

SPECIAL ISSUE ARTICLE

# ‘Too utopian’: Theories of Utopia in constituent power

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## Abstract

There is something utopian about constituent power, whether this is the unrealisable idea of “the people” or the world-building nature of constitutional change. However, in contemporary constitutional scholarship “utopia” is more often used as a pejorative critique of reform projects that are seen as idealistic ambitious calls for constitutional change, which might fail for being “too utopian”, “too idealistic”, “too unrealistic”. In an attempt to move beyond this critique, this article draws on alternative approaches to utopianism to uncover the temporal assumptions underpinning contemporary approaches to constituent power and highlights the different approaches that can be exposed if theories of utopian-thinking are foregrounded. Both utopia and constituent power are closely aligned with visions of alternative futures, and constitutional scholars agree that there is an intersection between utopian thinking and the subjectivities, temporalities and operationalisation of constituent power. Moving away from utilising utopia as a pejorative label and engaging instead with what it can expose about temporalities, offers alternative approaches to the study of constituent power.

**Keywords:** constituent power; Utopia; utopianism; constitutional change; temporalities

## Introduction

There is something utopian about constituent power. For Andrew Arato, the very notion of ‘the people’ as constituent power holders is an unrealizable idea.<sup>1</sup> Both utopia and constituent power are closely aligned with visions of alternative futures, and constitutional scholars agree that there is an intersection between utopian thinking and the subjectivities, temporalities and operationalization of constituent power.<sup>2</sup> This article

<sup>1</sup>Andrew Arato, ‘Political Theology and Populism’ (2013) 80(1) *Social Research: An International Quarterly* 143–72, 158.

<sup>2</sup>David Landau and Rosalind Dixon, ‘Utopian Constitutionalism in Chile’ (2024) 13 *Global Constitutionalism* 228–38; Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, trans. Maurizio Boscagli (University of Minnesota Press, 2009); Mark Tushnet, ‘Utopian Thinking for Progressive Constitutionalists’ (2018) 93 *Indiana Law Journal* 232; Illan rua Wall, ‘Notes on an “Open” Constituent Power’ (2015) 11(3) *Law, Culture and Humanities* 378–392.

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uses utopian thinking to expose the temporal assumptions that underpin the construction of constituent power in constitutional scholarship.

Demands for political and legal change, which seek to engage in a project of constitutional world-building are understood as utopian in two ways in contemporary constitutional scholarship. They can be considered 'utopian' because they seek to *reimagine* the very constitutional fabric of society; breaking away from the current contemporary constraints of society, the utopian imagination can offer alternative systems of governance and ways of being. Another way legal scholarship can use 'utopian' is as a criticism, in the sense that the idealistic ambitions of calls for constitutional change might fail for being 'too utopian,' 'too idealistic,' 'too unrealistic.'

This critique of being 'too utopian' is a common refrain within legal scholarship,<sup>3</sup> and it is this notion of utopianism that is used in David Landau and Rosalind Dixon's latest work on 'utopian constitutionalism'.<sup>4</sup> Landau and Dixon argue that Chile's 2022 constitutional draft and constituent process failed because it was 'too utopian'.<sup>5</sup> Undertaking close readings of the use of utopia in constitutional scholarship, this article will expose how notions of the past, present and future inform constructions of constituent power.

Within constitutional scholarship, the notion of constituent power is contested, but it is broadly understood as the power to bring about constitutional change. Scholars debate the role of representation,<sup>6</sup> the construction of the constituent power-holder (or the 'people'),<sup>7</sup> whether there are normative or procedural constraints,<sup>8</sup> and whether an expression of constituent power is exhausted in the constitutional moment.<sup>9</sup> There are discussions about whether constituent power is always external to the constitutional order or whether it can be internalized, judicialized,<sup>10</sup> derivative or constitutionalized.<sup>11</sup> There are also debates about whether the relationship between constituent and constituted power is better understood relationally or as a binary.<sup>12</sup> These debates give rise to contrasting views about the temporalities of constituent power; whether it is fixed in the past, open to being revised in the present, or limited by the needs of the future.

Just as constituent power has different modalities which invoke various temporalities, so too does utopia. From the 'everyday' quotidian utopias of social movements or intentional communities,<sup>13</sup> to utopian blueprints,<sup>14</sup> these different manifestations of

<sup>3</sup>See Akbar Rasulov, 'The Utopians' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2018) 879–99.

