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## We the People and the Others: The Co-founding of Democratic States

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In democratic theory it goes without saying that people should establish their own political orders. However, the making of new states sometimes involves people with no intention of joining the future state as citizens. The US-led imposition of new regimes in Afghanistan and Iraq is one example and the UN administration of post-conflict societies in Kosovo and East Timor is another. Could such policies be reconciled with the conviction that people should establish their own political orders? In this paper I will develop an affirmative answer to this question. The founding of a state is democratic – i.e. constituted by the people subject to this foundational decision – when agreed to by as many people as possible within and beyond the boundaries of the state to be founded. Hence the very sense in which a state may have been democratically founded in the past presupposes an involvement of people beyond its current boundaries. Moreover, the moral values inherent in the practice of people constituting their own states do not imply a restriction of power to the group of future citizens, but protection of their autonomy, and properly understood the realisation of this autonomy is contingent on people who will remain outside the state to be constituted.

**Keywords:** constitution building, democracy, legitimacy, normative political theory, sovereignty, state building

In democratic theory it goes without saying that people should establish their own political orders.<sup>1</sup> Perhaps the most famous expression of this moral intuition is found in the preamble of the American constitution. By the opening phrase ‘*we the people ... establish this constitution*’ the founders sent a message to revolutionary movements throughout the world that people may establish not only the rights and obligations that will regulate their public life, i.e. their own constitutions, but also the organisations which will exercise supreme power over

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<sup>1</sup> Some terminological issues may need to be clarified from the start. First, when I use the term ‘political order’ to name the outcome of an exercise of constituent power, the intention is to extend the scope of my argument across empirical cases whose status as ‘states’ or ‘constitutions’ may be controversial and across schools of thought which disagree over the relationship between such concepts. For the argument of this paper it is not necessary to debate, for instance, whether foreign interventions have actually established new states in Kosovo and Iraq and whether constitutional changes necessarily imply a change in the state itself. However, less general concepts, like state and constitution, are retained where arguments require or allow for greater specificity. Second, while the formulation that people *should* establish their own political orders clearly presumes that democratic theory is a normative project, i.e. concerned with the guiding of political action, my intention is also to address the more descriptive and conceptual branch of democratic theory which is committed to the following, functionally equivalent, idea: a state *is* democratic if constituted by the individuals under its rule. For illustrations of how similar ideas on the constituent power of the people can be expressed in normative as well as descriptive and conceptual terms, see Chalmers 2007: 291 and Walker 2007: 248.

the territories in which they live, i.e. their own states. However, the making of new states, or new constitutions in existing states, sometimes involves people with no intention of subjecting themselves to the political orders that they seek to establish. The US-led imposition of new regimes in Afghanistan and Iraq is one example and the UN administration of post-conflict societies in Kosovo and East Timor is another (Zaum 2007). Could such policies be reconciled with the idea that people should establish their own political orders?

This paper defends an affirmative answer to this question. I will argue that a democratic constituting of a political order presumes a democratic founding of the people under and above that order, and that a democratic founding of a people is available in the form of internal and external agreement on who will be included in the people. Hence the very sense in which a political order can be democratically founded already presupposes an involvement of people beyond its own boundaries. Moreover, the normatively sound reason why people should constitute their own political orders is surely not that political exclusion of prospective foreigners is an inherently good thing, but more plausibly that individually and socially exercised autonomy should be realised as much as possible; and since, properly understood, the realisation of such autonomy is contingent even on people beyond the political order about to be founded, the constituent power should include both internal and external people. Hence the legitimacy of external constituent powers need not derive from any pragmatic balancing of, on the one hand, negative effects on the autonomy of people within the constituted territory and, on the other hand, positive effects on other desirable things, like peace, prosperity, and protection of human rights. The justification of external constituent powers can derive, instead, from the value imbued in the very practice which we may be used to think of as people constituting their own political orders.

This conclusion may look surprising to theorists who agree that constituent powers are essential for the legitimacy of states but who are used to look for such powers only at the inside of the state to be constituted. Such lines of argument can be found in the mainstreams of both nationalist and contractualist theories. Contractualists define people as being free in the constituting of states if the authors and the addressees of the constitution are the same people (e.g. Habermas 2001) while nationalists understand such freedom as the condition in which all people who participate are members of one and the same nation (e.g. Sieyès 2003). The same premise can also be found in the doctrine that a legal state is constituted by a supreme power unrestrained by any internal or external norms (Schmitt 1985), which would seem to suggest that the constituent power is necessarily internal to a single state. By pointing

to empirical possibilities and factors in the context of external constituent powers, one critical aim of this article is to revise like concepts so as to avoid universally claimed verdicts on the moral standing of external constituent powers and so as to permit, by contrast, a critically argued assessment of their legitimacy under various conditions.

Moreover, the argument pursued in this paper might be rejected as outright irrelevant for the legitimacy of states, if the concept of constituent power is thought to play no role at all in normative political theory. This objection can be derived from different sets of assumptions. One variant is the notion that democracies are unable to provide for their own legitimacy because the composition of the people cannot itself be democratically decided, i.e. the composition of the people cannot be decided by a people whose composition has not yet been decided (e.g. Whelan 1983; Näsström 2003). Another notion with similar implications is that a state has its legitimacy from how decisions are made, or from the contents and effects of those decisions, independently of the ways in which the state was founded (e.g. Rawls 1972; Dahl 1998). A third possible ground for rejecting the argument pursued in this paper as irrelevant is to conceive of the founding of states as taking place in contexts where more fundamental principles are at stake than the democratic foundation of the political order, and that reflections on constituent powers should therefore in any case not guide political action in more than marginal cases. By tracking down some implications of these notions I find that the theoretical domain in which they could be applied is indeed limited, and that the claim to irrelevance of my argument which can be derived from them is generally not valid in the theoretical and practical context of this paper.

The critical work leads on to a defence of the following six propositions, dealt with in one section each below.

- the origin of a state can be legitimate
- the origin of a state needs to be legitimate
- the ethics of constituent powers is irreducible
- essential constituent powers are internal *and* external
- external powers can reduce internal oppression
- external powers can enhance internal abilities.

Generally speaking, the attractiveness of this argument derives from the value of autonomy which it serves to realise, and also from the ways in which it overcomes the paradox of

foundation in democratic theory (hinted at above and described further in the next section) and thereby explains how democracy is possible in the first place. If we are to conceive of democratic legitimacy without being entrapped in paradoxes, the idea of foreign powers as contributors to the founding of democracy is not only a theoretical possibility; it is a necessary assumption.

