Examines the complex and varied interactions between law and the different visual media produced by changing technologies. Virtual courts and online judges? Paperless trials? Electronic discovery? All of these novel legal developments impact how we conceive of the practice of law. Here, international specialists from new and established domains of law, media, film, and virtual studies address the emergence of the jurist in the era of digital transmission.

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Key Features
• Includes an international range of contributions from the United States, Europe, the Middle East, and China
• Presents a firm historical foundation for considering the connections between law and new forms of media
• Part 1 tracks the media, technologies, and apparatuses of modern law, from the acoustics of architecture to contemporary fora such as blogs, Facebook, and #hashtaglaw.
• Part 2 examines the jurisprudential questions raised by new visual and virtual reality technologies of the twenty-first century.

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Constituent Power

Law, Popular Rule and Politics

Edited by Matilda Arvidsson, Leila Brännström and Panu Minkkinen

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Editors’ Introduction

Matilda Arvidsson, Leila Brännström and Panu Minkkinen

The notion ‘constituent power’ is an answer to the question about the origins of the constitution and the legal order. Within democratic-constitutional thought, it expresses the conviction that power is ultimately vested in an entity known as ‘the people’ which is the fundamental source of all political authority. Accordingly, a constitution is deemed legitimate only if ‘the people’ has both created it and continues to endorse it.

As a concept, constituent power emerged during the Enlightenment period as an articulation of the revolutionary right of a political community to alter or to replace its form of government.¹ Emmanuel Sieyès, the classic theorist of constituent power, emphasised the sovereignty of the people, or in his words ‘the nation’, in the traditional sense of being unlimited. Constituent power is consequently superior to the constitution and any constituted powers and may subvert or alter them at any time. In Sieyès’s well-known words:

Tyranny needs no more than a single moment of success to bind a people, through devotion to a constitution, to forms which make it impossible for them to express their will freely and, as a result, to break the chains of despotism. Every nation on earth has to be taken as if it is like an isolated individual outside all social ties or, as it is said, in a state of nature. The exercise of their will is free and independent of all civil forms. Since they exist only in the natural order, their will needs only to have the natural character of a will to produce all its effects. However a nation may will, it is enough for it to will. Every form is good, and its will is always the supreme law.²

The idea originally put forward by Sieyès that constituent power would somehow survive its constituted institutions – ‘above’ them, ‘within’ them, ‘beside’ them – perhaps in the form of a ‘dormant’ superior extra-constitutional popular sovereign, is not merely a historical curiosity. It is more or less explicitly present in, for example, Carl Schmitt’s notion of ‘constitution-making power’ that, in turn, has inspired many more contemporary elaborations on democracy and politics. Such a radical idea of constituent power is not only troubling for those with a liberal and result-oriented take on constitutionalism. Hannah Arendt feared the unsettling proclivity of the notion and made her point by scrutinising the instability that popular sovereignty imposed on the French Revolution. Similarly, Claude Lefort stressed the totalitarian dangers attached to the figure of a unitary people, of a ‘People-as-One’ (peuple-un), that will always have to be embodied by someone or some group, and he illustrated his worries with the examples of, inter alia, the French revolution, the Soviet Union, and neoliberal capitalism.

The promise of popular sovereignty – that of a rule ‘of the people, by the people, for the people’ – is, however, not easy to let go of, bound up as it is with creative, egalitarian and participatory impulses that are proper to democracy itself. While a liberal constitutional lawyer like Ernst-Wolfgang Böckenförde is willing to endorse some kind of unitary notion of the people, the radical political theorist Antonio Negri gladly embraces the instability that the concept introduces. However, most contemporary

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proponents of the constituent power of the people would prefer to renegotiate and re-articulate the people's oneness and its sovereign rule. Andrew Arato, for example, wishes to differentiate between constitutions that are imposed on a people and constitutions that can, in a meaningful sense, be considered as the product of a people's self-government. In order to achieve this, he has developed a notion of constituent power that survives under its constituted framework, but only as a 'post sovereign, pluralistic, always limited power whose authority is due to both its legitimacy and, even during legal breaks, its legality'. \(^{11}\) Hans Lindahl, on the other hand, defines the work of constituent power as 'normative innovation and rupture . . . [that] proceeds from a radical outside no political community succeeds in domesticating', and continues to argue that the collective identity of the people must be understood reflexively. \(^{12}\) And finally, Martin Loughlin, stressing the need for the people in its non-instituted manifestation to irritate instituted power, argues that constituent power 'exists only when [a] multitude can project itself not just as the expression of the many (a majority) but – in some senses at least – of the all (unity)'. \(^{13}\)