<sup>4</sup>Landau and Dixon (n 2).

<sup>5</sup>Ibid.

<sup>6</sup>For a discussion see, Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Theory* 218–37, 227.

<sup>7</sup>For a discussion see, Maxim van Asseldonk, 'Who, the People? Rethinking Constituent Power as Praxis' (2021) 48(3) *Philosophy & Social Criticism* 361–385.

<sup>8</sup>For example, Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford, 2016); Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021) *Connecticut Law Review* 476.

<sup>9</sup>For a discussion see, Martin Loughlin and Neil Walker, 'Introduction' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2009) 6.

<sup>10</sup>Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale, 2020).

<sup>11</sup>Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020) 9.

<sup>12</sup>Jacobsohn and Roznai (n 10).

<sup>13</sup>Davina Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Duke University Press, 2013).

<sup>14</sup>Russell Jacoby, *Picture Imperfect: Utopian Theory for an Anti-Utopian Age* (Columbia University Press, 2005) xvii.

utopian thinking proffer varied temporalities. The utopian impulse is sometimes conceptualized as requiring a radical break from the past,<sup>15</sup> in other accounts utopian thinking has a more complicated relationship with notions of futurity – as always becoming, always in the future<sup>16</sup> – and there is a complexity to the relationships between past, present and future in processes of utopian thinking.<sup>17</sup> In exploring how ideas of utopia inform conceptualizations of constituent power, this article is not seeking to impose normative constraints on constituent power; it does not argue that for an exercise of constituent power to be successful or legitimate it must align with some utopian impulse. Rather, this article provides a more substantive exploration of how utopian thinking can inform the study of constituent power and offers a way of thinking about utopia that moves beyond the pejorative labels or blueprint conceptualizations.

The article is divided into two sections. The first section interrogates how notions of utopia and utopian thinking have been discussed in constitutional scholarship to draw out how the specific approach to utopianism in constitutional scholarship constructs particular ideas about the temporalities of constituent power. Through close readings of the work of Landau and Dixon, Peter Niesen and Andreas Kalyvas, it explores how the temporalities of utopia and constituent power have been constructed, and specifically how scholars position them as diametrically opposed, how both concepts are connected to ideas of revolution and radical change, and how the future is conceptualized within theories of constituent power and utopia. In section two of the article, alternative approaches to utopia will be brought into conversation with debates on constituent power to highlight alternative ways of understanding the temporalities of that power in constitutional scholarship. Moving away from utilizing utopia as a pejorative label and engaging instead with what it can expose about temporalities, offers alternative approaches to the study of constituent power.

### Utopia in constitutionalism

Defining ‘utopia’ is a challenge because there are competing approaches to utopia and utopianism. Challenges arise because etymologically utopia means the ‘good place’ and the ‘no place’. There is little agreement on the form utopias can take,<sup>18</sup> with ideas ranging from practical examples to theories of social dreaming.<sup>19</sup> Whilst some argue for blueprint models, others discuss iconoclastic versions, and whilst some see utopias as programmatic, others identify impulses.<sup>20</sup> In order to understand how ideas of utopia and utopian

<sup>15</sup>Fredric Jameson, *Archaeologies of the Future: The Desire Called Utopia and Other Science Fictions* (Verso, 2005); Fredric Jameson, ‘A New Reading of *Capital*’ (2010) 25(1) *Mediations* 5–14, 13.

<sup>16</sup>For example, Jose Esteban Muñoz, *Cruising Utopia: The Then and There of Queer Futurity* (New York University Press, 2009).

<sup>17</sup>Ruth Levitas, *Utopia as Method: The Imaginary Reconstitution of Society* (Palgrave Macmillan, 2013).

<sup>18</sup>Lyman Tower Sargent, ‘The Three Faces of Utopianism Revisited’ (1994) 5(1) *Utopian Studies* 1, 9; See also, Ruth Levitas, ‘The Imaginary Reconstitution of Society: Utopia as Method’ in Tom Moylan and Raffaella Baccolini (eds), *Utopia Method Vision: The Use Value of Social Dreaming* (Peter Lang, 2007) 52.