## **The origin of a state can be legitimate**

### *Constituent power and the origin of politics*

Much of what we know about politics is sufficiently evident to escape our notice most of the time: political orders are not eternal and never the same in different places; social groups who rule in one state may be ruled over in another; collective action may be more or less effectively regulated by law. But who determines what shape the political order will take in a particular case? When this question is answered by saying “the constituent power” what is contributed is merely an assumption that the answer is still worth looking for; here the term is not intended to name anything more specific, or anything more mythical, than the capacity to determine the particular form of the definitional characteristics of a state, or a political order more generally, such as its territory, authority, and citizenry.<sup>2</sup> The assumption of a constituent power is not altogether unimportant, though. By thinking there is some agency behind the fundamental principles to which people accord much of their public lives we are able to extend the notion of moral and political responsibility to cover what would otherwise be conceptualised as the outcome of arbitrary historical forces. If there is anything like constituent powers, the importance of defining and assessing their claims to legitimacy could hardly be exaggerated.

Theorists have often sought to identify the constituent power in terms of a subject, such as a people, a nation, or a dictator. But we will avoid a range of demanding empirical assumptions if we choose to focus, more abstractly, on whatever political processes which can possibly embrace legitimate constituent powers. Where should we look in order to find them? A source of legitimacy can be located in the past, in the present, or in the future of the political time for which legitimacy is claimed. In those terms constituent powers can be thought of as belonging to both the past and the present. Some contract theorists think of constituent powers as belonging to a more or less fictional past, when the state of nature was transformed into one of civilization, while others see those powers as located in the presence, as the political order

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<sup>2</sup> The concept of the state, or that of a political order more generally, can of course be investigated and redefined independently of this definition of constituent powers.

must be continually reconstituted in parallel with the changing composition of the people as well as changes in constitutional norms. Constituent powers of the former kind are typically visualised in processes which establish national boundaries and political institutions, as well as in the composition of a written document which describes that order. In the latter sense, constituent powers can perhaps be thought of more easily as operating in processes of socializing people into compliance with the existing order, or in human actions which upheld or alter it, such as participation in electoral or educational activities.

External constituent powers, which draw on resources outside the people and territory of the future state or political order, can be imagined most easily as playing a role in the past of the political now, or in a political now which is intended to provide legitimacy for a future state. Instead of a continual process of sustaining a constitution, the intervention by a foreign power is then seen as a unique rupture and renewal of political relations which will in the future be locked back upon as a turning point. Constituent powers imagined in the past of the political now (or in a political now which is constitutive of the future) may be referred to as operating in the *beginning* or the *origin* of a state, regardless of whether the constituent power is internal, external or both.

So defined the concept of constituent power has not found an evident application in normative theory. The difficulties are typically referred to as paradoxes (Honig 2007; Laughlin and Walker 2007) of which a few variants should be distinguished. From a *legal perspective*, laws are legitimate if they originate from within a constitution. But why then should the constitution itself be seen as legitimate, as it does not have the same origin as the laws? And if by this question we are pushed to admit the necessity of a constituent power, how could such power be given any legal justification at all? The perhaps most famous disagreement over these issues took place in the context of the Weimar republic between Kelsen and Schmitt (e.g. Dyzenhaus 2007: 131-34). From a *republican perspective*, politics is legitimate when conducted under a law which reflects the common good of the people. But how then can the decision to establish the republic be legitimate, as this decision must be taken at a time when the law of the republic does not yet exist? Here is where many theorists have remained sceptical, because “the effect would have to become the cause; the social spirit which should be created by those institutions, would have to preside over their very foundation; and men would have to be before the law what they should become by means of law” (Rousseau 2003: 27; cf. Honig 2007). From a *democratic perspective*, a government derives its legitimacy from the consent of the people. But if this is so, why should we regard the people itself as

legitimate? Since the decision of who belongs to the people cannot be consented to by the people before it has been decided who belongs to the people, there appears to be no way in which a government decision of who belongs to the people can itself be democratically legitimate (e.g. Whelan 1983; Näsström 2003).

In some senses the paradox derived from democratic theory poses a more severe difficulty than the legal and the republican ones. The legal paradox may itself be solved by referring to the constituent power of a people (e.g. Ackerman 1991), which would then presuppose that the democratic paradox can be solved. The classical republican presumptions, for their part, will lose much relevance as national or international legislation tends to prevail even before the creation of a new republic in today's politics; ideas of how an individual might act in a state of nature (though a relatively benign state of nature as the one imagined by Rousseau) have little implications for how individuals will behave in today's constitutional context, which is limited to replacing or supplementing one constitutional structure with another. By contrast, the difficulty of deriving democratic legitimacy from a people which can itself make no similar claims to legitimacy will remain a serious issue as long as democracy is a dominating political value and the problem of delimiting political communities has not reached a universally acceptable solution. Indeed, the problem has been described as unsolvable (e.g. Whelan 1983; Näsström 2003; Benhabib 2004; Honig 2007). Let us then focus on the most severe challenge, i.e. the paradox of democratic beginnings.

#### *Attempts at solving the democratic paradox*

Among the *unsuccessful* attempts at solving the democratic paradox is the idea of locating the foundational moment in ancient times. Whether that moment took place yesterday or two thousand years ago will affect our abilities to document and mythologize it, but not our ability actually to solve the problem. This is worth recognising since the historically influential theory which attributes constituent powers to the nation (Sieyès 2003), or any other pre-political group, is untenable for precisely this reason. Among the normative resources of the concept of the nation is that a nation can exist before and independently of the state, wherefore the question of who should participate in the making of a legitimate state has an obvious answer: members, and only members, of the nation. However, this strategy only pushes the question one step back in the chain of concepts and historical events. Rather than a paradox in the constituting of democratic states we would be faced with the same difficulty in the constituting of nations, or some other group. If the nation is the source from which governments can derive democratic legitimacy, how could the process in which the nation

was constituted derive legitimacy from the same source? If the nation itself has no democratic legitimacy, how could it confer such legitimacy on a state? Once again we would be stuck in the paradox of deriving legitimacy from an entity which did not exist at the moment when legitimacy must be derived.

A more recent, still unconvincing, attempt at solving the foundational paradox conceives of constitutionalization as a learning process: as times goes by, people may detach themselves from their primordial beginnings and build their identity on the protection of human rights within and beyond their own political structures. However, there are two difficulties which this argument appears unable to overcome. First, to the extent that the content and moral standing of human rights are politically contested, human rights can provide no source of legitimacy for the political boundaries within which those human rights were established. A controversially founded political order does not become less controversial because it leads on to a still controversial protection of human rights. Second, even if human rights were in fact universally recognised and implemented in the same way, which they are not, a retroactive justification of a beginning does not produce any guidance with regard to the legitimacy of foundations which take place today and in the future. Whatever the general merits of retroactive justifications of constituent powers, their application is limited to states founded in the past. For anyone interested in the legitimacy of the ongoing and future efforts at creating new political orders addressed in this article, theoretical attention must be directed elsewhere.

