THE CONSENT OF THE GOVERNED: RESISTANCE AS CONSTITUENT POWER

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ABSTRACT

The legal status of resistance to tyranny as a universal human right has received little attention in recent years. Following the conclusion of World War II and the de-escalation of Cold War hostilities, it seemed to many that liberal democracies had won; a global wave of democratization saw more states adopting constitutions with provisions for judicial independence, the separation of powers, and wide chapters on guaranteed human rights, with the United Nations serving a foremost role in adopting new standards of state conduct. In light of renewed global cooperation, it seemed tyranny and transnational aggression would perhaps become unwelcome intrusions within a new world order.

However, these changes did not signal the end of history; instead, they preceded a sharp reversion toward aggrandized executive powers and a collective withdrawal from international institutions, coupled with nationalistic politics and political polarization. Democracy is now in decline, whereas most of the world currently lives under autocratic rule. Existing works on this new authoritarianism presume the silence of the people as populist leaders enact policies in their name, subtly shifting narratives of constituent power to the authoritarian state. Scholars are focused on how autocrats use the law as a legitimating tool to enhance their powers—leaving a gap in our knowledge of how to resist these leaders once we understand them.

It is within this context that new consideration of resistance and its nexus with constituent power is overdue. Drawing from contemporary constitutional theory and the creative methodologies of grassroots actors, this Article argues that a state that violates its social contract avails itself to the constituent power of the people as they resist encroachments upon their liberty.

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INTRODUCTION

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law[.][1]

As of 2021, approximately seventy percent of the world's population now lives under autocratic rule.[2] Countries previously regarded as synonymous with democratic values are now backsliding, as legal institutions are gradually compromised by forces hostile to the equalizing nature of the law. According to the V-Dem Index, many democratic achievements over the past thirty years have been erased since these counter-developments began in earnest in 2011.[3] The commensurate growth of toxic political polarization that facilitates sharp divisions among the people, alongside regulations on fundamental rights like the freedom of expression, creates a challenging and dangerous environment for the (re)construction of a liberal world order.

Nevertheless, resistance efforts remain steadfast within the most powerful autocratic states. Protesters in Russia demand the end of the war

1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).
2. V-DEM INST., DEMOCRACY REPORT 2022: AUTOCRATIZATION CHANGING NATURE? 6 (2022), https://v-dem.net/media/publications/dr_2022.pdf [https://perma.cc/8KKR-RQQY].
3. *Id.*

in Ukraine and for the government to respect the nation's constitution.[4] The citizens of Iran gather to condemn its brutal dictatorial regime and call for equal status under the law.[5] In China, nationwide protests began for the first time since the Tiananmen Square massacre in 1989, as dissenters expressed their desire for the end of life-threatening zero-Covid measures and for a state that respects their democratic contributions.[6] Individuals in all three jurisdictions participate in these movements at great personal risk.

As states struggle, there has been a renewed interest in the concept of constituent power, a term commonly defined as the people's ability to form or reform a constitutional state.[7] In contemporary discussions, constituent power manifests as the idea that the people, as a collective body, are by nature superior to the constitutional order and thus are entitled to change it. Naturally, this is a compelling narrative of change when faced with encroaching tyranny and the capture of state institutions capable of supporting a democratic transition.

However, constituent power has not yet been linked to states where narratives of transition are perhaps most needed—namely, autocratic regimes. Moreover, these discussions of constituent power also fail to engage with mobilized resistance measures, many of which possess similar characteristics to expressions of self-determination. This Article intends to open the discussion of constituent power and resistance with a focus on autocratic regimes.

The first Part considers commonly held views of constituent power and its relationship with resistance efforts. It begins by emphasizing constituent power's conceptual role in literature that embraces popular sovereignty over legality. This group, here referred to as "absolutists," or absolutist proponents of constituent power, would elevate the authority of the people over that of the law. The second group addresses what I refer to as "republican" views on constituent power, which typically disagree on whether constituent power is a useful framework for understanding resistance. Finally, this Part concludes by addressing "liberal" accounts on both subjects. These accounts view constituent power with deep skepticism, and see resistance as a right, and sometimes an obligation.

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4. *See* Marco Hernandez, *Decoding the Antiwar Messages of Miniature Protesters in Russia*, N.Y. TIMES (June 16, 2023), https://www.nytimes.com/interactive/2023/06/16/world/europe/russian-anti-war-protesters.html [https://perma.cc/9RJ4-WTQG].

5. *See* Parisa Hafezi, *What Has Changed in Iran One Year Since Mahsa Amini Protests Erupted?*, REUTERS (Sept. 12, 2023, 4:02 PM), https://www.reuters.com/world/middle-east/what-has-changed-iran-one-year-since-mahsa-amini-protests-erupted-2023-09-11/ [https://perma.cc/76LQ-4HQ5].

6. *See* Martin Quin Pollard & Brenda Goh, *Blank Sheets of Paper Become Symbol of Defiance in China Protests*, REUTERS (Nov. 27, 2022, 8:21 PM), https://www.reuters.com/world/china/blank-sheets-paper-become-symbol-defiance-china-protests-2022-11-27/ [https://perma.cc/32WN-HFRP].

7. EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE?, *reprinted in* EMMANUEL JOSEPH SIEYÈS: THE ESSENTIAL POLITICAL WRITINGS 89–91 (Oliver W. Lembcke & Florian Weber eds., 2014) [hereinafter SIEYÈS, WHAT IS THE THIRD ESTATE?].

The second Part critically assesses these commonly held views of constituent power and argues that authoritarian regimes cannot be seen to possess the consent of the people and must thereby be considered fundamentally illegitimate. Consequently, this condition invokes the right to resistance. As venues for legal and political participation have been compromised, limited resistance measures exist as one of the only methods for the people to express their right of self-determination.

In assessing the existing literature on constituent power and resistance, this Article finds that orthodox perspectives on legal and political theory have 1) neglected the study of either concept as it relates to autocracies or illegitimate forms of rule, and 2) disproportionately and often uncritically relied on the theory of constituent power as proposed by Carl Schmitt, who conflates constituent power with popular sovereignty. On these bases, traditional theorists conclude that there can be no true relationship between resistance and constituent power, a premise that this Article challenges.

Building from these critiques, this Article first argues that the fundamental concept of constituent power provides a helpful framework for understanding resistance movements in autocratic states. Contemporary discussions on the topic view state-building as a process initiated, supported, and achieved by the largely anonymous and monolithic "state." By emphasizing the people's contributions through expressions of constituent power, this perspective succeeds in bringing the people back into the conversation of state-building. It moreover revives discussions of the dialogic process between the people and their representatives that have been lost within modern conceptions of statehood and constitutionalism.

Second, this Article presents a new conceptualization of resistance and constituent power in autocracies that extends from consent theory. As the basis of legitimacy, the voluntary (and ongoing) consent of the people is an essential element of statehood. Autocracies have denied their citizens the capacity to voluntarily cede their political power to the state; this means that their basis for rule is illegitimate according to contractarian theory. Punishment for disagreement with the regime and targeted campaigns against dissent render any choice other than agreement null. In turn, this justifies resistance measures and the consequent expressions of constituent power.

This Article does not exclude the possibility of invoking constituent power under these circumstances in the context of democratic states. It is possible that this framework is applicable to unjust policies or practices promoted by a democratic regime, that the people are entitled to resist and remake parts of a system that unduly suppress their fundamental rights. However, the primary focus of this analysis is limited to authoritarian states and will thus be most directly applicable to these jurisdictions.

This Article contributes to the fields of constitutional and political theory through a novel analysis of the nexus between traditional conceptions of constituent power, resistance, and consent theory. It moreover challenges both fields through its discussion of these concepts in relation to autocratic states, which has thus far been a neglected topic in the literature. Finally, it suggests new consideration of how the people might express self-determination in a regime that suppresses dissent, an inquiry that is essential during an era of vast autocratic expansion and subsequent closure.

I. CONSTITUENT POWER & CIVIC RESISTANCE

A. Constituent Power

Constituent power represents the inherent power of the "people" as a collective to establish a new constitutional order. Its role is most often discussed in the aftermath of a successful revolution, wherein the people have put an end to one regime and will then exercise their constituent power to create a new civil state.[8] Contemporary debates on the merits of constituent power have been limited in the years surrounding the global "Third Wave" of democracy, when it appeared to many that the world had approached Fukuyama's "end of history."[9] Global constitution-building initiatives and the stabilization of democracies in the post-war era somewhat dampened discussions of revolution.[10]

Constituent power's origins can be found in the writings of Emmanuel Sieyès, who described it as the "national will" upon which a nation is built.[11] While Sieyès is often read to promote the idea of constituent power that is supreme and beyond the scope of legal regulation, recent works have challenged these more extreme interpretations. For example, Lucia Rubinelli has argued that Sieyès's structure instead supports the idea that constituent power is limited to set points in time:

> Sieyès relied on the notion of constituent power to introduce an alternative way of framing the principle of popular power. This fitted with philosophical accounts of modern liberty, as well as with Sieyès's institutional plans for the French state, and allowed him to substantially limit the direct exercise of power by the people.