<sup>19</sup>Compare Cooper, *Everyday Utopias* (n 13) and Lucy Sargisson, ‘The Curious Relationship Between Politics and Utopia’ in Tom Moylan and Raffaella Baccolini (eds), *Utopia Method Vision: The Use Value of Social Dreaming* (Peter Lang, 2007) 26.

<sup>20</sup>Moylan, for instance emphasises the need to see utopianism as a spectrum: rather than a binary construction between the programmatic and the impulse, utopianism as a spectrum facilitates utopian programs inculcating an ongoing utopian impulse. Tom Moylan, ‘Next Steps: Tracking the Utopian Method’

thinking inform discussions on constituent power, this part of the article will first outline a key conceptualization of utopianism.

The blueprint or end-state utopia is the most common form found in legal scholarship.<sup>21</sup> It is best explained as the projection of an ‘ideal’ or ‘perfect’ place, society or point in time. It is these connotations of idealism and perfection that inform utopia’s usage in legal studies. Matthew Nicholson, for example, argues that international law is informed by blueprint utopias for a better future.<sup>22</sup> The blueprint utopia is often understood as a final destination, and in his study, Nicholson argues that international law projects itself as the *path* to a utopia. Utopian studies have identified a shift from place to time in blueprint models, such that there is now an idea of futurity that is at work as the blueprint is constructed as being in the future.<sup>23</sup>

Understanding utopia as a blueprint or as striving for perfection gives rise to a number of criticisms. Firstly, that this utopian thinking is ‘whimsical,’<sup>24</sup> ‘frivolous’ and ‘irrelevant.’<sup>25</sup> Secondly, it is an exercise in daydreaming that distracts from the revolution.<sup>26</sup> Thirdly, that it can be dangerous for it can lead to totalitarian projects.<sup>27</sup> For liberal scholars, such as Popper, liberalism and liberal constitutionalism (the rule of law, separation of powers, and democratic accountability) are understood as necessary bulwarks against the utopian projects of Nazism and Stalinism.<sup>28</sup>

Yet, despite these critiques giving rise to a dearth of legal engagement with utopian thinking, within constitutional scholarship, there are examples of engagement with the idea of utopia. Landau and Dixon’s latest work on utopian constitutionalism<sup>29</sup> joins previous work by Mark Tushnet on an articulation of utopian constitutionalism.<sup>30</sup> This section explores how utopian thinking is currently utilized in constitutional scholarship. It is divided into three sub-sections. First, the common oppositional relationship between constitutionalism and utopia will be set out. Then, in the second sub-section, close readings of the work of Landau and Dixon, Petersen and Kalyvas will be used to show how ideas of utopia inform approaches to constitutional change, both with respect to the nature and means of change. The final sub-section reflects on how the temporal account of utopia as something that is ‘futuristic’ raises questions about how constituent power is located either in the past, present or future.

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in Tom Moylan (with Ruth Levitas, and Philip E Wegner (eds)), *Becoming Utopian: The Culture and Politics of Radical Transformation* (Bloomsbury, 2022) 187.

<sup>21</sup>Bart van Klink, ‘The Rule of Law: Between Ideology and Utopia’ in Bart van Klink, Marta Soniewicka, and Leon van den Broeke (eds), *Utopian Thinking in Law, Politics, Architecture and Technology* (Edward Elgar, 2022) 38–58.

<sup>22</sup>Matthew Nicholson, *Re-Situating Utopia* (Brill, 2019).

<sup>23</sup>Richard Scholar, ‘Utopias and Temporo-Spatial Invention: Reading More with Marin. *Early Modern*’ (2023) 45(1) *French Studies* 22–9; Nicole Pohl, ‘Of Survival and Living Together: The Eighteenth-Century Utopian Novel’ in Cathy Shrank and Phil Withington (eds), *The Oxford Handbook of Thomas More’s Utopia* (Oxford University Press, 2024) 522–36, 525; Bo Stråth, *Europe’s Utopias of Peace: 1815, 1919, 1951* (Bloomsbury, 2016) 17.

<sup>24</sup>See Gregory Claeys, *Utopia: The History of an Idea* (Thames and Hudson Ltd, 2020) 7.

<sup>25</sup>Fredric Jameson, ‘The Politics of Utopia’ (2004) 25 *New Left Review* 35–54, 35.

