theory is still on a quest of self-definition as a field of inquiry and consequently is ripe for methodological reassessment. The chapter explores the methodological assumptions – mostly unstated but widely shared – underpinning much constitutional theoretical work by focusing on the role of comparison in constitutional theorising. Insofar as it finds itself at the intersection of, or in close conversation with, other disciplines such as political and legal theory, constitutional theory has developed hybrid (or, less generously, hodgepodge) methodological tools. It often finds it difficult to occupy the space between ideal and non-ideal theory. It may employ tools such as analogy and extrapolation, but frequently decontextualises or generalises from cherry picked or 'usual suspect' case studies. This chapter seeks to mine the rich methodological advances in cognate fields such as comparative constitutional law and comparative politics for insights on how constitutional theory can embrace contextualism and robust comparison. Our aim should be to avoid a 'view from nowhere' approach in constitutional theory that mistakes for objectivity what are ultimately contextual impoverishment and comparative blindness.

The inspiration for the chapter's title, of course, comes from Thomas Nagel's eponymous work.[1] His insight that we are constantly grappling with the reality of interconnected subjectivities and objectivity in the world and that these sometimes will be irreconcilable has farther-reaching consequences for scholarly inquiry than will be explored here. For my purposes, most relevant will be Nagel's insight that recognising our own subjectivity is directly connected to recognising our possibility of detaching from it. In other words, recognising that we as scholars are always contextually situated and individually subjective does not preclude us from engaging in robust scholarship – quite on the contrary, it is a prerequisite for it, especially when drawing inferences we assume have wide application. I would not overemphasise the inspiration drawn from Nagel's work, however. I use it, instead, as a reminder to resist lawyerly "amateurish…pseudo-philosophical efforts" as Mark Tushnet once put it.[2] In other words, as a call for self-reflection and self-awareness when doing constitutional theory, aided by a comparative outlook.

The chapter proceeds by, first, discussing the comparative turn in constitutional theory and its potential for correcting old assumptions and revealing new insights. I illustrate these benefits by revisiting two well-trodden debates in constitutional theory and comparative constitutional law, one around the legitimacy of constitutional review and the other around citations of comparative material in constitutional adjudication. The chapter then turns to investigating recent advances in comparative constitutional change literature, in particular new work on constituent power and on unconstitutional constitutional amendments. These are used as examples of the type of interdisciplinary, comparative, and also deeply contextual scholarship that has the capacity to shed new light on old core questions of constitutional theory. I ultimately argue that this is demanding work, but that much more rewarding for it.

[1] T Nagel, *The View from Nowhere* (Oxford University Press 1986).
[2] M Tushnet, 'Constitutional Scholarship: What Next?', *Constitutional Commentary* 5 (1988) 28, 31.

1. The comparative turn in constitutional theory

The type of engagement with comparative work I am interested in is not entirely alien to constitutional theorising. Recent work has indeed proceeded precisely on the assumption that there is scope for innovative thinking by approaching questions of constitutional theory old and new from a comparative vantage point.[3] The authors of a recent collective volume on the topic note their own precursors among Weimar-era constitutional theorists grappling with questions of democratic institution-building in comparative historical perspective.[4] They also remark on a familiar conundrum in comparative work in constitutional and human rights studies: the tension between the universal and the particular. The question is whether we are dealing with sufficiently similar constitutional questions that necessitate common solutions, or whether differences in culture and history preclude such universalising.[5] Their answer is that this is a false paradox and the tension can be reconciled, while constitutional principles can be divided between those that remain polity-specific and others that "can make a claim of universality" but nevertheless require local adaptation.[6]

The volume in question is a welcome scholarly addition that sees comparative constitutional studies and constitutional theory as a unified field of study, or at least as two bodies of literature that are in close correspondence.[7] Its chapters cover important constitutional theoretical topics that can only be enriched by comparative engagement, including the separation of powers, federalism, and constitutional amendment. Valuable though such collective work is, though, it suffers from two limitations, one of design and one of scope. The latter is the usual problem of edited collections on comparative themes being unavoidably limited in their scope, in terms of both the number of substantive topics and of number of jurisdictions covered. An objection that comparative constitutional scholarship is not exhaustive would be disingenuous, as authors themselves readily acknowledge the limits inherent in their projects. Choices must be made, of course, and topics and themes cut for principled or pragmatic reasons. The range of jurisdictions covered, however, risks skewing results (to employ a more scientific terminology) in a way that should concern us more. This is where the research design-based objection comes in. Insofar as we extrapolate, on the basis of a limited number of jurisdictions, to infer that our constitutional theorising is sound, we had better make sure that those jurisdictions are representative of the questions tested and are robustly comparable. We should also make efforts to ensure no serious omissions remain that could call into question our findings.

The nature and legitimacy of constitutional review

Two examples illustrate these problems and constitutional scholarship's repeated attempts to grapple with them. The first is the much-explored debate in constitutional theory surrounding the nature and

[3] GJ Jacobsohn and M Schor (eds.), *Comparative Constitutional Theory* (Edward Elgar 2018).
[4] *Ibid.*, 4-5.
[5] *Ibid.,* 5. See also C McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies* 20:4 (2000) 499 and V Jackson, 'Comparative Constitutional Law: Methodologies' in M Rosenfeld and A Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 54-74.
[6] Jacobsohn and Schor (2018), 6-7.
[7] On comparative constitutional studies as itself an interdisciplinary body of literature bridging comparative constitutional law and comparative politics, see R Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014). See also Günter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (Edward Elgar 2018).