8. The concept of *pouvoir constituant* was initially created for this precise set of circumstances by Sieyès, whose works remain influential on popular sovereignty or "absolutist" accounts of constituent power. *See id.* at 43; *see also* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 206 (1991).

9. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

10. *See Countries*, CONSTITUTE, https://www.constituteproject.org/countries?lang=en [https://perma.cc/7Y5V-JMHV] (providing an interactive display of the world constitutions' basic elements from 1789–2020).

11. SIEYÈS, WHAT IS THE THIRD ESTATE?, *supra* note 7, at 88–89.

> Specifically, the idea of constituent power served to reduce the people's exercise of power to the election of ordinary and extraordinary representatives in the Assembly. As such, constituent power helped Sieyès to put forward a model of political organisation alternative to the concurrent projects upheld by the appeal to national or popular sovereignty.[12]

The limitations of this concept are controversial, especially with regard to its usefulness within constitutional law scholarship. The most common view of constituent power is as an overwhelming force that is continuously held by the people, to be expressed at any time, unlimited in form, and above the law.[13] It is often conflated with the concept of popular sovereignty, which renders even more moderate proponents of constituent power reluctant to suggest a more limited view of the concept.

While it is not tied to any particular theory of law, constituent power has over time become especially poignant in positivistic theories of constitutional law.[14] An unbound constituent power has resonance in the notion that an unjust law can still be valid, so long as it is appropriately enacted. Constituent power is mostly viewed as a political concept, isolated from moral considerations that are more common in liberal or idealistic theories of law.

Regardless of more absolute or moderated views on constituent power, the fundamental characteristics of constituent power remain similar. It is the vector through which the people rebuild their constitutional order and express their right of self-determination. As a positive and creative force, constituent power is fundamentally *constructive*, while many discussions neglect this aspect. As this Article argues, constituent power should be divorced from its reputation in traditional constitutional law studies as an uncontrollable and unpredictable force of majoritarian power.

B. Resistance

"Resistance" is here used as a broad, umbrella term for the multiple forms of grassroots opposition to state rule. In discussions on its relationship with constituent power, it is most often invoked in the context of *civil disobedience*, or when citizens of a pre-existing constitutional state legitimately (yet unlawfully) resist the legal mandates of their government. Common examples of resistance are the U.S. Civil Rights Movement, resistance forces within Nazi-occupied territories during World War II,

12. LUCIA RUBINELLI, CONSTITUENT POWER: A HISTORY 33 (2020).
13. *See infra* Section II.A.
14. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

and labor movements worldwide in their efforts to establish trade unions.[15] While resistance can take many other forms—for example, conscientious objection and revolution—civil disobedience and its connection with constituent power is most prevalent in the below discussions.[16]

Resistance to tyranny is less controversial as a concept than constituent power.[17] However, the precise circumstances under which resistance measures can be justified or legitimated are far more contentious. The justification for resistance refers to the question of whether resistance can take place; it is a litmus test for whether a particular wrong committed by the state is egregious enough to warrant "illegal" behavior. Legitimation, on the other hand, represents the quality of resistance. For example, some would view violence as integral to resistance, while others would permit violence only in certain dire situations.[18]

As Ingeborg Maus has argued, much literature on resistance has deviated from the traditional liberal premise that the state and the people are on equal footing. Instead, it suggests that the people exist in a vertical rather than horizontal relationship with the sovereign; it forces them to resist and "petition[]" for change that they rightfully possess the authority to adopt.[19] As Maus rightly suggests, it is now timely to challenge this paradigm—especially as many avenues of resistance are on the verge of closure in autocratic states.

Unlike constituent power, resistance—by reputation—is reactive. It is a challenge to stasis. Traditional perspectives view resistance as placing the impetus on the state to correct and restore the damage once the point has been made.[20] However, this narrative of resistance as a passive force is only partial. It neglects the constructive work of the people as they collaborate to rebuild their institutions.

As this Article argues, resistance is inherently imbued with the constructive nature of constituent power. This is especially apparent

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15. *See, e.g.*, CIVIL RESISTANCE AND POWER POLITICS: THE EXPERIENCE OF NON-VIOLENT ACTION FROM GANDHI TO THE PRESENT (Adam Roberts & Timothy Garton Ash eds., 2009) (surveying civil resistance movements throughout the world in the twentieth and twenty-first centuries).

16. Resistance movements have also been linked to governmental transitions and revolution, a nexus which will be discussed later in this Part. *See, e.g.*, ERICA CHENOWETH & MARIA J. STEPHAN, WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT (2011) (arguing that civil resistance offers a more successful route for democratic transition than violent uprisings or other forms of revolution).

17. Whereas the utility of constituent power has been questioned by contemporary theorists, there is general agreement that individuals are entitled to protest or resist the abuse of their rights. *See infra* Section III.B.

18. *See infra* Section I.C.

19. This Section adopts Niesen's translation of Maus's "right to rule." Peter Niesen, *Reframing Civil Disobedience: Constituent Power as a Language of Transnational Protest*, 15 J. INT'L POL. THEORY 31, 32–33 (2019) (analyzing INGEBORG MAUS, ZUR AUFKLÄRUNG DER DEMOKRATIETHEORIE: RECHTS- UND DEMOKRATIETHEORETISCHE ÜBERLEGUNGEN IM ANSCHLUß AN KANT 32 (1992)).

20. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 260 (1977).

within resistance measures in autocracies, wherein resistance exists as one of the only methods of implementing meaningful change in the absence of democratic institutions. The following Section will introduce prominent perspectives on the relationship between constituent power and resistance within the existing literature.

C. The Relationship of Constituent Power & Resistance

The question of constituent power's relationship with resistance has been met with some renewed interest as populist, autocratic leaders assume power and democracies struggle with old and new institutional challenges. Three primary viewpoints on the subject are most salient for this discussion. The first are absolutists, who are designated as such for their "absolute view" of virtually unlimited constituent power.[21]

Absolutists view popular sovereignty and constituent power as inseparable pieces of a whole.[22] Contemporary absolutists elevate popular sovereignty over the force of the law and view the people's voice as an (or perhaps *the*) essential source of power within a legal system. According to these perspectives, should the people as a whole—or as a majority—reject their incumbent government's mandates, they are entitled to express this dissent and call upon their constituent power to change their constitutional order.

This concept is well-represented by Bruce Ackerman's constitutional moments theory, which holds that the U.S. Constitution is the culmination of "an evolving historical practice, constituted by generations of Americans as they mobilized, argued, [and] resolved their ongoing disputes over the nation's identity and destiny."[23] Conversely, more traditional absolutists that view the government as the voice of the people might adopt a different perspective and name dissenters "enemies," an important distinction that is emphasized below.

The transitionary nature of constituent power and the relative "stasis" (or non-revolutionary quality) of resistance movements leads some scholars to regard these two concepts as inherently incompatible—those scholars are noted here as republicans.[24] While republicans believe in the value of a representative democracy, they typically do not ascribe any specific normative content to the law. These accounts in some ways

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21. JOSHUA BRAVER, WE, THE MEDIATED PEOPLE: POPULAR CONSTITUTION-MAKING IN CONTEMPORARY SOUTH AMERICA 7 (2023).

22. *See* Peter Niesen, *Constituent Power: A Symposium – Introduction*, VERFASSUNGSBLOGOUT (Dec. 18, 2020), https://verfassungsblog.de/constituent-power-a-symposium-introduction/ [https://perma.cc/WGZ5-RTAC].

23. ACKERMAN, *supra* note 8, at 34.

24. *See, e.g.*, William E. Scheuerman, *Constituent Power and Civil Disobedience: Beyond the Nation-State?*, 15 J. INT'L POL. THEORY 49 (2019).

resemble that of the absolutist view, while simultaneously adopting elements of liberal theory. For example, they adopt a positivistic view of the law and expansive support for popular sovereignty that resembles absolutist accounts, while also requiring resistance measures to follow certain criteria to be considered legitimate, in the style of the liberals.

Of special note is that the absolutist and republican conceptions of constituent power generally support the idea of the people's boundless authority to some degree.[25] In democratic regimes, the exercise of this limitless constituent power within a liberal and democratic state creates several problematic considerations. Specifically, constituent power exercised in this way is able to validly topple what may be just and equitable institutions within a liberal and democratic regime.[26]

Finally, liberal perspectives are deeply critical of constituent power and generally do not see it as a useful framework for understanding a constitutional state.[27] They are given this designation for their alignment with liberal theories of the law, which hold that law is inherently tied to liberal principles such as equality and justice. Liberal perspectives do not share the same veneration of popular power as do the republicans and absolutists; instead, liberals posit that it is necessary that all power be checked by laws to prevent a tyranny of the majority.[28] Moreover, this view holds that power must be equally vested among the people and the state within a functional liberal democracy. Unlike in republican accounts, the law must also possess a certain normative character to be legitimate. On this basis, much has been written by these theorists on the topic of resistance to illegitimate authority,[29] but very little on its connection with constituent power.