<sup>26</sup>See Rasulov (n 3) 891.

<sup>27</sup>Jameson, ‘The Politics of Utopia’ (n 25) 35.

<sup>28</sup>Lawrence Douglas, Austin Sarat, and Martha Merrill Umphrey, ‘Law and the Utopian Imagination: An Introduction’ in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (eds), *Law and the Utopian Imagination* (Redwood City, CA: Stanford University Press, 2014) 6.

<sup>29</sup>Landau and Dixon (n 2).

<sup>30</sup>Tushnet, ‘Utopian Thinking for Progressive Constitutionalists’ (n 2). See also, Negri (n 2).

Constructions of utopia as a radical alternative *future* work to situate constituent power within a fixed understanding of a constitutional present.

### *In opposition*

Since the mid-20th century, legal scholarship has been disparaging of the utility of utopian thinking within law and as such, law and utopia are often constructed as diametrically opposed.<sup>31</sup> This construction of an antithetical relationship among utopia, politics and constitutionalism is not the only approach,<sup>32</sup> but it does raise questions about the plausibility of a generative discussion between utopianism and constitutionalism.

Liberal thinkers such as Popper, Berlin and Oakeshott reject utopia for being totalitarian and absolutist.<sup>33</sup> Law is instead seen as the ‘necessary bulwark against the inevitable excesses of utopia’.<sup>34</sup> The ‘single truth’<sup>35</sup> and drive for uniformity that underpins the blueprint model of utopia is at odds with the pluralism espoused by liberalism.<sup>36</sup> For those theorists, utopia is associated with an abuse of power.<sup>37</sup> As such, liberal scholarship considers utopia to be incompatible with key constitutional tenets, such as the rule of law.<sup>38</sup>

This oppositional relationship also informs Jameson’s discussion on utopia and constitutions. He juxtaposes utopian thinking with constitution-writing.<sup>39</sup> He argues that constitutions are ‘devised to forestall’ such as revolutions, or ‘power seizure and power imbalance’.<sup>40</sup> In this way, constitutions thwart further utopian change. Whilst he concedes that the drafting of constitutions can be inspired by utopian thinking,<sup>41</sup> he notes that ‘in utopia, politics is supposed to be over’.<sup>42</sup> By politics, he means that ‘[f]actionalism, parties, subgroups, special interests, must be excluded in the name of the General Will’.<sup>43</sup>

<sup>31</sup>Although, there has been a recent turn to utopianism in legal scholarship within discussions on prefigurative legalities and feminist international law and feminist constitutional scholarship: For example, Davina Cooper, ‘Figuring the State’ (2016) 49(2) *Antipode* 335; Ruth Houghton and Aoife O’Donoghue, ‘“Ourworld”: A Feminist Approach to Global Constitutionalism’ (2020) 9(1) *Global Constitutionalism* 38; Amy J Cohen and Bronwen Morgan, ‘Prefigurative Legality’ (2023) 48(3) *Law & Social Inquiry* 1053–82; Di Otto and Anna Grear, ‘International Law, Social Change and Resistance: A Conversation between Professor Anna Grear and Dianne Otto’ (2018) 26(3) *Feminist Legal Studies* 351–63; Ruth Houghton, ‘Feminist Approaches to Global Constitutionalism’ in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing, 2023); Zoe Tongue, ‘Reproductive Justice: The Final (Feminist) Frontier’ (2022) 4(2) *Law, Technology and Humans* 95–108.

<sup>32</sup>For a discussion, see Lyman Tower Sargent, ‘Revolution, Evolution and Reform’ (1970) 10(8) *Anarchy* 253–57; van Klink, ‘The Rule of Law’ (n 21) 38–58; Barbara Goodwin, ‘Utopia Defended Against The Liberals’ (1990) 28(3) *Political Studies* 384–400.

<sup>33</sup>Goodwin (n 32) 393.

<sup>34</sup>Douglas, Sarat, and Umphrey (n 28) 6.

<sup>35</sup>Goodwin (n 32) 393.

<sup>36</sup>*Ibid.*, 398.

<sup>37</sup>van Klink, ‘The Rule of Law’ (n 21) 56.

<sup>38</sup>*Ibid.*, 56.

<sup>39</sup>Jameson, *Archaeologies of the Future* (n 15) 33.