proper scope of judicial review in a constitutional democracy. The Dworkin-Waldron disagreement,[8] with its implications for our understanding of rights, judicial interpretation, and the judicial function, has since been re-evaluated, reconciled, and restated by constitutional theorists.[9] Some of the most valuable contributions to that debate have been the ones identifying comparative gaps and faulty assumptions about the universality of the strong versus weak judicial review debate. For example, work on transitional democracies has revealed that, for institutional capacity and political stability reasons, the choice of constitutional review model is at best secondary and at worst counter-productive in many jurisdictions.[10] Waldron's conditions for trusting the legislative process to guard rights, for example, will be of limited value to the many constitutional systems plagued by electoral instability, cronyism in legislative seat allocation, and weak parliaments. Equally, Dworkin's trust in the judge to dispense her constitutional role with integrity and fairness will seem misguided to one in a constitutional system where the judiciary has never enjoyed the perception of such integrity, whether due to political co-optation or, more mundanely, because its judges do not actually engage in the type of discursive, reason-giving, non-formalist judging Dworkin assumes them to. The point here is not simply to show that neither of their models fits the whole spectrum of possible case studies. It is instead to highlight that their operating assumptions or stipulated conditions were, from the onset, ignorant of the vast number of jurisdictions that operated under different constraints and along different parameters. At the very least, this awareness would have qualified and narrowed down the purported general import of both approaches.

Nor does this comparative awareness need to highlight only the pathological and marginal. Take comparative work on the so-called 'weak', 'dialogic', or 'Commonwealth' model of judicial review. This work has shown the complex operation and benefits of systems without judicial strike-down of legislation.[11] Indeed, the same rich contextualism has revealed the subtle differences between these three labels,[12] as well as challenged the assumption that the model is confined to the common law world.[13] This scholarship has reminded us that foundational constitutional concepts such as 'constitution', 'basic law', or 'constitutional law' carry very different meanings across jurisdictional boundaries. We may think we speak of similar legal institutions, in other words, but we should know better. It has also challenged the too easily accepted dominance of the strong judicial review model,

[8] See, *inter alia*, R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (HUP 1996); J Waldron*, Law and Disagreement* (Oxford University Press 2002).

[9] See, *inter alia*, A Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22(5) *Law and Philosophy* 451-486; W Sinnott-Armstrong, 'Weak and Strong Judicial Review' (2003) 22 *Law and Philosophy* 381-392; D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford University Press 2017); A Latham-Gambi, 'Political Constitutionalism and Legal Constitutionalism—an Imaginary Opposition?' (2020) 40(4) *Oxford J Legal Studies* 737–763.

[10] For an argument that this should result in constitutional designers reorienting their attention to mechanisms to guarantee judicial independence in such contexts, with an accompanying weaker model of constitutional review to avoid destabilising constitutional conflicts, see S Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia J Transnational Law* 285-320.

[11] S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013).

[12] A Kavanagh, 'What's So Weak about "Weak Form Review? The Case of the UK Human Rights Act 1998' (2015) 13(4) *International J Constitutional Law* 1008–1039; R Gargarella, '"We the People" Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances' (2014) 67(1) *Current Legal Problems* 1-47.

[13] J Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective', (2000) 48 *American J Comparative Law* 345-381; T Gyorfi, *Against the New Constitutionalism* (Edward Elgar 2016).

which had been assumed – especially during the post-1989 wave of new constitution-making – to be part of a sort of 'end of history' set package of liberal constitutionalism.[14]

At the very least, these reassessments of the debate surrounding the legitimacy of judicial review show that earlier contributors to it would have benefitted from deeper comparative knowledge. This would have allowed them to consider the applicability and limits of their respective theories beyond the narrow common law world (and really, beyond a narrow sub-set of jurisdictions even within that world). Waldron's belief in parliaments as the quintessential arena for democratic law-making would have seemed immediately suspect with more familiarity with countries where majoritarianism has led to exclusion, abuse, and corruption. Dworkin's belief in judges as moral agents might equally have appeared alien to a scholar aware of the numerous societies where legal education, legal inheritance (for example, authoritarian), and even simply legal culture and tradition (for example, a commitment to legal formalism) have created a judge figure very different from that he presents. It might be argued that theirs are theories that presuppose certain conditions, that they rest on certain assumptions about the inner workings of the legal system that need to be met before the theories hold. However, from the point of view of constitutional theory as a midway theory between jurisprudence and applied constitutional law, this would be problematic: if, applying their criteria, we find that their theories fit only the narrowest of cases, the theory itself may need to change. Moreover, even their implicit case studies may not meet these criteria, if they ever did. We could indeed ask ourselves how Dworkin would assess the extreme politicisation of judicial appointments in the US and its impact on the legitimacy of the Supreme Court there.[15] Or how Waldron would assess the erosion of political accountability mechanisms so crucial in ensuring the operation of the UK's political constitution.[16]

What might also be argued, in broader terms, is that their intention was closer to ideal theory and as such that it would be disingenuous to attack them for failing to capture the full complexity of comparative experience in the world. This possible retort reveals the different understandings of the aims of constitutional theory embedded in scholarship. We could envision the field as bringing together a spectrum of work, some indeed closer to ideal theory such as political or moral theory and other more interested in applied questions of constitutional design and constitution-building.[17] The problem remains that this is not a neat distinction, and insofar as we are seeking answers to concrete constitutional problems, whatever our starting point, our solutions need to be at least plausibly workable in the real world. This is what differentiates constitutional theory from other forms of theorising. Its existence in the liminal space between political theory and constitutional practice means it is harder to define its contours. But we somehow understand that a good work of constitutional theory might be equally attractive to the theorist looking for conceptual refinement as to the practitioner looking for deeper analysis, systematisation, and critique of real world problems she has encountered in her practice.

[14] For a challenge to this, asking whether traditions of political constitutionalism were ignored and then sidestepped during constitution-making in Central and Eastern Europe, see P Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2013).