A third unsuccessful attempt at solving the foundational paradox is to rely on unanimous voting among the people who will constitute a legitimate state. The reason for resorting to unanimous voting may derive from dissatisfaction with majoritarian procedures. If people are born free, how could it be right that the majority decides and forces its will on the minority? The only condition under which this can be right is that every individual has agreed to the use of majority voting in the founding of the state (Rousseau 2003: 8; Locke 2003: 141-42). Hence unanimous voting may appear to solve the problem of a legitimate origin of democratic politics. However, this theory does not address the challenge that the group of individuals who was permitted to participate in the unanimous decision could and perhaps should have been composed in some other way – either that someone who was in fact included should actually have been excluded, or that someone who was in fact excluded should actually have been included. This risk would perhaps not trouble the future citizens of the state, all of whom must agree with the ways in which the people is delimited for a state to be founded at all, but it will be a devastating objection against the legitimacy of the state in the views of people who

remain outside. Those people will have little reason to accept the existence and effects of a state founded by a process from which they were excluded.

It may be noted also that the negative conclusion remains also if we add to the idea of unanimous voting the idea of voluntary association (e.g. Nozick 1979, Ch. 10; Habermas 1996: Habermas 1996: 124-26 *et passim*). If you have a justified claim to some resource which is controlled by a group of people to which you do not presently belong, the justification for your claim does not disappear because the group in control of the resource invites you to join their association. Your preference might have been to dispose of the resource, to which you have a justified claim, on your own or within some other constellation of people. Likewise, the possibility to secede from an association is an insufficient condition for the legitimacy of that association, since they who secede may have an as justified claim as they who remain to the goods of the association.

#### *Democratic and legitimate foundations*

What we then begin to approach is the conclusion that the paradox of democratic beginnings will remain unsolved as long as we presume that a people is constituted by itself. In contrast, a democratically legitimate people must be recognised as such, or justified in the views of, even they who will not play the role of citizens in the state about to be constituted. That is the condition under which states can indeed be conceived of as democratic on the basis of the ways in which they were founded.<sup>3</sup> At the level of ideal theory, hence, each individual in the world should have the same opportunity to consent to, or require justification of, the political order not only of his or her own territory, but also of the political orders of other people. If that criterion is fulfilled, any later complaints about what states exist cannot be justified by reference to any unfair delimitation of the demos at the moment of foundation.<sup>4</sup>

It will be noticed that the solution to the democratic paradox suggested here is extremely idealized. The argument appears to assume that people are endlessly willing to recognise the equal right of all humans to constitute legitimate states, and that no territory or human resources will be the object of irresolvable and competing claims of different states and peoples. These are completely unrealistic assumptions and still necessary for the principle suggested in the previous paragraph to do its job, i.e. to explain the possibility of democratic

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<sup>3</sup> Cf. Näsström 2007: 639 fn 62

<sup>4</sup> A first, and simplistic, objection to this theory would be that democracy is about the right of a people to rule itself, and that the origin of democracy must therefore not be conditioned by the decision of any foreigner. But this objection is obviously mistaken. Before a people has been constituted there is no ground for claiming that some individual is a foreigner rather than a member of the people.

beginnings. On the other hand, we have also made completely unrealistic assumptions about what kind of justification will be needed, namely that every state in order to be legitimate must be consented to, or justified in the views of every individual in the world. This is an opposite idealization which makes the problem more difficult to solve than it would be if we accepted what most of us would be ready to believe in other practical contexts of normative reasoning. What we tend to accept in other practical contexts, I believe, is that *some* kinds and levels of coercion of individuals are acceptable, and also that the legitimacy of states derives not so much from their fulfilment of an absolute moral criterion but rather from the extent to which they on balance are better or worse than the constitutional alternatives available in different time frames and at different costs. Such less demanding premises of normative justifiability would indeed be relevant in this case; recall we are concerned with the real thing of constituent powers, as manifested on territories like Iraq or Kosovo, not some idealized theoretical construction serving to elucidate one argument or another. Hence while the move from an ideal to a real level of normative reasoning implies that some notions will be reduced from a normative criterion to an ideal of approximation, other notions will enter as resources for explaining the possibility of democratically legitimate political beginnings.

How then should the above principle be specified for the purpose of providing guidance on what states should be established? Here we face a dilemma of thin and thick conceptions of legitimate politics. On the one hand people should be as free as possible in deciding even the grounds on which the establishment of a state could be seen as legitimate. This view may ultimately lead into a strict consent theory of legitimacy, according to which there are no assumptions at all on the preferences of the individuals whose consent establishes a state as legitimate. On the other hand the *raison d'être* of normative theory is to furnish some advice for people who are unsure about how to decide on morally pressing issues, such as the issue of whether an attempt to establish a particular state should be consented to or not. This second position may ultimately lead us to adopt a substantial moral theory according to which all individuals should pursue aims of happiness, security, or some other good – a theory which may, under some additional assumptions, imply that the people need not be consulted in the first place, whereby we would certainly have left the domain of democratic theory. The position which I would propose at this point is located in the middle ground of these two perspectives – deontological consent and consequentialist utilitarianism. A middle position, I would argue, is available if we focus on the concept of autonomy, defined as the range of alternative actions – performed individually or collectively – available for an individual while free from domination by other actors (e.g. Agné 2006). A principle based on this concept will

not predetermine what choices people should make (in contrast to utilitarianism) while it still does not refuse the responsibility of normative theory to guide individuals in difficult cases (in contrast to consent theory).

There are various ways in which a theoretically defined normative ideal can be sufficiently simplified so as to guide political action. One method is to stipulate that only a very specific aspect of social life will fall under the scope of the normative ideal, as when Rawls restricted the application of justice as fairness to the “basic institutions” of society. Another method is to defend a certain normative principle for making tradeoffs between different applications of the ideal to different parts of society, such as the maximin principle. Without having the space necessary for critiquing these methods here, I will suggest a more traditional, strictly quantitative way of turning the ideal of autonomy into a practically useful criterion: the founding of states is democratically legitimate if *providing as much autonomy as possible to as many people as possible*. The introduction of a quantitative element, “as many people as possible”, in judgements about what foundational decisions are democratically legitimate can be supported in two ways. First, it is democratic in the sense that, if applied within a given group of people, it yields the same outcome as the standard principle of political equality; in both cases simple majority rule has a *prima facie* justification. In contrast to the principle of political equality, though, the “as many as possible” criterion does not presuppose a predefined group of individuals among whom political power is equally shared. Second, the “as many as possible” criterion is one way of seeing to the requirement that democracies must be able to implement their decisions. “As many as possible” is always a social power. The capacity of democracies to implement their decisions is particularly important to emphasize in a post-sovereign context, where states are not necessarily legitimate or even capable actors, and where a critical background assumption common in democratic theory, that states can implement their decisions because they are states, does no longer hold.