The aim of this collection is not to revisit the debates on constituent power at a general or historical level. Rather, we wish to ask the central questions about the place and composition of the people in liberal democracies anew, in light of what the current political situation may suggest. Over the last few years, right-wing forces claiming to speak for the people against liberal elites, thematically often focusing on immigration, minorities and/or feminism, have either surged to power or gained considerable ground in almost all European states, as well as in the United States, Brazil and a number of other liberal democracies around the globe. There is widespread uncertainty as to how to characterise and name this ascending family of parties and politicians, suggestions range from ‘fascism’ and ‘new authoritarianism’ to ‘illiberal democracy’ and ‘enraged majority rule’. But most scholars and pundits refer to the phenomenon as ‘right-wing populism’. The increasing concern about

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the current political trajectory is reflected in the trending numbers of related academic engagements. According to the British Library catalogue, the number of books published this millennium with words related to ‘populism’ in the title had been around ten to fifteen titles a year up until 2015, with a sudden increase to 35 in 2016, and a record high of 65 in 2018. The dramatic increase, of course, marks Donald Trump’s rise to power as the President of the United States, which gave a recognisable face to developments that had gradually been taking place.

Populism, whatever else one could say about it, is a politics that claims to make good on the founding ideal of democracy, that is, to let the people rule. And so populism is intimately associated with the idea of constituent power and popular rule. It should, therefore, not come as a surprise that assessments of populism often mirror those made of constituent power.

For some like Jan-Werner Müller, German-born political scientist at Princeton, populism is unequivocally a threat to democracy. He argues that populism lacks any potential to function as a useful corrective for a democracy that has somehow become too ‘elite-driven’. Populism is, Müller concludes, always an exclusionary and anti-pluralist form of identity politics. A similar argument is reduplicated in more or less elegant forms in much of the literature on populism, and it reflects the reservations that many constitutionalist scholars have about ‘radical democratic’ interpretations of constituent power, as well.

The Belgian-born political theorist Chantal Mouffe has a more positive view. Perhaps inspired by some Latin American experiences, Mouffe claims that populism is not primarily substance, but strategy. And as strategy, it can serve potentially progressive aims, as well. Right-wing populism claims to support popular rule, but its definition of ‘the people’ is factually a narrow ethnoracial entity that excludes categories of individuals that are seen as a threat to its identity or prosperity. Mouffe’s left populism, by contrast, would attempt to broaden and deepen democratic rule by including groups that are not adequately represented in the politics of neoliberal societies. The strategic aim of left populism is to align the possibly conflicting demands of multiple social groups – workers, immigrant communities, the middle class, the LGBT community, and so on – into a collective will that will be able to function as the foundation of a ‘people’ confronting the oligarchy as its common adversary. This reflects well positions that even other post-Marxist ‘radical democrats’ developed in relation to constituent power and popular rule.

Finally, Mexican political theorist Benjamin Arditi has noted populism's familial relation to democracy by describing it as the ‘internal periphery’ of democratic politics. Populism, he suggests, is a ‘spectral’ companion that haunts the workings of a healthy democracy in three different forms. First, it can appear as a mode of representation. Populist representation is less about the positions a politician takes, and more about trusting a charismatic individual and favouring what he or she symbolises. Populist representation is also about creating a sense of identification, connection and closeness, often staged and media-communicated. Think of, for example, the televised rallies in which President Trump addresses his ‘base’. Arditi suggests that populism as a mode of representation has gone mainstream and has become commonplace in media-enhanced democracies as recent elections in Austria bear witness. Second, populism can arrive as a mode of political participation in which ‘improper’ subjects not only depart from conventional political etiquette but also challenge the credentials of formal democracy. By mobilising improper subjects, populism can claim to expand the scope of citizen involvement in public affairs which mainstream opponents will have problems in criticising. Populist mobilisations may, however, not be easily distinguishable from the desire for mob rule. Think of, once again, the reported hostility and aggression of the fired-up audience at Trump’s rallies. In this second mode, the populist spectre, Arditi notes, causes tangible discomfort for mainstream politics. Third, populism also materialises as the ominous shadow of democracy and its potential destroyer. In this mode, populists fully embrace and act out the fantasy about the social body as a unitary one by dispensing pluralism and toleration, using state resources as patrimony for the in-group, by dismissing accountability as an issue, and by engaging in authoritarian behaviour and rule by decree. President Trump’s frequent threats of executive orders that are meant to circumvent the will of a democratically elected legislature is an instance of populism’s third guise as the ‘underside of democracy’.