[15] He had expressed deep concern over the growing politicisation of judicial appointments and the possibility of young ideologues being appointed to the Supreme Court and tilting the ideological balance on its bench. See, R Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton 2006), 158.

[16] For an overview of these, see, e.g., 'The Political Constitution at 40' special issue in *King's Law Journal* 30(1) (2019).

[17] For examples of the latter, see T Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press 2012).

The use of comparative material in constitutional adjudication

A second example comes from the rich scholarship on the use of comparative material in adjudication.[18] Here too the terminology employed will itself reveal much about the jurisdictional milieu: it is no coincidence that American constitutional scholarship refers to it as the use of 'foreign law', with 'foreign' citations timidly embraced and then quickly renounced following backlash to the comparative references in the case of *Lawrence v Texas*.[19] Nor is American constitutional law alone in this. 'Foreign jurisprudence' citations are also viewed sceptically in UK human rights adjudication, for example, which reflects a widespread assumption that the common law's long history of recognition of civil liberties is tantamount to a certain epistemological superiority in all rights matters.[20] The label is not determinative of a given constitutional system's openness to comparative material—section 39(1)(c) of the South African Constitution indicates that courts "may consider foreign law" when interpreting the Bill of Rights, as indeed happened quite extensively in the country's early post-apartheid years.[21]

What this example also reveals is the importance not just of broad comparative awareness, but also of a theory of comparison itself.[22] The appeal of looking for judicial answers comparatively is great, whether it fully embraces a universalist perspective on constitutional questions or is simply an indirect source of judicial inspiration.[23] Accompanied by jurisdictional openness, the potential for innovation and radical thinking increases. For example, it has been argued that the Delhi High Court's incorporation of comparative citations in its decision decriminalising homosexuality was a positive step, allowing it not only to better ground its doctrinal solution but also to increase the moral legitimacy of its conclusion.[24] By looking to comparative doctrinal developments in places like Nepal and Fiji, therefore, the court revealed the possibilities of "an inclusive approach towards constitutional comparison [that] can be both useful and responsible", one that "can allow for our work to be not merely comparative but truly global."[25]

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[18] T Groppi and M-C Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart 2013).

[19] M Tushnet, 'When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law', *Minnesota Law Review* 90 (2006) 1275; M Rosenfeld, 'Comparative Constitutional Analysis in United States Adjudication and Scholarship' in M Rosenfeld and A Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 38.

[20] For an overview of such foreign citations in UK human rights adjudication, see H Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart 2018).

[21] C Rautenbach, 'The Influence of Foreign Judgments on the Development of Post-apartheid Constitutional Law in South Africa: Judicial Law-making in Action?', *Journal of International and Comparative Law* 7:1 (2020) 99; U Bentele, 'Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law', *Georgia Journal of International and Comparative Law* 37:2 (2009) 219; DM Davis, 'Constitutional borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience', *International Journal of Constitutional Law* 1:2 (2003) 181.

[22] For an attempt to put forward such a theory in the American context, see R Dixon, 'A Democratic Theory of Constitutional Comparison' (2008) 56 *American Journal of Comparative Law* 947.

[23] M Tushnet, 'The Possibilities of Comparative Constitutional Law', *Yale Law Journal* 108:6 (1999) 1225; S Issacharoff, 'Comparative Constitutional Law as a Window on Democratic Institutions', New York University Public Law and Legal Theory Working Papers, Working Paper No. 17-14, May 2017, http://lsr.nellco.org/nyu_plltwp/582/.

[24] M Khosla, 'Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision' 59:4 (2011) *American Journal of Comparative Law* 909.

[25] *Ibid.*, 934.

This comparative enthusiasm risks overlooking potential pitfalls in the comparative turn, especially in adjudication. First, comparative citations can be misused, such as by being selective and acontextual – a point often raised by judges and scholars resisting reliance on comparative material.[26] These qualms are valid, however, even while they leave open the question of whether selection bias and insufficient attention to context can be overcome. Robust comparative methodology is specifically designed to help prevent such misuse. Rejecting comparison wholesale because methodological rigour is needed when engaging in means renouncing its benefits because doing the comparison well is difficult.

Second, the politics of comparison in constitutional law matter. Methodologically, this takes us back to the problem of shoddy research design. Insofar as we rely on usual suspects in our comparative studies, or simply selecting comparators whose legal tradition or language we may be familiar with, we are inadvertently importing our biases and epistemic limitations into our comparative research design. Even more worryingly, it leads us to leave unchallenged disciplinary assumptions and frameworks of analysis that perpetuate the same elisions and injustices. In one influential formulation, the endurance of this Western-centric political imagination amounts to a form of 'epistemicide'.[27] Or, to quote a comparative constitutional law scholar and theorist having grappled with the difficulties of bridging the gap between the two fields:

> Preoccupied with judicial review and, with time, methodological questions about the migration of constitutional ideas comparative constitutionalism has systematically neglected issues such as poverty, imperialism, or socioeconomic emancipation which have otherwise been high on TWAIL's agenda. Though a number of scholars associated with the comparative constitutionalist movement contributed systematic and innovative theoretical reflections on the nature and functions of constitutional government, none of them challenged the liberal-democratic 'software' of Western constitutionalism.[28]

It is not just that the dominant paradigm remains unchallenged. It is also that these same assumptions inform the work of constitutional designers and their (often international) advisers. The "significant methodological limitations" of a young field (comparative constitutional law) are often unreflectively imported into constitution-making processes.[29]

This brief foray helps illustrate the numerous dangers entailed by comparative legal citations. While most of the scholarship in this area focuses on such citations in constitutional adjudication, I would argue the same self-awareness and methodological rigour required of the good adjudicator when citing comparative material should inform the good constitutional theorist. While disciplinary boundary policing serves no one, I think constitutional theorising carries with it a certain duty of care on the part of those engaging in it. Our work informs constitutional processes in the real world, even if indirectly, and as such we should strive to *know* that world and to do so beyond our own backyard.