### *Morality, authority and politics*

To specify the idea that as many people as possible should be as autonomous as possible, let me confront it with three different questions. The first question concerns *morality*: Who should be included in the people of a given political order? On the basis of said principle, they should be included whose inclusion yields as much autonomy as possible for as many people as possible, accounting for the autonomy of people inside as well as outside the political order. The implementation of this idea should be undertaken with some care, though. Consider the politics of foreign intervention. A legitimate intervention of state A into the

affairs of state B requires, under the above principle, that B constrains the autonomy of people inside or outside its own boundaries and that the actions of state A serves to free people from that domination by B. In practical terms, state A will therefore need to assess the will of the people even as no democratic procedures can operate on the relevant territory,<sup>5</sup> or state A may restrict intervention to cases or sectors of society where state B is “obviously” not supported by a majority of autonomous people.<sup>6</sup> Moreover, to safeguard that A intervenes in B for the purpose of furthering autonomy for as many as possible, rather than for some other purpose, may require that the democratic intervention is legally sanctioned,<sup>7</sup> that proposals to intervene are publicly debated,<sup>8</sup> and that people in the target country are involved as much and as early in the process as possibly.<sup>9</sup>

The second question concerns *authority*: Who should decide who should be included in the people? Here some elaboration is necessary. Moral philosophers might want to reduce this question to the previous one and proclaim: they should decide who are most likely to reach the morally desirably outcome, be they a well-armed and self-appointed elite or a political mass movement. Democratic theorists, on the other hand, might wish to develop a procedural theory with no explicit claims as to what should count as the right decision: for instance it may be contended that the boundaries of particular citizenries should be decided by humanity as a whole (Agné 2008; Bartelson 2008). Focused at one particular point in time, however, the moralist and the proceduralist positions converge: the decision should be taken in the political procedure which provides more autonomy for more people than alternative political procedures *at the very time of making the decision*. On the basis of this view, the question of authority is indeed instrumental to the question of morality (as some moral philosophers might want to have it) while a subordination of authority to morality implies in this case a decision by humanity as a whole (as a procedural theorists might want to have it).

The third question is *political*: Why should people accept the decisions of such authority? The direct answer is that such authority provides more people with more autonomy than any other alternative for constituting political orders, but it seems reasonable to assume that for this

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<sup>5</sup> To illustrate, the intervention in Haiti 1990 may have been preferable to the attack against Iraq in 2003 on this account.

<sup>6</sup> As in the northern, Kurd dominated parts of Iraq 1991-2003.

<sup>7</sup> On this score, constitutionalization in East Timor from 1999 would be preferable to that in Iraq from 2003.

<sup>8</sup> For instance, philosophical ideas about the nature of democracy are more open for debate than is classified intelligence about weapons of mass-destruction and, as such, more legitimate bases for decisions to intervene. And of course, interventions by states themselves democratic are better scrutinized than interventions by authoritarian states.

<sup>9</sup> On this account the constitution giving process of Afghanistan 2001 and West-Germany 1945 was preferable to that of Japan 1945.

argument to be politically effective there must be a minimum of political communication among the whole group of people whose strengthening autonomy will form part of the basis for accepting the authority of a constituent power justified in this way. In addition, the political question can be answered by resorting to the classical defence of a social contract, namely that the alternative to subordination is a state of anarchy. Hence the most persuasive, and therefore effective, efforts to establish legitimate states by foreign powers would appear to prevail in cases of failed states and civil war.

### *Procedural legitimacy in practice*

In procedural terms, the perhaps most difficult conflict in democratic politics concerns the distribution of citizenship.<sup>10</sup> If two groups of people disagree over who should be included in, or excluded from, a particular state, the conflict will not come any closer to its solution by democratic elections or referenda among the conflicting parties. As noted in the paradox of democratic foundation, such methods presume that the issue of inclusion has been solved already. But while democratic elections among conflicting parties are not applicable, the possibilities for democracy have not been exhausted, as this concept has been interpreted above. It will approximate democratic principles and permit a procedural solution to the conflict if the issue in such cases is decided by external powers alone, that is by people whose inclusion in the procedure will not itself represent one position in the conflict. There are two reasons why such an arrangement can be said to approximate democracy. First, a democratic decision to constitute a particular people must under all circumstances be open also for they who will not be included in the particular people. A foundational decision may therefore be taken by foreign powers alone in cases when inclusion of the conflicting parties would undo the political process in the first place. Second, by letting external powers make the foundational decision by themselves it is possible to retain the majority principle. This is important because of the standard reasons in favour of the majority rule, such as procedural neutrality among decision alternatives, etc. (e.g. May 1982). In political practice this would imply that directly involved conflicting parties should be deprived of their power to block

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<sup>10</sup> Two other policy issues for which the normative reasoning in this section is relevant can be mentioned more briefly. First, it will have implications for government and UN decisions about what political actors and organization will be internationally recognized as states. The traditional doctrine of recognition, according to which a decision of recognition should be based on whether a government controls a territory, should give way to a democratic doctrine according to which a state is recognised depending on what autonomy it produces, assisted by other states, for people inside and outside the state. Second, it will have implications for how policies of alleged democratic interventions should be decided and pursued. *If* a democratic intervention is justifiable, the principle that politics should be constituted while giving as much autonomy as possible for as many people as possible would seem to require that interventionist policies should not be taken by an intervening state alone, but rather by involving people from the target country (at best a representative sample) as well as people in the region and the world as a whole.

changes in the *status quo* and instead be forced to convince the international community with good arguments.

### **A legitimate state needs a legitimate origin**

From a layperson's perspective a state's legitimate beginning is an obviously good thing. To celebrate a historical event, when it is worth celebrating, may serve as an emotional medium for transcending senses of pain and meaninglessness in the present and to recreate – through rituals, symbols, drugs, etc – a moment when human life was rich, happy, and worth remembering. Likewise, an illegitimate origin of a state is obviously bad, threatening at any moment of conflict to recreate such feelings of humiliation and despair which borders on political violence.

However, such reflections have not much impressed political theorists concerned with legitimacy or justice in the last decades or even centuries. Political legitimacy has been explained rather as deriving from the ways in which decisions are made within an existing association (Dahl 1998), from the content of such decisions or their effects (Rawls 1972), or both (Sharp 1999). Moreover, when the origin of a state is referred to in normative reasoning, it is not treated as a real event but as a thought example. For instance, the original position (Rawls 1972) and the state of nature (Nozick 1974) are surely not intended as blueprints for political practice in the founding of new states, but rather as instruments for assessing the legitimacy of a state already constituted. This tendency in political theory may certainly proceed from the position rejected in the previous section, that the foundation of democracy cannot itself be democratic, but also from a view that the origin of a democratic state is in any case a normatively unimportant entity. If the constitutional alternatives which are open at the constituent moment will be equally available for democratic deliberation and decision-making at any later point in time, then it is legitimate to question why we should bother about how it all started. Wouldn't the best alternative be to get over and done with the constituting of states as soon as possible in order to permit democratic procedures and just outcomes to begin producing legitimacy independently of how democracy once began?