25. *See* discussion *infra* Sections II.A, II.B.

26. Although this exceeds the scope of this discussion, the conclusion that constituent power and the right of resistance cannot be so closely intertwined in liberal democracies is probably a correct one.

27. *See, e.g.*, David Dyzenhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 1 GLOB. CONSTITUTIONALISM 229, 233 (2012).

28. *Id.*

29. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) [hereinafter RAWLS, A THEORY OF JUSTICE]; DWORKIN, *supra* note 20.

The chart below outlines the primary differences between these groups:

Theorists	Constituent Power	Resistance	CP&R Nexus
Absolutists	View constituent power as above the law and an absolute right; the people can exercise constituent power at any time to change their constitutional order.	Resistance is a natural component of constituent power; without resistance, the people cannot change their constitutional order.	Constituent power and resistance are fundamentally related.
Republicans	Also view constituent power as an absolute right but are skeptical of this concept existing above the law in a functional democracy.	Resistance measures can only commence under certain circumstances and must meet certain requirements to be justified and legitimate.	Opinions diverge. Some argue that this nexus is harmful, while others suggest it may allow the people to transcend inefficient or unjust institutions.
Liberals	Deeply critical of constituent power. Most liberals are "ideal" theorists and predicate their analyses on a hypothetical legal system with optimal functionality. Any power existing beyond the law's regulation threatens this stasis.	Resistance is not only a right, but an obligation in many cases to oppose unjust laws. Resistance measures must meet basic standards of civility to be justified and legitimate.	Many deny any such nexus.

While these discussions provide important insight into the benefits and detriments of a constituent power framework, the subject has not yet been fully explored. The above chart highlights some of these areas. As the following Part illustrates, most of the literature discussing the nexus between resistance and constituent power presumes a liberal and democratic state as a baseline. When discussed both individually and together, both concepts are almost exclusively referenced in these contexts, especially in modern debates.

Likewise, while constituent power is tied to revolutionizing one's constitutional order, resistance efforts are rarely connected to these discussions. Resistance is referenced as the gradual process that makes way for expressions of constituent power; these elements are often addressed separately, despite a clear conceptual link. Finally, all three groups seem to view constituent power in a uniform way. Like Carl Schmitt's theorization, constituent power exists beyond the legal framework, which leads to suspicion on the part of liberals and republicans.

The following Part will build upon these themes and provide a foundation for the argument that resistance in autocratic states can and should be regarded as invoking the right to self-determination.

II. PERSPECTIVES ON CONSTITUENT POWER & RESISTANCE

A. Absolutists

One powerful conception of constituent power arises from the idea that "the people" inherently possess the power to transcend the law to enact their mandates—or to resist. To some extent, it is a natural assumption that the people should be able to express their will in exceptional circumstances, especially in cases of top-down threats to fundamental human rights or serious breaches of public trust. Without recourse to extra-legal change through deliberation, resistance, or revolution, the people become vulnerable to a government that would use the law as a tool of oppression, leaving open the potential for a tyranny of the minority.[30] Therefore, to absolutist scholars of constituent power, the people's authority is considered paramount within any legal system and cannot be bound by the law.

Within this group, most discussions of constituent power take place in the context of revolution. Likewise, to the extent resistance is explicitly discussed by absolutists, it is usually bound in revolutionary language. This can be said to relate to constituent power's creation—Sieyès introduced the concept of *pouvoir constituant* in his writings supporting

30. Several such critiques were levied against the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

the French Revolution.[31] Whereas Sieyès adopted a mixed account of natural law and the people's supreme authority, the most influential aspects of his account stem from the latter.[32] To Sieyès, a constitutional state possesses two types of power: constituted and constituent.[33] *Constituted* power represents those institutions granted authority by means of a constitution and are considered by many interpretations as subordinate to constituent power. Under this reading, constituted authorities are never entitled to alter or expand their powers.[34]

Sieyès's *constituent* power, however, has been interpreted as unlimited in this regard. The people as holders of constituent power could not truly be bound by a constitution and were thus entitled to change their constitutional order at will.[35] More contemporary absolutists have deviated little from this interpretation; this is reflected well in Ingrid Maus's argument that "[t]he entire legal and constitutional order depends for its validity on the fact that the people have not yet changed it."[36] However, subsequent contributions have since brought more nuance into who the people are, and how they invoke this authority.

Carl Schmitt remains an influential figure on this matter and is a prominent absolutist proponent of constituent power. Although Sieyès is credited with the creation of constituent power as a concept, it is arguably Schmitt's account that continues to dominate contemporary discussions of the idea, particularly with those that support some form of popular constitutionalism. The contemporary revival of his work in advanced autocracies like the People's Republic of China is particularly noteworthy.[37] Whereas republican accounts (and many democracies themselves) draw from Schmitt's veneration of the people as a collective force, modern autocracies rely even more extensively on elements of his theory to resurrect key elements of the National Socialism party that his theory was initially intended to support.[38]

The people's supremacy dominates absolutist literature on constituent power, subsequently leading to a strong classification of who possesses constituent power, and who does not. This can also be traced to Schmitt, who argued that the nation-state is built upon a unified will and common

31. SIEYÈS, WHAT IS THE THIRD ESTATE?, *supra* note 7, at 89.

32. However, many tend to read him through Schmitt, who emphasizes Sieyès's constituent power while arguably undermining his contemplated role of constituted powers. *See, e.g.*, RUBINELLI, *supra* note 12, at 61–62.

33. SIEYÈS, WHAT IS THE THIRD ESTATE?, *supra* note 7, at 89.

34. *Id.*

35. On this, Sieyès has stated that the nation's "will is always legal." *Id.*; *c.f.* RUBINELLI, *supra* note 12, at 33 (interpreting Sieyès's constituent power as limited).

36. Niesen, *supra* note 19, at 33 (quoting the translated text of MAUS, *supra* note 19, at 40).

37. Lucas Brang, *Carl Schmitt and the Evolution of Chinese Constitutional Theory: Conceptual Transfer and the Unexpected Paths of Legal Globalisation*, 9 GLOB. CONSTITUTIONALISM 117, 134 (2020).

38. *Id.* at 117–20.

identity—as a collection of "friend[s]" who possess constituent power posed against their "enem[ies]."[39] As friends, the people are bound by a common interest to condemn their "enem[ies]," who do not share the same ideals.[40]

Schmitt's concept of the people at first glance is inclusive, as the friend and enemy distinction could be made upon any number of bases; but on closer inspection it is built more upon the violent "suppression of difference"[41] that demands uniformity of will.[42] Under Schmitt's conception of the state, those who cannot or will not conform to the people's common identity are equally subject to censure, oppression, and expulsion—and deprived of their constituent power.

A more contemporary absolutist perspective of constituent power can be found within Bruce Ackerman's constitutional moments theory. In his *We the People* series, Ackerman proposes that the people of the United States have used their constituent power to fundamentally change their constitutional regime without resorting to the challenging limitations of Article V of the Constitution.[43] Instead, Ackerman argues that the people can legitimately change their Constitution through a rigorous four-step framework requiring intentional democratic deliberation between the people and the sovereign body.[44] Like Schmitt's theory, Ackerman's concept of constituent power exists outside the boundaries of the law; he also adopts a broad yet sometimes exclusionary idea of the people, although his works are more firmly situated in liberal and democratic theory and not positioned as an alternative.

While Ackerman himself denies alignment with any particular theory or moral code,[45] his four-step process of democratic deliberation cannot take place in a jurisdiction that does not value the fundamental rights of the freedoms of expression and of association (i.e., an autocratic state). Rosalind Dixon and Guy Baldwin, who positively engage with the constitutional moments theory, have extended this claim even further, arguing that a constitutional moment cannot take place within a democratic jurisdiction that only possesses one political party.[46] To them, this would obstruct authentic engagement under this framework as there is

39. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26 (George Schwab trans., Univ. of Chi. Press expanded ed. 2007) (1932) [hereinafter SCHMITT, THE CONCEPT OF THE POLITICAL].

40. *Id.*

41. BRAVER, *supra* note 21, at 8.

42. *Id.*

43. ACKERMAN, *supra* note 8; 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

44. *See* ACKERMAN, *supra* note 8, at 6.

45. Bruce Ackerman, *Reactionary Constitutional Moments: Further Thoughts on the Civil Rights Revolution*, 13 JERUSALEM REV. LEGAL STUD. 47, 51–52 (2016).

46. Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 67 AM. J. COMPAR. L. 145, 147 (2019).

no "alternative" political account that the people can support, although the conditions for free deliberation are met.[47]

Absolutists do not engage as directly with resistance as they do with revolution, but it is possible to draw some conclusions based upon their fundamental approach. First, there are likely some distinctions between more classical and modern perspectives. Classical absolutists like Schmitt and Sieyès, whose theories do not presume a democratic baseline, are likely to view resistance in one of two ways. On one hand, within the context of revolution, anti-establishment resistance movements might be considered "friends," or part of the people, so long as they possessed the same enemies. On the other hand, outside of this context, any forces seen to oppose the people might face violent repression. In terms of contemporary—and comparatively more democratically minded—absolutists like Ackerman, resistance is a key element of a functional state. The people must be willing and able to resist a constitutional order that no longer suits them.

While an intuitively appealing framework for understanding constituent power and resistance, absolutist accounts possess problematic characteristics that undermine its use in this current analysis. This is particularly true in its acceptance of inherently non-democratic constitutional change as legitimate. While some absolutists are more wary of simple majoritarianism, Schmitt nevertheless maintained that the people are virtually unlimited in determining how (and to whom) to transfer their constitutional powers.[48] Schmitt's infusion of "authoritarianism and political existentialism" into constituent power remains the primary account for both absolutists and republicans.[49]

The result of this influence means that even within more contemporary accounts, should the will of the people prove to support the establishment of a totalitarian leader with powers to alter the fundamental norms of the constitution, then such a method of constitutional change is inherently valid. It would not truly result in the establishment of an entirely new constitutional regime, but rather it would represent a valid extension of the people's will.[50] In many, if not most, cases, this is directly contrary to the values held by resistance groups in autocratic states, which demand equality under the law.[51]

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47. *Id.* at 166.

48. *See* SIEYÈS, WHAT IS THE THIRD ESTATE?, *supra* note 7, at 89; *see also* CARL SCHMITT, CONSTITUTIONAL THEORY 75–77 (Jeffrey Seitzer ed. & trans., 2008) (1928) [hereinafter SCHMITT, CONSTITUTIONAL THEORY].

49. BRAVER, *supra* note 21, at 8.

50. SCHMITT, CONSTITUTIONAL THEORY, *supra* note 48.

51. The modern cases referenced in the introduction represent clear examples. In all three jurisdictions—China, Iran, and Russia—protesters demand their state respect the rule of law. *See supra* Introduction.

Whereas contemporary theorists might refrain from endorsing such illiberal and non-democratic constitutional changes, the shared premises of unlimited constituent power—including a majoritarian view of the people, which is the supremacy of their power without limitation—lead to a similarly problematic conclusion. This is exacerbated by the fact that these approaches are most often unaligned with a particular theory of law, which might work as a limitation upon what can be considered a "legitimate" change. For example, an absolutist approach would not necessarily be constrained by prohibiting changes to fundamental constitutional norms like human rights.[52]

As a more general consideration, constituent power can be invoked at any time under this perspective. Unlike in the republican accounts discussed below, there is no litmus test for resistance measures and the activation of constituent power; this means that even an ideal, democratically elected regime can be subject to revolution and replacement by a dictatorial movement that claims to represent the majority of the people. While these views on constituent power are appealing for their powerful and seemingly limitless nature, it is difficult to draw from these accounts when assessing democratization efforts in autocratic regimes.

B. Republicans

Republican perspectives on the relationship between constituent power and resistance efforts are diverse. These accounts juxtapose absolutist views of constituent power with liberal conceptions of resistance. This means that it is far more difficult to conflate the two by way of adopting them as necessary elements of a revolution (as with the absolutist account). To this group, constituent power simultaneously exists as superior to the legal order, while working alongside it "as a supreme, autonomous, and legally unrestrained source of constitutional (and ultimately institutional) legitimacy."[53] Most republicans would distinguish this definition from Schmitt's conception of the people's authority, but not in a way that divests the account entirely from his elevation of the people as beyond the legal system's limitations.

When referring to resistance measures, republicans describe a collective and "distinctive mode of lawbreaking predicated, however

52. For example, the Eternity Clause in Germany's Constitution prohibits changes to several fundamental principles, including human rights. GRUNDGESETZ [GG] [Basic Law] art. 79(3), translation at https://www.gesetze-im-internet.de/englisch_gg/ [https://perma.cc/9BM5-8EV4].

53. Scheuerman, *supra* note 24, at 51.

paradoxically, on basic respect for law or legality."[54] This primarily refers to different methods of civil disobedience, defined as peaceful efforts to facilitate legal change through breaking laws that are inherently unjust.[55] Most of this literature focuses on individual laws or policies rather than how dissenters might respond to an unjust political system.

There is some agreement that civil disobedience must follow certain standards to be distinguished from other forms of social resistance to oppression, such as violent riots.[56] General criteria include openness and publicity, nonviolence, and non-evasion of legal consequences.[57] These discussions most naturally presume that resistance is taking place within a democratic context, in a state that adopts protections for fundamental human rights.[58]

Unlike absolutists, republicans also commonly view resistance as requiring justification. Given the illegal nature of resistance movements, most would agree that a certain level of injustice or unfairness must be met prior to disrupting the legal order.[59] Rawls is often credited with creating a baseline of moral elements required to engage rightfully in civil disobedience, which many republicans draw upon in their work. Contemporary republican theorists might also adopt other moral or non-moral conditions, however, based on a growing skepticism of whether there exists a moral obligation to follow the law.[60]

Discussions of the relationship between constituent power and resistance have recently become more prevalent, commensurate with renewed interest in the former.[61] Within this sub-group, this topic is also somewhat divisive. In comparing republican conceptions of constituent power and resistance, William Scheuerman finds that the former "disfigures core features of civil disobedience."[62] To Scheuerman, constituent power is inextricably linked to the violence and upheaval of

54. *Id.* at 53. This premise was built from Martin Luther King, Jr.'s description of civil resistance as possessing "the very highest respect for law." Martin Luther King, Jr., *Letter from Birmingham City Jail* (1963), *reprinted in* CIVIL DISOBEDIENCE IN FOCUS 68, 74 (Hugo Adam Bedau ed., 1991).

55. RAWLS, A THEORY OF JUSTICE, *supra* note 29.

56. *Id.*

57. *Id.* at 321; *see also* Hugo A. Bedau, *On Civil Disobedience*, 58 J. PHIL. 653 (1961); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

58. JOHN RAWLS, POLITICAL LIBERALISM 6 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

59. *See, e.g.*, RAWLS, A THEORY OF JUSTICE, *supra* note 29, at 326–29.

60. KIMBERLEY BROWNLEE, CONSCIENCE AND CONVICTION: THE CASE FOR CIVIL DISOBEDIENCE 225 (2012); Robin Celikates, *Democratizing Civil Disobedience*, 42 PHIL. & SOC. CRITICISM 982, 984–85 (2016).

61. The rise of autocratic leaders and challenges to democracy has sparked a new interest in the role of constituent power in "organising and re-invigorating national and transnational democracy." Niesen, *supra* note 22 (emphasis removed).

62. Scheuerman, *supra* note 24, at 53.

revolutionary politics, which is contrary to the objectives of civil resistance. In sum:

> Even in its most radical democratic manifestations, [civil disobedience] has not been about a unified or homogeneous, legally unlimited people acting outside and against law, but instead groups of citizens, operating in the context of modern pluralism, peacefully coming together and, yes, breaking the law, but doing so ultimately to improve law. It does not necessarily or even typically aim to awaken some lumbering, homogeneous collectivity, or even claim to speak on an imagined (and probably fictional) unitary political subject's behalf. Instead, civil disobedience is typically about persuading political majorities to advance reform (and thus its public character).[63]

In Scheuerman's view, constituent power is not only an inappropriate framework for understanding civil disobedience, but also one which undermines its core features and efficacy as a mode of resistance.[64]

Robin Celikates adopts a contrary approach. To Celikates, resistance is not a force directed in opposition to the *state*; rather it represents a call to fellow citizens to express their collective self-determination, primarily through civil disobedience.[65] He does not allege that resistance itself should be viewed as constituent power, but rather that a connection between the two can be facilitated if certain conditions are met.[66] Contrary to liberal theorists of resistance who require moral justifications for civil disobedience, Celikates argues that resistance measures are justified through institutional weakness that prohibits legal reform.[67] In other words, when legal recourse is ineffective within a jurisdiction, the people are entitled to resist and thereby invoke their constituent power to change their constitutional order.

Finally, Peter Niesen proposes that resistance measures can themselves be justified as a unique expression of the people's constituent power.[68] Like Celikates, Niesen envisages resistance movements as grassroots efforts to invoke constitutional change, primarily in response to challenges within democratic institutions that prevent intra-institutional resolutions.[69] This account views civil disobedience as possessing a wholly transformative capacity as an extra-institutional articulation of constituent

63. *Id.* at 54 (understanding Celikates's "radicals" as "absolutists").
64. *Id.*
65. Celikates, *supra* note 60, at 988.
66. *Id.* at 989.
67. While Celikates does not provide examples of specific institutional weaknesses that might justify resistance, one could imagine this applying in reference to a captured judiciary or a corrupt prosecutorial system. *Id.*
68. Niesen, *supra* note 19, at 37.
69. *Id.*

power, but only when "exercised" in a certain way.[70] In rejecting the idea of "justifying" constituent power, Niesen argues that resistance movements need not be reactive to a state's institutional failures but can be authorized by the people themselves as the rightful holders of constituent power.