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[26] C Saunders, 'The Use and Misuse of Comparative Constitutional Law', *Indiana Journal of Global Legal Studies* 13:1 (2006) 37.

[27] B de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Paradigm Publishers 2014).

[28] Z Oklopcic, 'The South of Western Constitutionalism: A Map Ahead of a Journey' 37:11 (2016) *Third World Quarterly* 2080, 2082.

[29] A Pastor y Camarasa, 'The limitations of international expertise when drafting new constitutions', *The Conversation* (17 November 2020), https://theconversation.com/the-limitations-of-international-expertise-when-drafting-new-constitutions-149504. See also M Malagodi, 'International Assistance to Constitution Making between Principle and Expediency', *I-CONnect Blog* (13 January 2021), http://www.iconnectblog.com/2021/01/international-assistance-to-constitution-making-between-principle-and-expediency/.

The following section will illustrate these points by focusing on concepts in constitutional theory that have migrated into constitutional adjudication: constituent power and the notion of unconstitutional constitutional amendments.

2. *Constitutional theory and comparative constitutional change*

I propose to further illustrate what advances in comparative constitutional theory can illuminate by revisiting two problems with which the theory and practice of democratic constitutional change has long grappled.[30] The first, broad set of questions asks how to ensure the legitimacy of both the process of constitutional reform and its substantive outcome. Even under ideal conditions, these aims demand that we clarify our notions of democratic constitutional legitimacy and authority, as well as the no less thorny relationship between constitutional process design and its results. Constituent power, understood as the power to constitute and reconstitute the constitutional order, has often been relied on in pursuit of answers to such questions of constitutional authorship, legitimacy, and endurance. The second but related set of questions, raised with ever greater frequency today, asks how to prevent abusive constitutional change such as that pursued by would-be autocrats and populists in power. This can take the form of constitutional or legislative amendments and even replacement that undermine core democratic constitutional commitments, or else pack and subordinate courts so as to remove the possibility of legal accountability.[31] As we will see, the two strands are interrelated, as how constituent power is understood will have a direct impact on what we deem democratically acceptable constitutional reforms or replacements, and what we consider illegitimate change.

The revival of constituent power theory

For a long time, and to an extent still, discussions of constituent power embraced Sieyes's notion distinguishing it from constituted powers and saw it as both extra-legal and extinguished at the time of constitution-making. This understanding in turn led to a 'sanitised', apolitical view of constitutional authority that could, for the most part, ignore the messy dynamics of radical politics, coups and revolutions. They were simply outside the duly constituted legal order, even while they could fundamentally alter it.

More recently, scholars have insisted on revisiting earlier understandings of the notion of constituent power in order to better grasp the complexities of the concept.[32] One such scholar, Lucia Rubinelli, has provided a rich intellectual history of the concept of constituent power through close reading of

[30] When it comes to the study of constitutional change, scholarly attention *has* turned to the need to bridge comparative constitutional law and theory. See, *inter alia*, R Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019); R Albert, X Contiades, and A Fotiadou (eds.), *The Foundations and Traditions of Constitutional Amendment* (Hart 2017); and X Contiades and AFotiadou (eds.), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020).

[31] There are, of course, other forms that abusive constitutional change can take. For example, changes to electoral and media laws have been used to entrench incumbents' hold on power and undermine fair electoral competition. On the issue of 'abusive constitutionalism', see D Landau, 'Abusive Constitutionalism', *UC Davis Law Review* 47 (2013) 189. On the diversity of populist attacks on the separation of powers, see S Gardbaum, 'The Counter-playbook: Resisting the Populist Assault on Separation of Powers', *Columbia Journal of Transnational Law* 59:1 (2020) 1.

[32] For an earlier collection of contributions discussing constituent power as embedded in different constitutional traditions, both national and supranational, see M Loughlin and N Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

Sieyes's work and its reception.[33] Through careful reading of the original historical sources and comparative material, Rubinelli seeks to illuminate the many lives the concept of constituent power has lived over the years, and thus frames hers as a history of the *theory* of constituent power rather than its practice. This close engagement with a range of key thinkers (albeit an unavoidably selective sample) allows her to reveal the multiple different ideas often subsumed to the concept of constituent power, some theorists having collapsed it into sovereignty, some viewing it as inherently democratic, constitutional, or juristic, and others as pre-political and leading to decisionism. In Rubinelli's words, this is "a story that portrays constituent power as one amongst other ways of framing the principle of popular power over time."[34]

Rubinelli's is not just a pursuit to recapture the origins of constituent power as an idea, but also to track the uses of the language of constituent power over time and expose those instances when it has been misrepresented, reinterpreted, and even abused. In so doing, she seeks to expose those authors who operate a misguided appeal to history to defend their definition of constituent power as the one and true.[35] Such circular appeals to history – positing a 'true' definition of a constitutional concept in order to justify one's reading of 'real' constitutional practice – are to be resisted. According to Rubinelli, "[c]onstituent power is…in the eyes of the beholder and not, as some seem to believe, a positive reality from which one can straightforwardly abstract a concept."[36]

Here is, then, one of the most valuable contributions the historian can make to constitutional theoretical debates: unearthing original meaning, retracing legacies of ideas, and exposing misuses, oversimplifications, and claims to exclusive interpretation of a complex idea. There are also important limitations to such an approach, especially from the perspective of a constitutional theorist seeking to understand contemporary processes of constitution-making and constitutional change. By explicitly excluding a history of the practice of constitution-making from her account, Rubinelli's analysis operates on the basis of a distinction that is difficult to maintain and, I would argue, artificial from the onset.[37] This is not only because constitutional ideas and meaning are revealed, shaped, and transformed by practice, but also because at least some of the constitutional theorists she reads in the book view constituent power itself as a practice, rather than a grand narrative.[38] Theirs are not just attempts to recapture the 'true' meaning of constituent power but, especially when reacting to new problems in constitutional practice or to answer old questions in a new key, attempts at constructing novel theories of constituent power. As Rubinelli herself admits, "contemporary theorists are fully part of the process of negotiation of the meaning and implications of the principle of popular power."[39] In other words, they are "fully part of the history…narrated" in the book.[40] This does detract from the value of such a robust historical re-evaluation of the idea of constituent power. Quite on the contrary: it should further emphasise the sense of responsibility for the constitutional theorist relying on notions of constituent power to read, justify, and denounce contemporary processes. The theorist must remain aware not only of the partiality of her standpoint on the meaning of the concept, but also of the fact that she is developing and enriching its meaning herself.