#### *The past in contemporary political practice*

The vulnerable point in this argument is found in the arbitrariness of the premise, that the constitutional alternatives present at the constituent moment will be equally present even in the future. This is simply not true. Direct and representative forms of government, proportional and majoritarian elections, age limits of citizen rights, the size of constituencies

and the boundaries between them – all these are issues which, once decided, will bias the constitutional structure against the alternative not chosen. For instance, once a representative democracy has been constituted there will no longer be a free choice between representative and direct government since a political conflict on this matter will be resolved by the very same representative procedures which one side in the conflict supports and the other opposes; once a procedural democracy has started to operate on proportional rather than majoritarian election laws, any opposition against this constitutional policy will be handled by the very procedures which are opposed. Still these constitutional choices are enormously important, not only for their own sake but also because of their policy implications (or so it should be argued by the crowd of political scientist who believe that “institutions matter”). In fact, to the extent that we believe in the preference transforming capacity of political institutions, the construction of those institutions can be no less democratically central than is the construction of policy positions. Hence there is little reason to think of a procedural democracy in pre-given state as a system equipped with the constitutionally transformative powers which would render a legitimate origin superfluous. Indeed, decisions in the political origin can never again be decided without bias in favour of what was decided at the beginning.<sup>11</sup>

Yet the most serious counter-example to the view of political origins as normatively unimportant is the most evident. Once a demos has been delimited, any future decision about changing the delimitation of the demos will be decided on the basis of the delimitation already made. And still, issues of defining the boundaries of the people are today at the centre of politics. Who are we and what people are not parts of us? Within what territorial or social units should people be allowed to trade or run for public office? In what areas of action can there be moral obligations which transcend territorial borders and common political institutions? And what group of people should decide among conflicting views on such issues? In a procedural democracy operating within pre-given states, conflicting views on such issues will necessarily be resolved by privileging one particular view of what is the right answer. They who think the right answers do not coincide with the boundaries of existing states will still be forced to win their victory within the system of states whose legitimacy they question. Surely, a democratic state may stipulate substantial rights of inclusion and exclusion of people. But that does not rescue the legitimacy of procedural democracy in pre-given states in this case. As long as the state is the final authority of such rights, i.e. responsible for their creation and implementation, procedural democracy will favour the

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<sup>11</sup> In response to the immediate objection that no making of decisions can escape from this predicament one may theorize *freedom* as a main and partly unique value of constituent moments (cf. Arendt 1990).

political community on which it operates. If the state surrenders power over said rights to some authority beyond its control, its internal majority would no longer be free in the sense required by the procedural conception of legitimacy. To sum up, procedural democracies operating within pre-given states are unable to provide legitimacy for a range of issues which are the object of constituent powers. Hence a state wishing to derive legitimacy from its constitution has an obvious asset if it can explain how that constitution originated in a legitimate way.<sup>12</sup>

### **The ethics of constituent powers is irreducible**

There are more valuable things than the experience of being subject to a political order whose constitution one has contributed to (as argued for instance by Etzioni 2007). Protection of life and physical security would seem to be more fundamental, not only on intuitive grounds, but also because they are instrumental to the ability of people to participate in the constituting of their political order. Still the invocation of such more fundamental values is a very real concern in decision-making on these issues. People who seek to constitute a state will be opposed by others, who disagree with the political project and might be prepared to defend their position by violent means. More often than not the establishments or reconstitutions of states are preceded by wars and humanitarian crises. If justifiable at all, a political effort at constituting a state would under this predicament seem to require that the people have considered the risk of violence and are willing to take it. But such considerations become complicated or even impossible in the case of external constituent powers. Violence might then be performed by a group of people which is not inclusive of all, or even a majority, of they who will suffer from it, and hence no justification of the violence can be drawn from a proposition that the right people have considered its implications in advance. *It might seem then as if the legitimacy of involving external powers in the creation of states – and the practical relevance of a normative theory of such politics – is largely absent.*

While accepting many premises in this way of reasoning I do not think the ultimate conclusion reveals much truth. Issues of when foreign interventions should be undertaken,

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<sup>12</sup> To this conclusion it can be objected that the constituent power operates only at a specific moment in time while procedural democracy in given states is with us for an extended period, and therefore it is more important at least from the perspective of some utilitarian ethics. To remain reasonable, however, this argument must acknowledge that constituent powers operate at a time which, from an ethical perspective, is neither more nor less important than any other time. While injustices at the time of constituting a state may possibly be forgotten in the future (though the perception of the opposite is proven by some of the world's most devastating conflicts) injustices are still unjust when they occur, and as such no more tolerable than injustices of the same magnitude under times of constituted politics. Hence the historically situated character of a constituent power is no reason not to require them to be legitimate when they actually occur in practice.

what their appropriate form and scope are, and what foreign policy is legitimate in cases when interventions should be abstained from, these issues should indeed be considered in the light of a broader set of normative principles. However, that broader set of normative principles does not work exclusively against, but also in favour of, effective and even interventionist foreign policy. In the literature on humanitarian intervention it is all but universally acknowledged that capable states or international alliances should intervene in foreign territories in order to protect people from certain grave human right violations (e.g. Chatterjee and Scheid 2003). For the ethics of constituent powers to be an important concern in decisions about foreign intervention it is therefore *not* necessary to justify the very intervention on the basis of such ethics. The initiation of power or even violence from the outside can be justified on the basis of one set of principles, which in the most simple case will include they which protect people from mass-killing and genocide, while the issue of whether any foreign action should be directed against the existing constitution, or the delimitation of territory and population, will be considered independently of the securing of any more fundamental values.

One should recognise, moreover, that there are many senses in which constitutional policy does not overlap with the protection of human life. It is often the case, therefore, that a particular policy can overcome a condition of physical insecurity without affecting the legitimacy of the constitution. Perhaps it is a simplistic illustration of this point to notice that the kinds of policy which justify humanitarian interventions are universally absent from the written constitutions of the target states, but it does reveal something. To the extent that masskillings take place, it is not an effect of such political choice as the *de facto* and hence responsible political leaders of the country have succeeded or wanted to codify in their written constitutions. Hence the protection of overarching normative values does not reduce the need to consult principles furnished specifically for the purpose of assessing the legitimacy of written constitutions.