<sup>40</sup>*Ibid.*, 36.

<sup>41</sup>*Ibid.*, 16.

<sup>42</sup>Jameson, ‘The Politics of Utopia’ (n 25) 42.

<sup>43</sup>*Ibid.*

In that sense, ideas of plurality and democracy – features of liberal constitutionalism – are also supposedly lacking in utopias.

Placing constitutionalism and utopia in opposition in this way is based on a blueprint model of utopia, and as this article will highlight in the next section, there are alternative approaches to utopia. Drawing on this oppositional position, constitutional scholarship risks suppressing the potential for utopia to inform accounts of constituent power.

### *Constitutional change*

As outlined above, Jameson's discussion of utopia and constituent power shows there is a concern about the need to monitor and forestall (revolutionary or radical) constitutional change. Anxieties about change arise with respect to the nature of change (as in Jameson's discussion) or the rate of change (which is the case for Marx and Engels, who use 'utopia' pejoratively,<sup>44</sup> because for them utopian socialism (and utopias) distracts the 'working classes from more suitable political activity').<sup>45</sup> This sub-section explores how these anxieties inform the debates on utopia and constituent power.

Landau and Dixon's critique of utopian constitutionalism is informed by a concern around the nature and rate of change. They note that 'utopian constitutionalism can deflect attention from efforts to achieve immediate legislative and policy change'.<sup>46</sup> This disconnect between utopia and the need for 'immediate' change projects a particular vision of utopia as something that is in the future. It is not rendered as something that can have impacts in the present. This is at odds with the theories of 'everyday utopias'<sup>47</sup> or Jameson's more iterative approach of the utopian impulse,<sup>48</sup> explored in the section on 'Beyond the Pejorative: Utopias and Constituent Power' in this article.

In their conceptualization, 'utopian constitutionalism' sits as a contrast to transformative and preservative constitutionalism. For them, preservative constitutionalism maintains the status quo,<sup>49</sup> whilst transformative constitutionalism aims to 'transcend the past' and bring about social change for 'a better future',<sup>50</sup> but utopian constitutionalism refers to 'utopian projects' that have 'goals that are unlikely to be achieved within any reasonable timeframe'.<sup>51</sup> This construction of utopia echoes the critiques of utopia as unrealizable or unachievable, and the distinction between transformative and utopian constitutionalism oscillates on a temporal differentiation of how *long* change will take.

In their discussion of utopian constitutionalism, Landau and Dixon outline two forms of utopian constitutionalism: structural utopian constitutionalism and sociological utopian constitutionalism. As the following sub-sections show, these critiques map onto two ways utopia is used as a critique of constitutional change: the nature of the change (or in other words, what can be changed and how dramatically), and how change can come about (for example, the protests, calls for reform, or lobbying). Utopia is used as a label

<sup>44</sup>For a discussion, see Rasulov (n 3) 891.

<sup>45</sup>Ruth Levitas, *The Concept of Utopia* (Peter Lang, 2010) 66.

<sup>46</sup>Landau and Dixon (n 2) 231.

<sup>47</sup>Cooper (n 13).

<sup>48</sup>Fredric Jameson, 'Utopia as Method, or the Uses of the Future' in Michael D Gordin, Helen Tilley and Gyan Prakash (eds), *Utopia/Dystopia* (Princeton University Press, 2011) 25.

<sup>49</sup>Landau and Dixon (n 2) 229–30.

<sup>50</sup>*Ibid.*, 230.

<sup>51</sup>*Ibid.*, 228.

where the change is too radical or too futuristic, and where the change will take too long or it is too far into the future.

### *Nature of constitutional change*

For Landau and Dixon, utopia is a form of criticism that can be levelled at particular social and political movements seeking to bring about constitutional change. Structural utopian constitutionalism, for Landau and Dixon, refers to situations where there is a disconnect between the aims of political movements and the institutional processes necessary to implement those aims.<sup>52</sup> They raise concerns about social movements or independent actors that have limited 'institutional experience or know-how', or in other words concerns about those actors that are outside of the current constituted power.<sup>53</sup> This 'know-how' ties the constituent power to a particular way of constitutional thinking or knowledge framework of constitutionalism. Rather than viewing either utopia or constituent power as the potential for a radical break from the past or present, the structural utopianism critique works to stymy the opportunity for alternative frames of reference.