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[33] L Rubinelli, *Constituent Power: A History* (Cambridge University Press 2020).
[34] *Ibid.*, 3.
[35] *Ibid.*, 229.
[36] *Ibid.,* 16.
[37] To be fair to her, she acknowledges the difficulty of the distinction even while defending it at *ibid.*, 18, fn 40.
[38] This would lead to a more charitable reading of Arendt's understanding of constituent power for example. Arendt is discussed in *ibid.*, chapter 5.
[39] *Ibid.*, 30.
[40] *Ibid.*, 222.

A second strand of recent work on constituent power that has significantly advanced our understanding of the concept comes from scholars directly engaged in explaining and integrating contemporary constitutional practice into broader narratives of constitutional legitimacy. Andrew Arato and Joel Colon-Rios are both, in distinct ways, excellent examples of such richly comparative theorising that both clarifies and adds to existing understandings of constituent power.[41]

Arato argues that constitution-making today is post-sovereign, in the sense that no single agency drives the process; post-revolutionary, in the sense that it transcends the reform/revolutionary binary; and multi-stage, as it involves periods of transitional legality, such as governed by interim constitutions.[42] With examples from Spain and South Africa to Poland and Hungary, these constitution-making processes have developed in a staggered way, sometimes constrained by pre-agreed principles, and have involved a multitude of actors negotiating over time before a permanent constitution was finally agreed upon. It is the combination of this multiplicity of the *who* of constitution-making, coupled with a protracted *when* and a multi-step *how* that, together, afford democratic legitimacy.[43] Arato is not the only or indeed the first to note that constitutionalism, as a "process of becoming", necessitates a concept of the constituent power that is able to capture this cross-temporal dimension.[44] However, what Arato's work does very well is to showcase, through dense, comparatively-informed and at the same time critical and theoretically rigorous research, what comparative constitutional theory can look like.

Arato's work, grounded in Arendtian ideas, seeks to avoid the pernicious idea of a fully embodied constituent power (always appealing to autocrats) and to explore models of diffuse authority generated by a multi-track process with a plurality of actors. His, then, is a constitutional theory that is normatively engaged project to resist anti-democratic claims to constitutional authority and legitimacy. His general scepticism of innovations such as constitutionalising constituent assemblies or citizens' assemblies stems from a comparatively-informed distrust that participatory democracy will not be abused.[45] He thus sees developments such as the political co-optation of the Venezuelan constituent assembly and constitutional court in 1999 as directly deriving from a flawed understanding of constituent power, one that should be resisted for its propensity to legitimise constitutional abuse.

Arato's post-sovereign model has not been without its critics of course, and the author himself acknowledges gaps in it. For example, he has admitted that the case studies he has built his theory upon did not have the benefit of double differentiation: they did not have a separately elected legislature and constitution-making body, the former acting as procedural limitation on the latter.[46] However, the fact that the post-sovereign model developed in transitional countries without legitimate and competitively elected legislatures means they cannot provide a model for a double

[41] See, *inter alia*, A Arato, 'Multi-Track Constitutionalism Beyond Carl Schmitt', *Constellations* 18:3 (2011) 324; A Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press 2016); A Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge University Press 2017); J Colon-Rios, 'Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia', *Constellations*, 18:3 (2011) 365; J Colon-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012); J Colon-Rios, 'Five Conceptions of Constituent Power', *Law Quarterly Review* 130 (2014) 306; J Colon-Rios, *Constituent Power and the Law* (Oxford University Press 2020).

[42] Arato (2017), ix.

[43] This idea of democratic legitimacy not emanating from a single source, moment, or actor is increasingly being recognised in comparative constitutional scholarship. See V Jackson, '"Constituent Power" or Degrees of Legitimacy?', *Vienna Journal of International Constitutional Law* 12:3 (2018) 319.

[44] Loughlin and Walker (2008).

[45] Arato (2016), 9.

[46] Arato (2017), 416-417.

differentiated amendment process.[47] He speculates that looking to already existing democracies could further improve the idea of post-sovereign constitution-making.[48] A potential shortcoming of the comparative sample underpinning his theoretical model, therefore, may not necessarily be its undoing, but simply reason for enlarging the model to include non-transitional constitutional orders.

Most interesting for our purposes here is the very different position adopted by Colon-Rios to the question of whether constituent power can be institutionalised in the existing constitutional order. Drawing on Latin American examples in particular, Colon-Rios argues that such institutionalisation is possible and a worthy addition to the constitutional design arsenal. Drawing on cases such as Colombia's and Venezuela's constituent processes, Colon-Rios makes the case that constituent assemblies procedurally mandated under existing constitutions can nevertheless exercise constituent power insofar as they remain unbound by substantive positive law.[49] Insofar as their outcome (whether constitutional amendment or replacement) is indistinguishable from that of an original constitution-making, and also as they are often just as if not more participatory than the latter, Colon-Rios defends these institutionalised constituent processes on democratic grounds. He does so, however, careful to note that they are defensible only insofar as they do not purport to be sovereign, as opposed to constituent. In other words, as long as they are performing their task of producing new constitutional content – on the basis of an imperative mandate given by the people through a referendum or popular initiative – and not as omnipotent sovereigns claiming to embody the nation.