While varied on the question of whether constituent power can be invoked through resistance, republican theories hold fundamental tenets in common that unite these accounts. Constituent power and resistance are seen as distinctive concepts, but also related by their connection to the people; more specifically, these powers belong to the people to activate or express. Like absolutists, republicans see a connection between popular sovereignty and constituent power, and likewise understand the latter to be a power that cannot and should not truly be bound by the law.

Whereas some republicans like Scheuerman would deny a connection with Schmitt and other absolutist accounts' concept of constituent power, the distinctions offered are not convincing. These accounts agree that there is some unbounded and undefined authority within the people that cannot and should not be altered by legal limitations; although there is some disagreement as to when this might be invoked, it is no question that constituent power exists beyond and is superior to the law. Therefore, like absolutists, republican theories of constituent power suffer from the same weaknesses that estrange them from resistance movements in autocracies; specifically, that should "the people" will it, a constitutional moment can legitimately seat a totalitarian leader.

Resistance movements, discussed primarily through the lens of civil disobedience, are bound by requirements for their legitimacy, though the specific content of the requirements themselves depends on the theorist. In terms of form and structure, Scheuerman, Niesen, and Celikates view resistance within the vertical framework criticized by Maus.[71] That is, resistance is an action taken by the people against an unjust state or an unjust action taken by the state. Justification for resistance movements is sometimes a requirement in these writings, but not consistently. Rather than requiring political or moral failings as the justification for resistance movements, republican accounts instead appeal to whether democratic institutions can adequately respond to grassroots initiatives. If not, then resistance is justified.

However, it does not seem that resistance truly requires justification according to these accounts, especially those that would argue that resistance and constituent power should be linked. As republicans generally view constituent power as a limitless source of the people's rightful authority, it is somewhat inconsistent to claim that resistance, as

70. *Id.* at 40–41.
71. *See supra* Section II.A.

an expression of constituent power, need find a basis for its expression. The following Section will build on these ideas in the realm of liberal democratic theory, focusing more on the legitimation and justification of resistance.

C. Liberals

Liberal perspectives on the question of constituent power's relationship with resistance are more challenging to assess than in the former categories. First, liberal scholars tend to view the usefulness of the concept of constituent power with skepticism because of its existence outside the bounds of the law. Republicans and absolutists view constraints on constituent power as limiting the people's ability to challenge tyranny by wrongfully limiting their ability to change their constitutional order. In contrast, liberals view the unconstrained and seemingly limitless authority of the people as a potential *source* of tyranny, allowing the majority to trump established laws in the name of an ill-defined yet overwhelming power.

Whereas some liberals would endorse a more limited idea of constituent power that deviates from the Schmittian account that influences the absolutists and republicans, others are more generally opposed. David Dyzenhaus is especially critical of narratives of constituent power, arguing that it lessens the value of a written constitution and results in a "deep ambivalence about whether authority is located within or without the legal order."[72] To Dyzenhaus, the revival of constituent power debates during an era in which executive branches rapidly aggrandize their powers and recede from international fora signals a troubling reversion away from law and toward majoritarian rather than universal values.[73]

Liberals' opposition to constituent power is best explained by their positioning in relation to law and legality. Most are idealists, meaning that theorization of the law is predicated on what law might be in its ideal form, not its current state. In other words, constituent power and its presumed ties with revolution have little place within a state that is fundamentally equitable and just.

There are some scholars, including Ronald Dworkin, who understand constituent power in a more limited sense. Dworkin denies what he calls the "majoritarian premise," or the common view that it is "a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favor if fully informed and

72. Dyzenhaus, *supra* note 27, at 229.
73. This is particularly true in relation to the office of the chief executive. *Id.* at 231–32.

rational."[74] He instead supports what he calls a "constitutional conception of democracy," which requires "collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community . . . with equal concern and respect."[75]

Unlike other liberals, Dworkin does not denounce constituent power in his constitutional conception of democracy. Instead, he suggests there is space to preserve it, should a society meet three moral—or relational—conditions of inclusion. First, all participants should have equal weight in the decision-making process, and institutional arrangements that would favor the vote of some over others should be eschewed. Second, all decisions must be based on the principle of equality; both wealth and burdens must be equally shared. Finally, all persons must be morally independent, regarding themselves as individual participants in collective decision-making.[76] While Dworkin does not elaborate further on how prominent a role constituent power holds, his account suggests that constituent power remains an important narrative in some liberal theories of law.

On resistance, liberal theorists hold similar views to republicans, though imbued with more requirements for legitimacy; civil disobedience must meet certain criteria to be considered distinct from other forms of protest and show a certain fidelity to the law.[77] Unlike the republicans, however, liberal perspectives are more likely to agree that there exists a moral obligation to obey the law. This means that aside from requirements that *legitimate* civil disobedience, there must also be a *justification* for breaking the legal mandates.[78] In sum, resistance must follow requirements for civility to be legitimate, but it must also find a justification for it to take place at all.

This obligation to provide a justification for "illegal" activity is predicated on the fact that the law possesses a moral character that renders it worthy of obedience.[79] Within idealist accounts, the law's validity is commonly determined by assessing whether laws meet the demands of public reason. For these scholars, "public reason" represents universal moral principles that can be derived from the shared fundamental value of justice.[80] John Rawls's account argues that justice serves as a useful framework for assessing the law's validity:

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74. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 17 (1996).

75. *Id.*

76. *Id.* at 25.

77. *See, e.g.*, Martha C. Nussbaum, *Civil Disobedience and Free Speech in the Academy*, *in* ACADEMIC FREEDOM 170, 177 (Jennifer Lackey ed., 2018).

78. RAWLS, A THEORY OF JUSTICE, *supra* note 29, at 31.

79. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 41 (Erin Kelly ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS].

80. *Id.* at 26.

> [It] provides a publicly recognized point of view from which all citizens can examine before one another whether their political and social institutions are just. It enables them to do this by citing what are publicly recognized among them as valid and sufficient reasons singled out by that conception itself. . . .
>
> The aim of justice as fairness, then, is practical: it presents itself as a conception of justice that may be shared by citizens as a basis of a reasoned, informed, and willing political agreement. It expresses their shared and public political reason.[81]

Therefore, if laws have embodied principles of justice, they can be said to adhere to public reason; and if laws adhere to public reason, there is no justification to break them through resistance measures. Conversely, if a law does not meet standards of public reason, then resistance is justified, so long as it remains legitimate through expressing fidelity to the law.

While compelling, an issue remains on how one might determine principles of justice if a state is neither free nor fair—if there is no "publicly recognized point of view from which all citizens can examine before one another."[82] Among others, Rawls's account explicitly presumes ideal conditions, including:

> [F]irst . . . everyone accepts, and knows that everyone else accepts, the very same principles of justice; second . . . its basic structure [of society] is publicly known, or with good reason believed, to satisfy these principles. And third, its citizens have a normally effective sense of justice and so they generally comply with society's basic institutions, which they regard as just.[83]

Similarly, Dworkin also assumes ideal circumstances as a prerequisite for a constitutional concept of democracy.[84] Like republicans, liberal scholars use a liberal democratic state as a baseline for their analyses. This means that within an entire legal system that does not respect these features, the question of legitimating and justifying resistance becomes more complicated.

This complication is also present in the republican and contemporary absolutist accounts. Each group presumes a democratic state as a baseline for the determination of whether constituent power and resistance movements might be connected. Ultimately, while these perspectives inform current debates, little attention has been paid to whether these concepts might be connected within an autocratic state. Instead, constituent power is presumed to be wholly suppressed.

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81. RAWLS, POLITICAL LIBERALISM, *supra* note 58, at 9.
82. *Id.*
83. *Id.* at 35.
84. DWORKIN, *supra* note 74, at 24.

The foundations underpinning traditional views of constituent power must be challenged. Autocratic leaders are increasingly using the law as a tool, "hollowing" out legal principles to further entrench their regimes.[85] In this context of global and legalistic autocratic growth, it is important to begin transnational conversations about law, power, and resistance that return agency to an essential constitutional actor—namely, the people.

D. The Link Between Constituent Power & Resistance

This Article adopts an alternative perspective to those articulated above, while relying upon their basic tenets—one that reintroduces constituent power into the conversation in a way that diverges from a Schmittian account. It relies both on Sieyès's original writings and on liberal conceptions of legitimacy to craft an understanding of constituent power that is consistent with fundamental legal principles.