Another example of structural utopianism that they mention is where constitutional structures are 'attacked or undermined'.<sup>54</sup> They do not elaborate on how this could transpire, but if the challenge to constituted power is through claims of constituent power, structural utopianism ignores the destructive potential of constituent power. Again, this risks placing constituent power within current approaches to constitutionalism, denying the potential of a radical break from the past or present.

Kalyvas also draws a distinction between utopia and constituent power, where utopian thinking is pre-constitutive in the sense that it lacks the potential to bring about a radical break with the constitutional order. However, for Kalyvas, constituent power is proffered as a more radical alternative than utopia. Drawing on Cohen and Arato's theory of civil society as a 'self-limiting' utopia,<sup>55</sup> Kalyvas argues that social movements might work to expand the democratic horizon of democracy.<sup>56</sup> The utopian horizon of democracy presupposes and acknowledges the 'existing constitutional framework of an institutionalized democracy', but it works to extend what counts as legitimate citizen activity.<sup>57</sup> As such, these movements inspire the 'utopian' aspects of democracy by sitting alongside, apart from and next to democratic institutions but always firmly within the constituted order.<sup>58</sup> The 'self-limiting' utopias have to be 'compatible with the modern differentiation of society'.<sup>59</sup> In contrast, constituent power offers a radical break from the constitutional order.<sup>60</sup> He locates utopia within the 'normal times' of 'ordinary politics', rather than the extra-ordinary times of constituent power.<sup>61</sup> This *prima facie* constructs constituent power as having more radical potential than utopia.

<sup>52</sup>Ibid., 231.

<sup>53</sup>Ibid., 231.

<sup>54</sup>Ibid., 231.

<sup>55</sup>Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT Press, 1992) xii.

<sup>56</sup>Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge University Press, 2008) 186 and 299.

<sup>57</sup>Ibid., 186.

<sup>58</sup>Ibid., 298–99.

<sup>59</sup>Cohen and Arato (n 55) xii.

<sup>60</sup>Kalyvas, *Democracy and the Politics of the Extraordinary* (n 56) 299.

<sup>61</sup>Ibid., 298–99.

Yet, Kalyvas ties constituent power to law; 'higher constitutional norms are the final cause of the constituent power'.<sup>62</sup> For him, constituent power is intrinsically tied to a model of constitutionalism. In constructing a divide between utopia and constituent power, Kalyvas cuts off the potential that a utopian constituent power might break out of the institutional limits he places on that power. What this sub-section shows is that the utopian critique ensures that the analysis and evaluation of constitutional change remain within an accepted frame of reference. In contrast, a utopian constituent power would be able to imagine a radical departure from the confines of the reified constitutional form.

### *Bringing about constitutional change*

In addition to concerns about the nature of change, there are also critiques levied at how change occurs. Sociological utopian constitutionalism occurs, Landau and Dixon argue, where there is little political support for the aims of the 'utopian' political project.<sup>63</sup> Similar reflections on the role of social movements in constitutional moments highlight temporal concerns around duration and longevity. This sub-section unpacks how the scholarship tends towards a presentism that sedates alternative futures-thinking.

In his discussion on civil disobedience, Niesen draws a distinction between social movements that cannot be characterized through the lens of constituent power and social movements that can. He argues that '[t]he articulation [or a claim] of constituent power can apply only to collectives that aim at a certain tenacity and longevity, and not to the more fleeting campaigns that enact ambitious, but short-lived glimpses of alternative forms of life'.<sup>64</sup> Although Niesen does not use the language of utopia, the references to ambition and 'alternative forms of life' invoke the language of utopian thinking. For Niesen, a constitutive act requires a sense of longevity (something that is non-fleeting and not short-lived). In a similar vein, Kalyvas sees these types of expressions as utopian,<sup>65</sup> which are not sufficient for constituent power, and Landau and Dixon use the utopian label where the parties in Chile 'lacked a clear vision of how to implement' the changes.<sup>66</sup> For them, where political movements or projects are 'ephemeral' (in the sense that the 'energy behind the protests waned'), this would fall short of a claim or an exercise in constituent power and would amount to a 'too utopian' attempt to change the constitution.<sup>67</sup>

In a similar vein to the critiques of sociological utopianism, Kalyvas draws on similar vectors to distinguish those movements that can merely inspire utopian expansions of democracy and those that can bring about constitutional change. He writes: '[some] movements transgress the limits of legality in order to radicalize the utopian and radical content of a democratic government and to broaden and expand existing political freedoms'.<sup>68</sup> His suggestion that some 'utopian' activities can expand democratic horizons makes space for an understanding of the potential for some utopian thinking

<sup>62</sup> Andreas Kalyvas, 'Popular Sovereignty, Democracy, and Constituent Power' (2005) 12(2) *Constellations* 223–44, 233–34.