Colon-Rios's argument relies on a particular set of beliefs about the nature of constituent power, as well as about constitutional theory and law more generally. His analysis in many ways echoes Rubinelli's, in that he also retraces different understandings of constituent power over time and space with a view to better understanding this multifaceted idea. Where he differs, however, is that he is very much drawing on constitutional practice – notably in continental Europe and Latin America – to argue that the concept of constituent power should be understood as inherently juridical. If we are to "grasp the full potential of the theory of constituent power", he argues, we must squarely face the concept's legal and institutional implications.[50] While not part of positive law, constituent power "can play an important role in the assessment of the legality and illegality of different forms of political action, as well as in the types of institutions that should be present in a constitutional order whose creation is attributed to a constituent people."[51] An entity authorised to exercise constituent power, such as a constituent assembly, is unlike a true sovereign in that "cannot transform any will into law, but only produce constitutional law."[52] To believe the constitutional order closed off to constituent power once instituted is both to ignore the juridical nature of this power and to confuse constituent power and sovereignty.[53] Whereas the latter is unbound and may give rise to any legal content, constituent power should be viewed as inherently tied to constitution-making. As such, for Colon-Rios, a constituent process institutionalised as part of the existing constitutional framework is neither illogical nor unavoidably leading to abuse by political forces. For seemingly substantively unbound, such a constituent process is nevertheless not sovereign as such: it is procedurally bound (especially in terms of how it is to be initiated) and only mandated to engage in constitutional reform. Moreover, when bound by a popular constitutional mandate (which would normally also contain an implicit

[47] *Ibid.*, 417.
[48] *Ibid.*
[49] Colon-Rios (2020), 15 and chapters 9 and 10.
[50] *Ibid.*, 2.
[51] *Ibid.,* 28.
[52] *Ibid.,* 260.
[53] *Ibid.*, 3 and chapter 9.

requirement to respect the separation of powers), the constituent may be subject to judicial control seeking to enforce this mandate.[54]

The contrast with Arato is clear. The emphasis shifts for Colon-Rios from merely seeking to prevent constitutional abuse justified in the name of constituent power (conflated with sovereignty) to retaining constituent power's enabling role as a generative, juridical power to be accommodated within the constitutional order. Both are committed to democratic constitutionalism and to the usefulness of the concept of constituent power, but arrive at different conclusions about the role it should play in contemporary constitutional discourse and institutional design.

Yet I view these two theorists as having more in common than might initially appear. Not only are their analyses grounded in comparative, deeply contextual work, they are also fluent in debates in political and constitutional theory spanning centuries. Both resist the fusion of constituent power and sovereignty, even while assessing differently the institutional implications of seeking to retain limits on constituent processes. Both also resist oversimplified distinctions between law and politics that, in the case of constituent power, were too quick to relegate it to the extra-legal realm. This resistance is no doubt tied to their familiarity with comparative case studies that directly challenge the idea of constitutional creation *ex nihilo*: post-authoritarian constitution-making in Europe and South Africa in Arato's case, and twenty-first century constituent processes in Latin American constitutional orders in Colon-Rios's. Whereas Rubinelli's work helps us understand how we got to speak the language of constituent power as we do today, Arato's and Colon-Rios's illustrate the potential of a constitutional theory that starts from and is continuously checked against the messy and dynamic reality of constitutional practice.

Constituent power theory and unconstitutional constitutional amendments

From a niche subject, unconstitutional constitutional amendments and their related cousins, basic structure doctrines, have exploded as topics of scholarly interest in recent years.[55] Their appeal to constitutional theorists is irrefutable. The question at the centre of these doctrines is whether constitutional amendment can be limited substantively, either explicitly in the constitutional text (in the form of an eternity clause) or implicitly on the basis of principles of democratic constitutionalism (developed by courts as unamendability doctrines), to prevent the subversion or replacement by stealth of an existing constitutional framework. This ties back to problems of constitutional precommitment, insofar as altering existing arrangements is seen as undoing the original political settlement. Also related is the notion of militant democracy and how to calibrate its tools to prevent constitutional democracies being rendered defenceless against their enemies. Equally relevant are questions about constitutional courts as guardians of the constitutional order and how far they can go in exercising their guardianship, i.e. whether it includes preventing procedurally legitimate exercises of the amendment power for being substantively incompatible with entrenched values, principles, or provisions.

Yaniv Roznai, in his comprehensive study of the rise and migration of unconstitutional constitutional amendment doctrines worldwide, has shown that, rather than a fringe or anomalous development, judicially enforced substantive limits on amendment have been embraced across the globe and

[54] *Ibid.*, 294.

[55] See, *inter alia*, Po Jen Yap, 'The Conundrum of Unconstitutional Constitutional Amendments', *Global Constitutionalism* 4:1 (2015) 114; Y Roznai, 'Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea' *American Journal of Comparative Law* 61 (2013) 657; Y Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017); Albert (2019); S Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021).

continue to be on the rise.[56] Moreover, he has carefully constructed a theory that helps explain the doctrinal move of courts enforcing substantive limits on procedurally sound constitutional amendments. Relying on the distinction between primary (original) and secondary (derived) constituent power, Roznai describes the amendment power institutionalised in a constitution's amendment rule as embodying the latter type.[57] As such, the amendment power is a delegated power, held in trust by the amendment authority and constrained by the limits delineated by the constitution. As guardians of the constitution, constitutional courts are also guardians of the original, or primary, constituent power and empowered to review amendments materially. Only a renewed, revolutionary constitution-making moment could overcome these restraints.