Sieyès conceived of constituent power as being constrained by two forces—through his distinctive notion of "natural law" and through some of constituent power's inherent features. Regarding the former, Sieyès held natural law above all other forms of law and political power. A quote used by Schmitt and viewed favorably by absolutists is the idea that "[t]he nation [or the people's will] is prior to everything. It is the source of everything. Its will is always legal; indeed it is the law itself."[86]

However, this seemingly sweeping grant is curtailed in the following sentence, which is far less well-known. It reads, "[p]rior to and above the nation, there is only natural law."[87] When discussing the subject of constitutional entrenchment, Sieyès described the role and importance of natural law within a constitutional order:

> A political society that thinks itself free and enlightened must therefore establish some source of purely natural jurisdiction, both for smaller offences and for real crimes, in order to allow for legitimate defenses in cases in which the positive law has failed.
>
> . . . .
>
> . . . [A] positive law does not have retroactive force. Once it is passed, it is too late for it to be used to address the problem that prompted its making. If, however, natural law makes its voice heard, if it offers consolation to the unfortunate one and a good example to society, you will not accuse it of operating retroactively. Natural law is timeless: it was promulgated at the beginning of the

85. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 561 (2018).

86. SIEYÈS, WHAT IS THE THIRD ESTATE?, *supra* note 7, at 89.

87. *Id.* (emphasis removed). Sieyès here uses the term "nation" to represent the people's will, or the people's constituent power. *See id.*

> world, and was written into human nature itself as an indelible sense of justice and injustice.[88]

Sieyès's use of justice in the above selection here suggests there is some resonance in what he views as natural law and liberal legal principles. Based upon this account and other supportive writings, Raffael Fasel has argued similarly, proposing that Sieyès adopted a "secularized natural law"[89] to which popular power was subordinate.[90] Joel Colón-Ríos has also tied constituent power to human rights and justice, arguing it features an intergenerational component that mandates protecting the people as future constitution-makers.[91]

The inherent features of constituent power that limit its application arise from the same discussion of entrenchment. On this matter, Sieyès proposes the following:

> 1) The community does not cast aside its right to will: this is inalienable; it can only delegate the exercise of that right. . . . 2) Nor can it delegate the full exercise of it. It delegates only that portion of its total power which is needed to maintain order. In this matter, no more is surrendered than necessary. 3) Therefore, it does not rest with the body of delegates to alter the limits of the power that has been entrusted to them. Obviously such a competence would be self-contradictory.
>
> . . . 1) This will which resides in the body of representatives is neither complete nor unlimited; it is a mere portion of the grand, common, national will. 2) The delegates do not exercise it as a right inherent in themselves, but as a right pertaining to other people; the common will is confided to them in trust.[92]

At first glance, this passage seems to suggest that the people possess power external to the law; this is not so. Per Sieyès's analysis, natural law remains prior to and above constituent power. While the national will (constituent power) cannot be fully incorporated within positive or written law, it remains subject to the requirements of natural law.

The relevant aspect of this Section refers to the limitations of constituent power that have been delegated to political representatives. Contrary to the Schmittian account that would sanction the complete and

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88. EMMANUEL JOSEPH SIEYÈS, *The Opinion of Sieyès Concerning the Tasks and Organization of the Constitutional Jury, Submitted on the Second Thermidor* (1795), *reprinted in* EMMANUEL JOSEPH SIEYÈS: THE ESSENTIAL POLITICAL WRITINGS, *supra* note 7, at 180.

89. Raffael N. Fasel, *Constraining Constituent Conventions: Emmanuel Joseph Sieyès and the Limits of* Pouvoir Constituant, 20 INT'L J. CONST. L. 1103, 1106 (2022).

90. *Id.* at 1103.

91. Joel Colón-Ríos, *Constituent Power, the Rights of Nature, and Universal Jurisdiction*, 60 MCGILL L.J. 127, 127 (2014).

92. SIEYÈS, WHAT IS THE THIRD ESTATE?, *supra* note 7, at 88.

total transfer of constitutional power to one who claims to represent national interests, Sieyès here acknowledges that designated representatives cannot claim more than what they have been allocated by their constituents.

As Fasel has noted, it is remarkable how Schmitt's reading of Sieyès—and his unlimited concept of constituent power—has eclipsed the original, far more moderated version.[93] The above excerpt indicates Sieyès viewed the delegation of constituent power (national "will") as a minimal grant, to be held by representatives "in trust" that they will hold and execute it in a way that is consistent with their constituents' interests. Moreover, this delegated power would be held under the constraints of both natural law and positive law. It follows that this partial constituent power is subject to the same limitations imposed by natural law as when it is fully vested with the people. Such representatives would also be bound by the positive law that regulates constituted powers (the Constitution).[94]

This Article adopts a view of constituent power that draws from its original construction under Sieyès, yet it diverges slightly from its basis in natural law. In this sense, constituent power is not per se limited by natural order, but liberal principles of law. These principles—including equality, pluralism, and justice—have resonance both in Sieyès's view of natural law and contemporary liberal theories. In a word, constituent power is valid when it embodies the necessary moral components of law. This work focuses, therefore, on only certain expressions of resistance that meet these elements while attempting to facilitate reform.

There is a deep connection between expressions of constituent power as efforts to remake one's state and as resistance to tyranny. As Fasel suggests, constituent power "allows people to establish a constitutional order in which freedom and equal rights are protected and concretized . . . . Where tyrannical governments stand in the way of such an order, [constituent power] allows the people to overthrow them."[95] Constituent power, therefore, is "key to creating a legitimate constitutional system that represents the people's will and protects their freedom and equality."[96] With constituent power as their source and resistance as their method, the people can validly alter the fundamental laws of their civil state.

The following Part addresses the role of the right of resistance. It argues that when a government lacks the consent of its people, as in a repressive autocratic state, resistance measures are therefore justified; and through resistance measures, the people express their constituent power. Part III will critically assess the two major theories of public consent and argue that authoritarian regimes lack legitimate power under both conceptions.

93. *See* Fasel, *supra* note 89, at 1105.
94. SIEYÈS, WHAT IS THE THIRD ESTATE?, *supra* note 7, at 88.
95. Fasel, *supra* note 89, at 1115.
96. *Id.*

It will then define how the loss of consent can justify expressions of resistance in autocratic jurisdictions, and it will introduce the right of resistance. Finally, it will emphasize the creative force of constituent power and resistance in the context of autocracies.

III. CONSENT OF THE PEOPLE & LEGITIMATION OF RESISTANCE

A. Consent & the Social Contract

Modern governance structures are predicated on the consent of the people, which serves as a necessary (although not sufficient) condition for legitimacy. It is commonly held that people begin in the "state of nature," where humankind exists in the absence of a structured civil state.[97] To some, the state of nature remains bound by the principles of natural law; others describe it as "solitary, poor[], nasty, brutish, and short."[98] According to contemporary legal thought, it is possible to exit this stasis through engaging in a Lockean social contract, wherein a people enter into a mutually binding agreement to cede some of their capacity to act individually—or authority—to a political body, in exchange for the convenience associated with the formation of a civil state.[99]

Consent theory has expanded beyond its origins in the social contract. Democratic theorists commonly evaluate the extent of consent (or whether conditions are sufficient to consent) in empirically determinable ways—for example, by voting.[100] However, these methods have limited application within an autocratic context. Building from the example of voting, it may be difficult or impossible to hold impartial elections in autocratic states. Election data does exist within some autocracies, but it is of limited value; it does not account for elements such as state repression, the disenfranchisement of minority groups, or other factors which may interfere with integrity of the electoral process. It is necessary, then, to refer to the fundamentals of consent theory to evaluate adherence to the social contract in the context of autocracies.

John Locke's account of the social contract holds that the transfer of power is only legitimate if authentic consent is given by the people—specifically, "no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*."[101] The requirements for consent vary among legal theorists: Hobbes argues that consent is

97. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

98. THOMAS HOBBES, LEVIATHAN 84 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651).

99. LOCKE, *supra* note 97, at 325.

100. *See, e.g.*, Anna Lührmann, Marcus Tannenberg & Staffan I. Lindberg, *Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes*, 6 POL. & GOVERNANCE 60 (2018).

101. LOCKE, *supra* note 97, at 330.

implied should a state or sovereign be beneficent, or protect its citizens from the state of nature.[102] Joseph Raz suggests that theories of consent can be understood within one of the following camps:

> It may be a condition, or the condition of holding legitimate authority. Or, though not a condition of legitimacy itself, those conditions may be such that only a government based on the consent of the governed meets them.[103]

While nuanced, the primary distinctions between the above accounts arise from whether one views the expression of consent as an actual exercise or as a hypothetical exercise. The first view aligns most closely with Locke's initial theorization, which requires a true and ongoing expression of consent for the formation of a civil state.[104] Consent under this definition might also be tacit, wherein an individual fails to object to the assumption of power and voluntarily decides to remain within that authority's jurisdiction.[105] With regard to the present analysis, it is almost impossible under this rubric to convey either express or tacit consent within an autocratic regime.