The same point of course holds also if constitutions are conceived of as the basic political structure of a state (which may transcend the content of a written constitution). Consider, for the sake of the argument, the extreme possibility of a state which is partly constituted by the persecution and killing of certain groups of people. We may understand such practices as constitutive of the state in the sense that officials and ordinary citizens may regard the state as having ceased to exist should those policies come to an end. Foreigners who consider intervening by military force should then not base their decisions on normative principles of constituent powers, but on the human right not to be killed. The ethics of constituent powers

might then seem redundant. On a closer inspection, however, the possibility of such cases does not challenge the ethical autonomy of constitutional policy more than marginally. Even in an imagined country where killing of people is part of the constitution, there can be no *carte blanche* for changing or sustaining constitutional policies outside the domain which overlaps with values protected by superior normative principles. Issues of territory, citizenry, and authority will not in every aspect be instrumental to the protection of, for instance, human life while those issues still need to be decided one way or the other. Even in extreme cases, therefore, there are decisions which should be based on principles of constitutional politics.

### **Essential constituent powers are internal *and* external**

Earlier contributions to the normative theory of constituent powers have focused almost exclusively on factors internal to the future state. This holds for classical contributions like Hobbes (1958), Locke (2000) and Sieyès (2003) as well as later contributors such as Habermas (2001), Kalyvas (2005), and Honig (2007). Rousseau (1992) and Arendt (1990) mention the role of external powers in the constituting of states but do not really examine it. The for my purpose critical, though not always explicit, assumption in this literature is that only they can exercise legitimate constituent powers who will become citizens in the future state. In social contract theory this is a criterion for freedom and collective self-determination (e.g. Habermas 2001) while in classical nationalist arguments it serves also to create political unity and thereby to strengthen political agency (Sieyès 2003) just as in more recent contributions a common nationality is thought of as enabling for instance public welfare policy (Miller 1995).

In an important exception to this literature, Honig (2001) examines the role of foreigners in the founding of democracy. By reading canonical texts in political theory side by side with the bible, Western-movies, and psychoanalytical interpretations, she distinguishes a series of arguments why foreigners may sometimes be more capable of performing important functions in the founding of legitimate states. For instance, a foreigner can draft a constitutional document in a more impartial way than domestic political parties are able to, and he or she can channel out from the community the responsibility for such criminal or violent acts as Honig thinks are unavoidable in the founding of any democracy.

Though formulated at a high level of abstraction, we should recognise that Honig's claims are empirically contingent ones. Their aim is to specify what means are most effective for producing a democratic state. (This can be seen by recognising that it may, but need not, be

that foreigners are able to come up with a less partial constitution than any of the future citizens are able to. It may, but need not, be that the founding of a state by a foreigner will free the future citizens of guilt-feelings for their initial violence.) However, stronger claims could also be made, pertaining less to the conditions under which certain effects are plausible and more to the sense in which state foundations are possible or impossible. It might be suggested, for instance, that there is no sense in which people constitute their political orders without involvement of foreigners. The “we” which is able to constitute a political order is not just a distinct people but inclusive of all the others as well (cf. Christodoulidis 2007: 201). As descriptions of the role of foreigners in the founding of legitimate states, I will argue that these stronger claims are actually more accurate than are Honig’s empirically contingent ones.

### *The necessity of co-founding in practice*

Imagine a territory in which no state has yet been constituted, because the former state of the territory has for some reason disappeared or because a new territory has been discovered or created. The territory is a valuable resource for the people who live there as well as for people who live on the territory of other states. The population is a valuable resource in its own right, both for they who live on the territory and for they who live outside. Among the population on the territory there are some people who think that everyone who lives there should form a state of their own while others think everyone should be included in the citizenry of another state. Still other people are indifferent about where they will be included as citizens or whether they will be included in no state at all. On these premises one does not have to be a realist of international relations to imagine some level of politicisation of the delimitation of population and territory for the new state. We may consider a few scenarios, all of which confirms that a state is not constituted independently of its future outside.

In the typical case, the boundaries of the new state will be drawn after negotiations among a group of external powers, like the most neighbouring states, the most powerful states, the states which have a specific interest in the territory, or the international institutions authorized to decide on like matters. In this case the impact of the external powers will be directly visible. It may also be the case that most, or all, of the external powers are uninterested or unable to involve in the drawing of boundaries, but this does not mean the new state will be constituted independently of them. If an external power is capable of, but not interested in, influencing the drawing of boundaries, it just means that it accepts the boundary which is about to be implemented by others. If an external power is by contrast interested in but incapable of influencing the drawing of the boundary, it will obviously lack power to

dominate. But such lack of power (to dominate) does not mean that there is a lack of power to constitute. Power to constitute is the capacity of giving shape to that which is constituted, and in this sense the powers to constitute will not diminish because powers to dominate disappear. Rather, that which is constituted will take its constitutional form precisely because the external power to dominate is currently weak.

*The necessity of co-founding in conceptual theory*

It appears that at least the delimitation of territory and populations presumes a constituent power which transcends the boundary between inside and outside, or draws on resources from both categories. And honestly speaking, how could it be otherwise? It is not possible to divide anything without all parties between which it is divided being to some extent able to influence the division. If one party has no influence at all on the division, there is little reason to say we are faced with a division between parties rather than a unilateral decision of one (dominating) party to let another (dominated) party make use of its resources in a certain way. Two opposite cases of territorial distribution can illustrate this point. (1) If the dominated party withdraws to some corner of the world which the dominating party has limited interest in, the dominated party may like to think of this territory as its own. But as noted above, lack of interest on the part of the dominating party is no sign that it lacks power to dominate. (2) In case the dominated party is unable to withstand the pressures of the dominating party in the case of some future change of interest and open conflict, it will be clear that the small corner of the world to which the dominated part had withdrawn was just an area in which the dominating party accepted that the dominated party could exist on its own terms. If a party is able to protect its own boundaries in a future conflict, it will establish itself as the dominating party in its own territory. Both cases confirm the main conclusion drawn above, namely: for a territory and population to be divided, states on both sides of the future boundary must be able to influence how the boundary is drawn – otherwise there is no division at all.