A series of important consequences flow from this understanding of constituent power as it operates in the contest of constitutional amendments. One is that this guardianship role is incumbent upon courts regardless of whether the constitutional text formally grants them the power to substantively review amendments – in fact, this power is taken to exist even contrary to the constitution explicitly forbidding this type of review. Another has to do with the nature of the amendment process itself. Roznai describes a sliding scale of amendment legitimacy, wherein limits on amendment are more or less legitimate depending on the features of the amendment process: the more inclusive, participatory, multi-procedural, or deliberative it is, the more legitimate.[58] Additionally, the legitimacy of such far-reaching judicial intervention relies on judicial self-restraint. The understanding is that these will be exceptional interventions, aimed at preventing egregious abuses of the constitutional process and blocking constitutional dismemberment.[59]

The comparative breadth of Roznai's study makes the underpinning theory that much more appealing. For we see distant and disparate jurisdictions from Germany to India and Belize to Taiwan developing rich case law invalidating amendments on substantive grounds that include fears of resurgent authoritarian political parties, threats of executive aggrandizement under the cover of a state of emergency, restrictions on judicial review feared to undermine the rule of law, and more. As is unavoidable in such large sample studies, however, there is a risk that important local context is missed and consequently that the macro-level theory omits important nuances. I will highlight three such potential omissions.[60]

One important addition is recognising that unamendability, especially formal eternity clauses, often play a very different role in post-conflict and transitional constitution-making.[61] Frequently conducted under the threat of violence and in conditions of deep societal divisions, the outcome of constitutional negotiations is never a sure thing in such contexts. The resulting political settlement is often a hard-fought pact enshrining uneven and sometimes even contradictory compromises. Far from the lofty ideals of constitutionalism that precommitment understandings of unamendability assume underpin constitutional eternity clauses, such provisions may concern themselves with much more pragmatic topics. An example would be the entrenchment of amnesties for previous political opponents whose buy-in is needed in the new political dispensation, or of executive term limits in contexts plagued by

[56] Roznai (2017).
[57] *Ibid.*, 105-134.
[58] *Ibid.*, 158, 219-220.
[59] On doctrinal interpretive techniques to engender such self-restraint, see Roznai (2017), 213-225. On the notion of 'constitutional dismemberment', see Albert (2019), 78.
[60] I develop these in much greater detail in Suteu (2021), chapters 2-4.
[61] See further discussion in S Suteu, 'Eternity Clauses in Post-conflict and Post-authoritarian Constitution-making: Promise and Limits' *Global Constitutionalism* 6:1 (2017) 63.

executive overstay. The point here is important insofar as a great number, if not the majority, of constitution-making processes today occur in precisely such fraught contexts.

A second typology of understudied cases involves otherwise democratic constitutional frameworks that nevertheless incorporate unamendable constitutional provisions of an explicit but more often implicit exclusionary nature.[62] Such exclusionary entrenchment is insidious in that it often coexists with liberal democratic constitutional commitments. An unamendable constitutional commitment to an official language, for example, may appear innocuous and is typically defended by its drafters as a mere statement of fact: the constitutional recognition of a majority language. However, constitutional practice may reveal, as it has done in Romania and Turkey for example, that such seemingly harmless constitutional unamendability is anything but and will be relied on by constitutional courts to block linguistic minorities' attempts at gaining greater recognition or entitlements. The exclusionary aims of constitutional entrenchment, including unamendability, are difficult to spot absent deep contextual analysis and will frequently only be revealed as part of constitutional adjudication. Importantly, such outcomes can be present in constitutional democracies otherwise committed to fundamental rights, equality, and non-discrimination. Thus, when defending unamendability as the 'lock on the door' protecting liberal constitutionalism, comparative knowledge should have us question whose values and principles are actually being protected and at what price.[63]

A third corrective to constitutional theoretical understandings of unamendability directly challenges the understanding of constituent power usually taken to underpin it. As Vicki Jackson has argued, the delegation model – wherein amendment power is a secondary or derived form of constituent power bound by the constitutional framework, with courts tasked with defending the original constituent's will as enshrined in the constitutional framework – is deeply problematic.[64] The constituent power is assumed to be an 'it' instead of a 'they', reified as a univocal people where instead there is plurality of voices. This in turn risks conflating constitutional legitimacy with the expression of a supposed unified original will ('the people'). Instead, Jackson proposes we assess "the legitimacy bases of the existing constitution" on a case by case basis and have them "weigh in the calculus of whether a subsequent amendment should be understood as unconstitutional."[65] While popular consent is necessary, it is not a sufficient condition to establish constitutional legitimacy, which can only be ascertained through a holistic evaluation over time of both the process of adoption and the substantive commitments within a constitution.[66] As I have argued elsewhere, drawing on work by Arato and others, "[t]he risk is there to derive legitimacy from identity, ascribing it solely to the *who* of constitution-making without taking into account the *when*, *what* and *how* of the process."[67] This conflation also carries with it the danger of masking contestation, including of the very existence and

[62] See further discussion in S Suteu, 'The Multinational State That Wasn't: The Constitutional Definition of Romania as a National State' *Vienna Journal on International Constitutional Law* 11:3 (2017) 413 and S Suteu, 'Eternity Clauses as Tools for Exclusionary Constitutional Projects' in R Abeyratne and Ngoc Son Bui (eds.), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021, forthcoming). See also M Masri, 'Unamendability in Israel: A Critical Perspective' in Richard Albert and Bertil Emrah Oder, eds., *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018) 169.

[63] Here again, a robust analysis by a political theorist of the history of constitutional entrenchment since antiquity reveals its propensity for entrenching elite privilege. See M Schwartzberg, *Democracy and Legal Change* (Cambridge University Press 2009).

[64] Jackson (2018).

[65] *Ibid.*, 327-328.