While a Lockean account does not necessarily require ideal conditions for the expression of consent (i.e., a liberal, democratic state), the quality of consent must be such that it is voluntarily given—or that the people are at least not unwilling.[106] Even if true consent might be granted on behalf of some that benefit from an autocratic regime, others are deprived of choice. Within an autocratic state that is predicated on control, the expression of non-consent—resistance or dissent—is rendered virtually impossible by the violent suppression of critical, non-conforming viewpoints—a practice that is increasingly typical of modern authoritarian leaders.[107]

On this subject, David Hume raises a similar objection in his critique of Locke's tacit consent theory:

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102. HOBBES, *supra* note 98, at 154.

103. JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 356 (1994). This quote omits Raz's third category, "legitimate government may deserve the consent of its subject," which closely resembles the second category for the purposes of this analysis. This work therefore focuses on his first two classifications, as they underline the majority of contemporary accounts.

104. *See* LOCKE, *supra* note 97, at 337. It is Rawls's interpretation that suggests consent must be ongoing and freely given once new citizens reach "the age of reason." JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 124–25 (Samuel Freeman ed., 2007).

105. LOCKE, *supra* note 97, at 347–48.

106. *See, e.g.*, JOHN DUNN, POLITICAL OBLIGATION IN ITS HISTORICAL CONTEXT: ESSAYS IN POLITICAL THEORY 29–52 (1980).

107. *See generally* SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD 2022: THE GLOBAL EXPANSION OF AUTHORITARIAN RULE (2022), https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf [https://perma.cc/DQG4-NDLB].

> Can we seriously say, that a poor peasant or partizan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.[108]

Similar challenges are levied against citizens of an authoritarian state. Express or tacit consent made under extreme duress is thus an invalid exercise. Therefore, even a regime that perhaps began with the consent of the people, but then adopts practices that would deprive individuals of this right, cannot claim to possess legitimate political authority under this account. This is a conclusion that demands consideration of Raz's second categorization of consent theories.

Most contractarian theorists are aligned with Raz's second account, or consent as a hypothetical exercise. These theorists do not understand consent itself to be a requisite condition of legitimacy, but they view a government that meets liberal conditions of legitimacy as necessarily possessing the consent of the people.[109] This relates back to the above discussion of liberal views on legitimacy, justification, and public reason (or universal moral principles).[110] Proponents of this understanding adhere to the idea that a government can only be legitimate—and therefore possess the consent of the people—if it is aligned with core principles of justice upon which reasoned persons can agree. Put simply, if a rational person in the absence of duress would hypothetically agree to cede some of their political authority to the state, the state could then be considered legitimate.

Rawls articulated a "liberal principle of legitimacy" that adopts these ideas—namely, that "political power is legitimate only when it is exercised in accordance with a constitution . . . the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason."[111] Under this conception of consent, the obligation to maintain the political environment that supports the people's free and voluntary expressions of consent is an ongoing obligation of legitimate political authority. Put differently, consent must be given in ideal conditions—without duress and within a liberal state that provides sufficient protections for dissenters.

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108. DAVID HUME, HUME'S ETHICAL WRITINGS: SELECTIONS FROM DAVID HUME 263 (Alasdair MacIntyre ed., 2012).

109. RAZ, *supra* note 103, at 356.

110. *See supra* Section II.C.

111. RAWLS, JUSTICE AS FAIRNESS, *supra* note 79, at 41.

While it is arguable that ideal conditions are difficult to attain even within democratic states, it is clear that autocratic states cannot hope to meet the standard of public reason that might facilitate voluntary consent. Here, partial consent—or authentic consent on the part of some—is not a defense; it must be acquired from each individual, without fear of reprisal. In the absence of these ideal conditions, authoritarian states lack consent—thus, they lack political legitimacy.

B. The Right of Resistance

The core of the right of resistance is that the people of a nation-state are not obligated to suffer tyrannical rule but are entitled to reject a sovereign that fails to respect fundamental human rights.[112] This right possesses ancient origins in most global philosophies, with common characteristics—namely, that there is not only a right to resist tyranny, but an obligation of the people to oppose or depose an unjust ruler.[113] Today, the right to resistance is codified within several legal instruments of international, regional, and domestic character. It is referenced in the Universal Declaration of Human Rights (UDHR) under the following paragraph of the Preamble:

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law[.][114]

Similarly, the African Charter on Human and Peoples' Rights (the Banjul Charter) reads, in relevant part, that:

> All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. . . .
>
> . . . [O]ppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.[115]

Finally, the German Constitution (among others) articulates a right to resist when one challenges the state's democratic constitutional order.[116]

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112. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, *supra* note 1.

113. One example is the Mandate of Heaven, which was the source of the Emperor's divine right to rule in ancient China. In the event of corruption or immorality, the Mandate could be transferred to a new rightful ruler. Dingxin Zhao, *The Mandate of Heaven and Performance Legitimation in Historical and Contemporary China*, 53 AM. BEHAV. SCIENTIST 416, 418–20 (2009).

114. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, *supra* note 1.

115. Organization of African Unity, African Charter on Human and Peoples' Rights [Banjul Charter] art. 20(1)–(2), June 27, 1981, 21 I.L.M. 58, 1520 U.N.T.S. 217.

116. GRUNDGESETZ [GG] [Basic Law] art. 20.

Despite its inclusion in a number of legal instruments, the legal status of the right of resistance as a universal human right is the subject of dispute. This can in part be attributed to its historical, yet ongoing, link to violent upheavals rather than peaceful transitions.[117] The majority of perspectives view resistance as a last resort, a final struggle of the people to eradicate a tyrannical regime.[118] Thus, the standard for calling upon the right to resistance is extraordinarily high in many accounts, representing a "level of abuse that admits of no alternative path than resistance; the normal channels of voice must not be available or effective."[119]

The implied nexus between resistance and violence is dated. While many regimes have attained power through violence, it is no longer reasonable to assume this is the only or primary route to political change. More traditional views on the right of resistance seem to neglect modern findings on the subject, which support the idea that nonviolent methods are the more successful forms of resistance.[120] One study conducted by Erica Chenoweth and Maria Stephan suggested that nonviolent resistance measures have been found to be far more effective in instigating regime transition—they are *twice* as likely to succeed.[121] Their study suggested the former to be true even in cases of overwhelming comparative power held by the incumbent regime, and commensurate repression efforts.[122]

This is not to say that violent resistance is necessarily illegitimate. There are certain situations where violence might be required; Gandhi did not exclude violence in cases of self-defense or in the defense of others, for example.[123] Rather, this analysis deviates from traditional views that understand violence and the right to resistance as necessarily linked. It argues that the right of resistance incorporates nonviolent measures, including the methods in the above discussion on civil resistance.

A more permissive standard for the invocation of the right to resistance must be considered. In the context of a repressive regime—such as the case in autocracies—the people must be entitled to resist. Resisting is not simply reaction to arbitrary action, although this may be one of its many benefits; it is an essential exercise that can invoke the people's constituent power. The commencement of resistance movements to address one wrong may quickly become a more sweeping challenge.

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117. One thinks of, for example, the French and American Revolutions, or other wars that have resulted in political transitions. *See* Arthur Kaufmann, *Small Scale Right to Resist*, 21 NEW ENG. L. REV. 571, 574 (1985–86).

118. *See id.*

119. Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184, 1191–92 (2013).

120. CHENOWETH & STEPHAN, *supra* note 16, at 6.

121. This dataset was analyzed between 1900 and 2006. *Id.* at 8.

122. *See id.*

123. MAHATMA GANDHI, THE MIND OF MAHATMA GANDHI 190 (R.K. Prabhu & U.R. Rao eds., 1960).

This Article does not ascribe a particular form or content for these movements; however, it does propose that when resistance movements are aligned with basic legal principles discussed in the previous Section, it becomes an inherently valid expression of constituent power. It is a right that enables the expression of constituent power, and "allows people to establish a constitutional order in which freedom and equal rights are protected and concretized."[124] Through constituent power and resistance movements, the people reshape their constitutional order.

The following Section discusses justification and legitimacy in relation to resistance to tyranny.

C. Justification & Legitimacy

Putting aside the question of legitimacy for a moment, it is first essential to ascertain when the right of resistance can be appropriately invoked. When approaching this question from the perspective of traditional consent theories, it becomes clear that autocratic regimes do not fulfil the terms of the social contract. These regimes lack alignment with universal principles and the fundamental conceptions of justice that would allow participants to express consent in the absence of duress. Instead, they perpetuate controlled systems of oppression, which suspend the equal right of participation. Censorship and information control, prohibitions of gatherings, enforced disappearances, and sham trials have initiated the gradual isolation and loss of dissenters, and have introduced a "rule of fear"[125] under which the price of disagreement becomes far too high.