<sup>63</sup> Landau and Dixon (n 2) 231.

<sup>64</sup> Peter Niesen, 'Reframing Civil Disobedience: Constituent Power as a Language of Transnational Protest' (2019) 15(1) *Journal of International Political Theory* 31–48, 43.

<sup>65</sup> Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge University Press, 2008) 299.

<sup>66</sup> Landau and Dixon (n 2) 229.

<sup>67</sup> Ibid., 236.

<sup>68</sup> Kalyvas, *Democracy and the Politics of the Extraordinary* (n 56) 299.

to have ongoing effects, even if they fall short of recognized exercises in constituent power. These utopian demands are contrasted with movements that have broader support. He continues:

‘[b]ut [...] some of the movements are able to mobilize and encompass broader strata of the population, to form wider organic alliances, to articulate new norms and rights, to formulate original collective aims that transcend the confines of the existing regime, and to propose a new hegemonic founding project.’<sup>69</sup>

Kalyvas’ model of a successful constitutive social movement is one that is capable of mobilizing and strategizing, which echoes Landau and Dixon’s distinction between those movements that are ‘too utopian’ and those that are recognized as constituent power holders.<sup>70</sup> In this sense, for Kalyvas, utopian thinking is pre-constitutive. For Kalyvas, utopia is aligned with ‘unrealistic’ expectations.<sup>71</sup>

By locating utopia as something that is not sufficient to amount to constituent power is again using utopia as a form of criticism. In these approaches, utopian projects remain pre-constitutive because they lack the requisite agency needed to be recognized as successful claims for constituent power. Under sociological utopianism, the social movement is evaluated against ideas of longevity and institutional robustness. For example, in this approach, social movements must have aims and objectives, clear visions and strategies for implementing these plans. This evaluation – and critique of failed movements – chimes with Levitas’ critique of some types of utopias that are too ‘abstract’ and undisciplined as they are open-ended and are lacking in a programme or agenda.<sup>72</sup> Similarly, Engels in his critique rejects utopianism for ‘lacking any conception of agency or political strategy’.<sup>73</sup> To the extent that they cannot bring about social change, these social movements are evaluated as having ‘no future.’

### *Paradoxical present?*

There is a potential paradox that emerges. Whilst the lack of a plan renders a movement ‘utopian,’ it is the blueprint or futuristic nature of a plan that can also give rise to the ‘utopian’ label. This position highlights further temporal features of constituent power. For Landau and Dixon, there needs to be a plan for the present. Plans that will take *too long* into the future are dismissed as utopian. For them, this utopian-future-thinking is a potential distraction from present-day legal reforms. This places constituent power within a constitutional present. Within that present, change must be actionable and framed within the current structures, or align with the status quo of constitutionalism. Reading across the constitutional scholarship above, there is a trend which suggests that to be recognised as claims of constituent power – to be rendered plausible – such constitutive acts need to be located within a constitutional present.

<sup>69</sup>Ibid., 299. The reference to ‘a new hegemonic founding project’ in Kalyvas’ discussion, constructs an idea of a one-off constitutive moment, where this singular ‘hegemonic’ project negates the potential for an iterative, ongoing role of constituent power.

<sup>70</sup>Landau and Dixon (n 2).

<sup>71</sup>Kalyvas, *Democracy and the Politics of the Extraordinary* (n 56) 6.

<sup>72</sup>Levitas, *The Concept of Utopia* (n 45) 226–27; Paul Mazzocchi, ‘Beyond the Education of Desire: The Utopia of Councils in Abensour’ (2023) 70(176) *Theoria* 96–120, 97.

<sup>73</sup>Jameson, *Archaeologies of the Future* (n 15) xi.