[66] *Ibid.*, 338.

[67] Suteu (2021), 171, citing Arato (2017), 31.

boundaries of 'the people' in whose name the constitution is adopted.[68] As cases such as Bosnia and Herzegovina have shown, no amount of constitutional engineering and entrenchment can overcome the deeply unstable contours of the constitutional subject. There, an uneasy peace and federal structure were meant to be buttressed by power-sharing arrangements and far-reaching international human rights commitments, entrenched in the constitutional eternity clause (Article X(2) of the Constitution of Bosnia and Herzegovina).[69] Yet decades later, Bosnian peoplehood remains fragmented and as contested as ever.[70]

These observations, informed by comparative constitutional experience, show that our theoretical understanding of unamendability must accommodate more varied contexts. These are contexts where it is not so much the high point of constitutionalism, but rather plays the role of political insurance in constitutional negotiations, of entrenching elite interests that may be exclusionary, and of entrenching a purportedly unified will where a fragmented constitutional subject exists. We could further question the notion of constituent power underpinning unamendability doctrines by considering a constitutional system grounded in parliamentary sovereignty such as the UK's. There, not only does the language of constituent power tend to be absent, but also the distinctions between original and derived constituent power and between constituent and constituted powers are difficult to map onto constitutional practice. At most, we could say about the UK Parliament, with Dicey, that it is acting as a legislative (constituted) power when adopting ordinary laws but as a constituent power when its acts "shift the basis of the constitution."[71] This is not to say that the notion of supra-constitutional limits or *de facto* unamendable commitments is entirely alien to the British constitutional tradition. As recent scholarship is proposing to show, building on a century of development of the principle of legality at common law, we may speak of a "theory of legislative legitimacy" that allows for invalidation of acts of the sovereign UK Parliament in extreme, as yet hypothetical scenarios.[72] This example shows how implied unamendability may yet operate while the language of constituent power remains alien to the UK system. Such comparative insights again remind us not to be too quick in assuming the inevitability of any given concept in constitutional theory.

3. Conclusion

In many ways, my aim in this chapter has been to take seriously Andrew Arato's observation that "[w]hat is missing [in scholarship] are serious synthetic works linking theory and comparative analysis that are capable of prudentially orienting actors engaged in constitution-making processes all over the world"[73] and to see how this might be remedied. In particular, I sought to illustrate the pitfalls of doing

[68] Z Oklopcic, 'Constitutional Theory and Cognitive Estrangement: Beyond Revolutions, Amendments and Constitutional Moments' in Richard Albert, Xenophon Contiades, and Alkmene Fotiadou, eds., *The Foundations and Traditions of Constitutional Amendment* (Hart 2017) 51, 60.

[69] Moreover, the case of Bosnia and Herzegovina is rendered even more complex by the highly internationalised nature of the peace process that resulted in the constitution being annexed to the Dayton Accords in 1995. This further challenges our received notions of constituent power, raising the prospect that it is no longer (if it ever was) nationally bound and inward looking. For a lengthier discussion, see Suteu (2021), chapter 5.

[70] The constitutional preamble itself remains indicative of this fragmented peoplehood, referring to "Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina".

[71] See discussion in Colon-Rios (2020), 11-12. See also, generally, M Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Loughlin and Walker (2008) 27.

[72] H Hooper, 'Legality, Legitimacy, and Legislation: The Role of Exceptional Circumstances in Common Law Judicial Review', *Oxford Journal of Legal Studies* 41:1 (2021) 142.

[73] Arato (2017), vii.

constitutional theory without such comparative awareness. In a nutshell, I sought to show that this type of theorising risks being impoverished and of limited applicability, especially when we take seriously the need to decolonise constitutional theory. Rendering it truly reflective of the myriad constitutional experiences out there will only be possible by engaging in difficult (though rewarding) comparative work.

I have also sought to illustrate the important work already done in this direction in the field of comparative constitutional change, particularly looking at the rise of new scholarship on constituent power and unamendable constitutional amendment. This scholarship is invariably interdisciplinary, richly comparative, and as such more representative of a variety of constitutional experiences across time. We need not agree with the conclusions reached by the authors working in this way to be able to appreciate the fruitfulness of their method. We will continue to differ on whether constituent power can be institutionalised and constrained by the existing constitutional order. However, we will do so more competently with the benefit of a cross-temporal understanding of the idea of constituent power, as well as of the practice of institutionalisation of constituent processes in countries in Latin America. Similarly, we will go on disagreeing over the benefits and drawbacks of unamendability and constitutional entrenchment more generally. However, appreciating the different roles such entrenchment will play in different contexts will allow us to do so with more nuance. After all, whether unamendability is relied on in a given system as an instrument of militant democracy, as political insurance for political elites, or as a tool for majoritarianism and exclusion should surely influence our assessment of its constitutional protective role. At the same time, the possible emergence of implied limits on legislative authority in the UK should have us question whether it is only through the lens of constituent power theory that we can understand unamendability.

The type of constitutional theory I have discussed in this chapter is no doubt laborious. It requires not just interdisciplinarity but also comparative fluency that is difficult both to obtain and to sustain. My intention is not to suggest that this is the *only* type of constitutional theory worth engaging in, of course. It is, instead, to highlight and praise this type of scholarship for the new insights it can offer and for the correctives to received notions it can encourage. It is also to suggest that more comparative awareness will help us enrich our conceptual arsenal, avoid too easy generalisations, and overall make us better constitutional theorists.

- This is only one slice of the complexity pie: e.g. need to look to history of political thought [Rubinelli]
- View from nowhere presumed to be objective → actually privileges experts?
- Consequences of my argument:
    - Much more interdisciplinary work: political science, history, sociology
    - May bring const theorists into the trickier waters of constitutional politics where they may have precisely sought to escape them – as it should