It must be the case that the people may invoke the universal right to resistance when under an illegitimate political regime. To say otherwise repudiates revolutions and transitions that have facilitated new, democratic constitutional orders. The invocation of the right to resistance to tyranny *justifies* resistance efforts. In this case, the important question is what action may be appropriate when the foundation of an entire regime is illegitimate.

On the legitimacy of actions taken under the right of resistance, this Article primarily concerns resistance measures that remain consistent with traditional principles of civil disobedience: publicity, fidelity to the law, and nonviolence (with caveats for self-defense and the defense of others). In *A Theory of Justice*, Rawls provides basic explanations for the above. Publicity suggests that the act must be visible, and open to the public; it is

124. Fasel, *supra* note 89, at 1115.

125. Minxin Pei, *China's Rule of Fear*, PROJECT SYNDICATE (Feb. 8, 2016), https://www.project
-syndicate.org/commentary/china-fear-bureaucratic-paralysis-by-minxin-pei-2016-02
[https://perma.cc
/73KQ-4RGS].

"not covert and secretive."[126] Nonviolence protects the basic rights of others; as Rawls suggests, "any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act."[127]

Fidelity to the law, however, is more complicated in the context of autocratic states. This characteristic is typically used to represent a dissident's respect for the legitimacy of their legal system.[128] However, in an autocracy that denies the social contract, fidelity to the law can only represent alignment with global legal principles, many of which are contained in national constitutions regardless of their jurisdictional type.[129] While alignment with global legal principles like the rule of law and human rights is not universal, these principles often exist at the heart of resistance efforts in autocratic states.

The next Section will discuss how these efforts can be connected with constituent power in autocratic states, drawing from contemporary examples.

D. Constituent Power & Resistance in Autocratic States

In autocracies, we can observe a clear link between resistance and constituent power. Resistance forces in Nazi-occupied states and Gandhi's peaceful opposition to British colonial rule both initiated an end to one regime with the gradual creation of another. However, it may be more helpful to illustrate the combined power of resistance and constituent power through modern examples referenced at the beginning of this article.

In China, the end of the state's controversial zero-Covid measures began with peaceful protests in November 2022.[130] In Urumqi, ten people were killed as a result of a fire in an apartment complex that was under strict lockdown by the local government.[131] Observers and journalists alleged that the quarantine measures inhibited the swift arrival of first responders to the site, indirectly causing the deaths of the victims.[132] Protests began in Shanghai, but quickly became a national phenomenon as Chinese citizens called for the end to the state's Covid policies, for the

126. RAWLS, A THEORY OF JUSTICE, *supra* note 29, at 321.

127. *Id.*

128. *See id.* at 322.

129. *See, e.g.*, *Constitutions*, CONSTITUTE, https://www.constituteproject.org/constitutions?lang=en [https://perma.cc/6BKD-NPKP].

130. Huizhong Wu & Dake Kang, *Protests over China's COVID Controls Spread Across Country*, ASSOCIATED PRESS (Nov. 26, 2022, 11:06 PM), https://apnews.com/article/taiwan-health-china-fires-covid-4ffc00e5f6761be48f5887d57d66c708 [https://perma.cc/UHW8-UWKB].

131. Stephen McDonell, *China Covid: Shocking Protests Are Huge Challenge for China's Leaders*, BBC NEWS (Nov. 27, 2022), https://www.bbc.com/news/world-asia-china-63772365 [https://perma.cc/JBK6-9CLE].

132. Wu & Kang, *supra* note 130.

enjoyment of basic freedoms, and for the resignation of Xi Jinping.[133] Shortly thereafter, the state ended its zero-Covid restrictions and made plans to open its international borders in January 2023.[134]

In Iran, national protests demanding reform took place in late 2022 despite state crackdowns on participants and sympathizers with the movement.[135] Inspired by the wrongful death of Mahsa Amini, a young Iranian woman who was detained and beaten by Iran's "morality police," the protests have called for the protection of human rights, the equality of women, and an end to the current regime.[136] While since suppressed, the expansive social engagement of these protests has been described as "the biggest challenge for the clerical leadership since the 1979 revolution."[137]

Finally, dissidents in Russia have protested state oppression through various demonstrations and petitions designated as "illegal" by the state.[138] The war in Ukraine has been the focus of several contemporary movements; while pressure from the regime has limited these engagements over time, "quiet" protests including laying flowers at the graves or memorials of well-known Ukrainians remain a widespread practice.[139]

While not always successful, these extraordinarily significant moments of grassroots activism have certain elements in common. First, they *actively* resist. They protest incursions on basic rights and wrongful deprivations of liberty, in spite of repressive conditions that hinder activism. Contrary to the presumption of resistance as reactive, we are seeing movements that achieve mobilization on a global scale. These

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133. *See* McDonell, *supra* note 131.

134. *China Goes from Zero-Covid to Zero Restrictions*, ECONOMIST (June 1, 2023), https://www
.economist.com/china/2023/06/01/china-goes-from-zero-covid-to-zero-restrictions [https://perma.cc
/WPY3-6MLA].

135. A year on, some protesters remain committed to instigating political change despite harsh state crackdowns. Heather Law, Nechirvan Mando, Heather Chen, Sahar Akbarzai & Mohammed Tawfeeq, *Protests Erupt in Iran, One Year After Mahsa Amini's Death*, CNN (Sept. 17, 2023, 1:10 AM), https://www.cnn.com/2023/09/17/middleeast/iran-protests-mahsa-amini-anniversary-intl-hnk/index
.html [https://perma.cc/GQ89-ZQP5].

136. Tom Perry & Dominic Evans, *Events in Iran Since Mahsa Amini's Arrest and Death in Custody*, REUTERS (Dec. 12, 2022, 7:51 AM), https://www.reuters.com/world/middle-east/events-iran-since-mahsa-aminis-arrest-death-custody-2022-10-05/ [https://perma.cc/9JTE-K9CD].

137. Agence France-Presse, *Fresh Protests Erupt in Iran's Universities and Kurdish Region*, GUARDIAN (Nov. 6, 2022, 12:04 PM), https://www.theguardian.com/world/2022/nov/06/iran-fresh-protests-universities-kurdish-region [https://perma.cc/GEV5-73F3].

138. Megha Mohan & Nina Nazarova, *Olga Misik: Russia's 'Tiananmen Teen' Protester on Front Line*, BBC NEWS (Aug. 7, 2019), https://www.bbc.com/news/world-europe-49243745 [https://perma.cc
/K9PS-PSD8].

139. Kevin Liffey, *Russians Lay Flowers at Improvised Memorials to Commemorate Dnipro Dead*, REUTERS (Jan. 20, 2023, 2:03 PM), https://www.reuters.com/world/europe/russians-lay-flowers
-improvised-memorials-commemorate-dnipro-dead-2023-01-20/ [https://perma.cc/FD8B-HFVV].

efforts do not necessarily resemble revolutions, but they act as vectors for democratic participation when those channels are no longer available.

Second, these activists pursue reform. Resistance movements seek to change or end the institutions that create or support these state-enforced wrongs, or to wholly change the character of their civil state. They articulate specific courses of action that they wish to see in their government, demanding legal protections and the right of equal participation.

In this way, the joint relationship between resistance and constituent power becomes clear. Resistance is not simply destructive; instead, it is inherently reformative. It can be a method of civil expression in autocratic states where ordinary democratic channels have been closed. This is far closer to Sieyès's initial theorization of constituent power—of a people who can actively reform their nation by invoking their political authority. When considering these movements and what they represent, it becomes clear that it is time to correct our misunderstandings of constituent power. It is time to recognize its deep connection with resistance.

CONCLUSION

This Article proposed a novel view of the relationship between constituent power and resistance. Breaking from traditional constitutional law studies, it first critiqued existing perspectives on these two concepts and their relationship. It argued that the conflation of constituent power with popular sovereignty, which is contrary to the concept's origins, led to conclusions that denied any relationship between resistance and constituent power. It also addressed the lack of scholarship on these concepts in the context of autocratic states and submitted that resistance movements in these jurisdictions merit further study.

This Article then addressed how resistance might be justified and legitimated in autocratic states. It posited that when a jurisdiction deprives its citizens of the right to consent, the social contract between the people becomes invalid. Because autocracies censor and punish dissent, citizens in these states cannot safely disagree. Therefore, autocratic states must be considered fundamentally illegitimate.

Finally, this Article suggested that an illegitimate state justifies the invocation of the right to resistance. While inherently controversial for its popular link to violent uprisings, this Article proposed that this universal and ancient right can and should also be linked with nonviolent measures. It concluded with brief examples displaying how resistance and constituent power can be linked in autocracies. While resistance is destructive by reputation, it is time to shift our focus to its more constructive role as an inherent part of the people's political power.

Today, autocracies have achieved new influence in the global world order. It is essential now more than ever to investigate how the people might leverage their power in the context of oppression and to support their resistance to encroaching tyranny.