Some might question whether the term ‘populism’ best describes the current political situation. Be that as it may, the widespread and somewhat muddled use of the word is to us a symptom of the heightened tensions between constituent power and constituted politics that are typical of our times. In this light, the collection at hand examines the troubled relationships between the people and constitutions, law, human rights and democracy. While we make no claims about our ability to find cures for social ills, we have put the emphasis on the ability of multidisciplinary scholarship to understand and explain the complicated issues slightly better than before. The following chapters will accordingly approach the topic from without the liberal

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framework that usually informs this type of research. The contributions engage with classic works on constituent power, such as Carl Schmitt’s, Hannah Arendt’s and Claude Lefort’s, but also with more contemporary thinkers such as Jacques Rancière, Judith Butler and Alain Badiou.

In a lead essay that follows this introduction, Benjamin Arditi highlights and analyses two ways in which ‘the etiquette of public discourse’ has changed in today’s liberal democracies. On the one hand, confirmation bias has become a respectable mode of political reasoning (i.e. privileging belief over evidence), and on the other, shamelessness has become normalised (i.e. the willingness to accept behaviour that used to be unthinkable). These shifts in public discourse foster what Arditi labels ‘an exclusionary demos of ressentiment’, immune to embarrassment.

The main bulk of the book is organised around three interrelated themes.

As the rubric ‘The Ambiguities of Constituent Power’ indicates, the elusive notion of constituent power is at the centre of the first part of the book. Unlike constituted power, which is represented in the established political and legal institutions as defined by a constitution, constituent power is thought to be the ‘raw’ and formative power of popular sovereignty in a democracy ‘of the people, by the people, for the people’. Constituent power is the constitution’s source of legitimacy and, at the same time, not easy to pin down because the people does not appear as a single subject. The individual chapters of this first thematic subdivision investigate who and what might play the part of constituent power in contemporary liberal democracies. The chapters focus on topical issues such as the ‘activist’ role of the judiciary in democracies (Minkkinen), the compatibility of strongly entrenched constitutional provisions with popular sovereignty (Vinx), and the ‘world-stabilising’ capacity of constitutions (Zakin).

The second part of the book, ‘Popular Identity and its Others’, discusses the boundaries that establish the identity of ‘the people’, as well as the practices that destabilise and renegotiate these boundaries. The relationship between ‘the people’ and notions such as race, ethnic group and nation is at the very centre of discussion. The chapters of this section investigate the ethnoracial construction of ‘the people’ as a constitutional subject in the contemporary Western and Northern Europe (Brännström), the paradoxical relationship between constituent power and democratic representation (Lukkari), how the coming together of ‘the people’ may be mediated by culture and neoliberal rationality (Turpeinen), and whether, and under what conditions, human rights can be seen as constitutive of ‘the people’ rather than as a medium restraining its will (Gill-Pedro).

The focus of the third part of the book, ‘Populism and Democracy’, is populist politics and the impact of such politics on democratic life and
practices. The individual chapters address the reasons why the current political crisis cannot be reduced to merely a conflict between technocracy and populism as forms of rule, but that it may also involve a theologically framed ‘katechontic’ democracy intended to hold back the advent of the Antichrist (Falk), the ways in which the musings of contemporary political theorists like Jacques Rancière and Alain Badiou about popular sovereignty draw on the tradition of political philosophy (Hirvonen – Lindroos-Hovinheimo), the extent to what, and the possible senses in which, the current political trajectory is, in fact, related to what has historically been labelled ‘populism’ (Vergara), and how Carl Schmitt’s ideas concerning the protective, concrete and physical borders of communities involving curious entanglements between law, customs and sacred rituals remain relevant even today (Wittrock).

This book has come about as part of the work of a collaborative network. The individual chapters have been chosen and developed from a range of presentations given originally at a workshop organised by the network in Helsinki in June 2017 entitled ‘The People: Democracy, Populism, and the Constituent Popular Sovereign’, with keynotes by philosopher and Nietzsche-scholar Christa Davis Acampora\(^\text{18}\), political theorist and feminist theoretician Bonnie Honig\(^\text{19}\), and legal philosopher Hans Lindahl\(^\text{20}\). During the course of the workshop, all keynote speakers gave invaluable feedback to the paper presenters. The editors wish to thank the keynote speakers for their support and their inspiration.

\(^{18}\) See e.g. Christa Davis Acampora, *Contesting Nietzsche* (Chicago, IL: University of Chicago Press, 2013).