Because *should* implies *can* this argument would seem to entail that there can be no value in an exclusively internal constituent power – since no such thing can exist. But an original defender of an internalistic normative doctrine of constituent powers should not for this reason alone be convinced that legitimate states should be constituted by powers which are both internal and external. The conclusion can equally well be that *all* normative theories of constituent powers are invalid. Precisely because the concept of constituent power cannot discriminate between inside and outside, a theorist who prefers an internalist position might conclude that the legitimacy of a state can only be drawn from sources which exist after the

constituent moment. It could then be maintained that normative values are attainable only when “we” has been defined in opposition to – rather than as an overarching category inclusive of – “them”. In the following two sections of this paper I will object to this interpretation by suggesting that there are not only necessary but also valuable possible contributions from the outside of a political order. Not even if internal constituent powers could in fact be imagined would their ideal form be preferable to that of constituent powers which are internal as well as external. Hence the concept of internal constituent powers is not valid even as an ideal to be approximated.<sup>13</sup>

### **External constituents can reduce domestic oppression**

In this section I will suggest that foreign policy may indeed have a role to play in the constituting of legitimate states, by liberating people from domestic oppression. This argument, however, immediately faces a number of challenges. Where I see people who can be liberated, others will argue that no one can actually know whether the allegedly oppressed people want a foreign intervention to take place unless the people has been equipped with democratic institutions already (Arato 2005). Others will push the argument further and suggest that as long as the people have not revolted against their government – something which a people is always able to do because people are everywhere – they have also consented to their government and should therefore not be interfered with (Hobbes 1958). Moreover, even if the doctrine of tacit consent is rejected, it will be maintained that freedom cannot be imported from the outside anyway, because true and valuable freedom is not something which can be offered but must be fought for and earned (Mill 2008). Finally, where I see a possibility of drawing on resources from the outside of a population and territory for constituting a state of that same population and territory, others will deny the very possibility of partly external constituents powers: since a political order is necessarily created and held together by a supreme power (Schmitt 1985), the only political order which can exist is that which consist of the whole territory and population from which constituent powers are drawn. In this section I will explain a number of limitations in these arguments.

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<sup>13</sup> Since the last two sections are concerned with the possible good effects of foreign interventions in their operation of constituent power, the argument moves from democratic theory to moral theory. One may notice, however, that only parts of the argument developed in this paper rely on those substantial moral assumptions. While moral assumptions are necessary to move on from the notion that constituent powers are necessarily internal *and* external to the notion that external constituent powers are legitimate, they are not needed for, among other things, the conclusion that external constituent powers are legitimate because implied by a democratic beginning (i.e. they contribute to define a condition under which the paradox of foundation in democratic theory does not arise). Hence the last sections of this paper supplement, rather than replace, the procedural and conceptual arguments developed earlier on in the paper.

*What should be known prior to intervention?*

There are different kinds of autonomy which we may like to protect from internal as well as external oppressors. The perhaps most simple notion is that people should not be forced by other actors to do what the people do not want. How then are we going to evaluate a claim that the people, or a majority of them, are seriously oppressed by the constitution under which they live in such a sense? The will of the people has never been a simple concept. Available methods for aggregating individual preferences, before or after democratic deliberation, are fraught by arbitrary restrictions (e.g. Elster 1998). But when we can actually suspect that people are seriously oppressed, those difficulties will be superseded by even more serious ones. No democratic procedures for preference aggregation will be available and there will certainly be no room for public deliberation over the rightfulness of the constitution and the various costs at which it should be amended or sustained. If we think that very little can be known about the will of the people under such circumstances (Arato 2005), the legitimacy of external constituent powers is obviously at risk. In the absence of an empirically grounded assumption about what people in the target country actually wants a consistent normative defence of external constituent powers might then require an assumption that every individual should live under some liberal variant of a democratic regime, even if threatened to do so by military force. That, to be sure, would pose a serious normative challenge to the legitimacy of external constituent powers intended to eliminate or reduce internal oppression.

However, this challenge is not only based on debatable assumptions concerning the difficulties in obtaining knowledge about what people want, but more critically it is limited to supporting an agnostic conclusion: in the relevant context *it is difficult to know* what the will of the people is. But an agnostic conclusion does not question the possibility that a fundamental value is at stake, and hence we should consider whether any similar concepts of freedom are more easily applicable in this context. A for this purpose appropriate concept was called upon in a previous section, namely the capacity of individuals to reflect upon, and to choose among, alternative courses of action, in their individual as well as their collective life. This idea of autonomy is no betrayal of the idea we started with above. It does not lead our attention to stipulate what the will of the people is, but it suggests that a valuable act of willing takes concrete shape only if there is some range of choice. The wider the range of actions which can be reflected upon and chosen, the more autonomy for the individual or collective which possesses that capacity. The justification of external constituent powers should then not be conceived of as a realization of what people wants, but as a way of expanding the range of constitutional choice for a people. The criterion for this normative

principle can be observed more easily in a practical context than the one presumed earlier: while it may be difficult to know whether an authoritarian regime has popular support, there is little doubt that it reduces the range of constitutional alternatives open for deliberation and decision by the people.

At the same time, this normative criterion puts substantial restraints on the foreign policy agenda. The legitimacy of external constituent powers is, on this view, limited to cases which present a real alternative for the people, which the people must be given a real opportunity to reject. On the basis of this notion of autonomy, therefore, the external powers do not reduce the need and responsibility of internal people to initiate constitutional change. This is an important point especially for people who agree with John Stuart Mill (2008) that freedom is more valuable, sustainable, and even real if resulting from political participation or struggle than if simply given to a people. For the process of constitutionalization by external powers to be successful, the process must retain and encourage internal citizens as active and politically responsible subjects, and the conception of autonomy as capacity to form and perform alternative actions requires the construction of precisely that kind of political process.

But what if there is actually no way of distinguishing some aspect of a constituent power as more external than any other of its aspects? It may be contended that the unity of a state (Schmitt 1985) or a people (Hobbes 1958) does not have any existence prior to, and independently of, the constituent power, so that whatever the constituent power is, it cannot be external to the state or the people which it actually creates. On this reading we should not conceive of constitutional interventions in foreign countries as a case which involves two distinct states, but as a situation in which one part of the territory provides resources for the implementation of political order in another part of the territory of the same state. We will then remain within the theoretical horizon where the boundaries of the state are defined by the whole of the territory in which the constituent power can operate.

#### *The normative usefulness of bounded polities*

While this is a logically consistent way of re-conceptualising what would in another terminology be named as a politics of constitutional intervention in foreign countries, it is normatively problematic. What an elimination of the distinction between internal and external constituent powers fails to recognise is that all actors which together compose a constituent power need not have the same interest in the public policy of all people and all territories. If, by contrast, we retain the distinction between internal and external powers (even in cases

where one state may decisively affect the constitutional structure of another) we will have the tools necessary for recognising (1) that people need not be equally engaged in the constitutional policies of all people and territories and (2) that both individual and social autonomy can increase by letting people follow political directions of their own as long as they do not oppress others. These normative arguments cannot be reconciled with the ontological claims by Schmitt and Hobbes that constituent powers are necessarily internal to a single state, but rather with an ontology opposite to theirs: because constituent powers are made up of actors with different interest they have no reason to create only unitary and single states, but may happily see their powers materialize in a plurality of states as well as constellations of overlapping, integrating and disintegrating political arrangements.

### **External constituents can enhance internal abilities**

In this section I go further than in the previous discussion, suggesting that external powers can enhance freedom also where it is not curtailed by domestic oppression in the first place. Put in this way, my argument will face a new round of objections. Where I will recognise actors as possibly autonomous even if dependent on foreigners, others will define autonomy as the state of not being affected by any decision which you have not participated in making. Where I will see autonomy as thriving on ideas and matters which can be developed and provided by people outside one's political or cultural community, others will see it as the realisation of a common good of which we are already a part. By investigating these arguments I will further specify my claim that the value which a political order can serve to realise for its people is not necessarily realized to its full potential by restricting constituent influence to that same people. It will be argued, to the contrary, that the value of being affected by others is contingent on empirically varying conditions.

#### *The all-affected principle and its normative limitations*

Chief among contemporary normative concepts which imply that a political order should not be subject to external powers is the following: everyone affected by a decision should be able to participate in making it. Strongly associated with deliberative democracy (cf. Habermas 1996: 107), and pertaining to main issues in democratic theory of globalization, this principle has often been employed by cosmopolitan democrats such as David Held (1995: ix), Michael Zürn (2000: 186), and Daniele Archibugi (2004: 444). It can be used to explain why people who are affected by matters such as environmental pollution or global capital should have a say in the making of decisions producing those effects, or alternatively, why people should not be affected in like ways in the first place. The reason why the principle rejects the notion

of external constituent powers is that people will then be affected by decisions without being fully integrated, and able to participate, in the political system which produced those decisions. But is this a normatively sound ground for rejecting the notion of external constituent powers? It is important to distinguish the principle that everyone affected by a decision should be able to participate from the distinct principle relied upon in previous sections in this paper, namely that people should be able to reflect upon and choose among a wide rather than narrow range of alternative actions. “That actor A affects actor B does not by itself mean that there are fewer or less important possibilities of action available to B, nor that B is prevented from performing any particular action. The effect caused by A may indeed have been to increase B’s possibilities to act freely” (Agné 2006: 441). Moreover, such strengthening of B’s possibilities to act may under some circumstances even *require* that A is allowed to influence B without B being able to participate in the political procedures of A. Perhaps most tellingly, this is the case if B is the people of an oppressive regime and A is an external power trying to bring about a constitutional change in the state apparatus which oppresses B. A can then not affect B if A also requires that B participate in the procedures of A.

This should be enough to conclude that the autonomy of people may indeed benefit from being affected by others. But we should notice that the same conclusion follows even when B is not oppressed in the first place. This will be the case, for instance, if we define A as a peaceful group of people which need external funding and expertise for the building of political infrastructure, such as meeting halls and alphabetisation campaigns, in order to run something like a constitutional convention. Of course, the contribution of the external power will not be justified if the people in the target country unsuccessfully try to avoid the effect, but equally important: the justifiability of the effect will remain even if people in the target country *do not* have democratically sufficient opportunities to participate in making the external decisions which will affect their capacity for making constitutional choices.<sup>14</sup> In fact, the democratization of international relations might even reduce the scope of such good effects. Whether it does is an empirical question. Hence the value of external constituent powers cannot be rejected in any general terms.

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<sup>14</sup> I presume that “democratically sufficient opportunities to participate” would require something like a democratic state at regional or global levels

### *Communitarian ethics prior to the community?*

Another main challenge to my argument has a communitarian source: if freedom is about discovering and realizing the values of the community of which you are a part, or about having access to goods of a society which cannot be attained without being recognised as a member of the society, then *external* powers may have little to contribute to freedom beyond the removal of internal oppressors. However, if nothing else rejects such notions of freedom, this communitarian position must fall because of the particular circumstances of constituent politics: in theoretical terms we are talking here about a group of people which has not yet formed a political community and which will be unable to take this step without the recognition by people outside of that community.<sup>15</sup> At the very least, a closed community will benefit from a *boundary politics* in which the powers on the other side of the boundary support the values of the community. And although a minimal point, this is already enough for rejecting the traditional restriction of legitimate constituent powers to the inside of states: people will be freer in the determination of their internal affairs if the values on which their community is based are acceptable also to others.

## **Conclusion**

This article has investigated a number of objections against the possibility of involving foreign powers in the making of a democratic state, and has come to the following six conclusions. First, *the origin of a state can be legitimate*. The basis for this claim is that the democratic paradox of foundation is not a logically necessary one, but a paradox which exists only insofar as we are unwilling to recognise the constitutive role of foreigners in democratic theory. Second, *the origin of a state needs to be legitimate*. This conclusion appears undeniable in view of the effects of politics at the constituent moment on the conditions for how legitimate decisions will be made in the future. Third, *the ethics of constituent powers is irreducible*. This proposition derives basically from observations that, even in political contexts where issues of physical security are more fundamental than constitutional ones, the constitutional issues will remain once the normatively more fundamental difficulties are overcome. Forth, *essential constituent powers are necessarily internal and external*. The very idea of delimiting a territory, or even a group of people, implies that people on both sides of the boundary are able to influence where the boundary is drawn; otherwise we are not facing a case of delimitation but one in which people on one side of the boundary determines the constitutional conditions of the other. Fifth, *external powers can reduce internal oppression*.

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<sup>15</sup> Of course, the establishment of a community need not coincide with the establishment of a state, but the same conditions for legitimate foundings apply in both cases

By emphasising a definition of autonomy as the capacity to realise many and varied rather than few and nearly identical action alternatives, the view of external powers as reducers of internal oppression becomes at the very least empirically possible. Sixth, *external powers can enhance internal abilities*. On the basis of the same definition of autonomy, the possible contribution of external powers includes the raising of autonomy even beyond the level that is achieved when no internal oppression takes place. At a more general level, these six propositions suggest that legitimate states can and should be founded in certain ways: for the sake of democratic legitimacy it is insufficient to pay attention only to the procedures or decisions of states already constituted.

Since a legitimate constituting of a state implies the involvement of prospective foreigners as well as prospective citizens, the legitimate politics of foundation must be institutionally situated somewhere beyond the level of individual states. Exactly where this politics should be located, in terms of territorial levels and alternative institutional arrangements, remains to be investigated (but see Agné 2008 for a beginning). It may be noticed, however, that some elements in the constituent power of the territorially limited state is already exercised beyond its own boundaries. Because a state is constituted as a subject of international law through recognition by the international community, there are essential state capacities which cannot be provided for by internal powers alone. At the same time, international recognition is insufficient for establishing a state as a constitutional regime. These two sides of the legal state – the constitutional and the international one – have become increasingly mixed up and dependent on each other for various reasons, not least because internal respect for democracy and human rights are increasingly treated as preconditions for international recognition (for other sources of the interpenetration of constitutional and international law, see Cohen 2004 or Benhabib 2007). In view of this development, it is by no means utopian to conceive of the constituent power of legitimate states as being composed of internal *and* external actors. Such theoretical developments are necessary to catch up with practical changes already underway.

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