This focus on the ‘present’ obscures alternative timelines. Studies of utopian thinking and utopian projects uncover a longer trajectory, where utopian visions of past revolutions or other previous social projects might inform and influence the social movements of the present.<sup>74</sup> This longer trajectory might shift how the longevity of the social movement is evaluated. Constrained to the present risks overlooking the role of utopian impulses (and those social movements characterized by Niesen and Kalyvas as pre-constitutive) that appear unprogrammable because they fall outside of recognized institutional robustness or processes.

This particular focus on the present seems at odds with aspects of constitutional scholarship that locate constituent power firmly in the past. As Jameson does, much constitutional theory constructs constituent power as a singular constitutional moment when the constitution was adopted, located in a particular contextualized past.<sup>75</sup> This specific past is then often utilized in some theories of constitutionalism – such as originalism – to inform current constitutional jurisprudence.<sup>76</sup> However, the constitutional present in the constitutional literature analyzed above is informed by a constitutional past. Dismissing particular articulations of constituent power as ‘too utopian’ acts to stall change, fixing the constitution into a particular present which is tied to its constitutional past and the previous successful exercise of constituent power. Moreover, theories of constitutionalism herald from particular constitutional pasts (such as The French Revolution or American Revolution),<sup>77</sup> and these inform the ontological and methodological constitutional present.

This section shows some of the ways in which utopianism is currently used within constitutional scholarship, and specifically how the approach to utopian thinking constructs particular understandings of constituent power. Across these examples, utopia is associated with a future that is contrasted with a sense of the present. Constituent power is often located as something that happened in the past and whilst some of the literature recognises that it might be able to re-emerge in the present, for mainstream scholars it cannot be ‘too futuristic,’ and for them it operates within the confines of present institutional and constitutional parlance. This section thus exposes how the radical potential of utopianism to reimagine constitutionalism and constitutional change is neutered.

### Beyond the pejorative: Utopias and constituent power

To move away from using utopia as a form of pejorative criticism, alternative models of utopia need to be explored. This part of the article draws on three temporal themes found in constituent power scholarship that can be unpacked through different approaches to utopianism. The first theme is the idea that exercises of constituent power are a ‘radical break from the past’.<sup>78</sup> Drawing on Jameson’s theory of the ‘break’ as a function of utopian thinking,<sup>79</sup> this sub-section explores how constitutional scholarship can approach

<sup>74</sup> Laurence Davis, ‘Grounded Utopia’ (2021) 32(3) *Utopian Studies* 552–81.

<sup>75</sup> For a discussion see, Neil Walker, ‘The Legacy of Europe’s Constitutional Moment’ (2004) 11(3) *Constellations* 368–93, 368–69.

<sup>76</sup> M Balkin, *The Cycles of Constitutional Time* (OUP, 2020) 4.

<sup>77</sup> For a discussion see, Anthony F. Lang Jr and Antje Wiener, ‘Introduction to the Handbook on Global Constitutionalism: Protecting Rights and Democracy while Binding Power’ in Anthony F. Lang Jr and Antje Wiener (eds), *Handbook on Global Constitutionalism* (2nd edn, Edward Elgar, 2023) 1–23.

<sup>78</sup> Jacobsohn and Roznai, (n 10) 236.

<sup>79</sup> Jameson, *Archaeologies of the Future* (n 15); Jameson, ‘A New Reading of *Capital*’ (n 15) 13.

constituent power as a 'break from the past.' The second theme, as noted above, is the theme of longevity as a marker of success in the identification of constituent power. This sub-section draws on Jameson's theory of 'utopian impulse'<sup>80</sup> to interrogate how constitutional scholarship collects evidence of exercises of constituent power. The third theme is the idea of the constitutional moment as a one-off moment in time, and a related question about the potential ongoing effects of an articulation of constituent power. Drawing on Abensour's theory of the 'persistent utopia'<sup>81</sup> and Levitas' theory of utopia as method,<sup>82</sup> this sub-section articulates a more iterative notion of constituent power that contests the singular constitutional moment. Using these different approaches to utopia offers alternative temporal dynamics to inform the study, conceptualisation and construction of constituent power in constitutional scholarship.

### *A break from the past*

*Prima facie*, many exercises of constituent power seek a radical break from the past or the present in the sense that constituent power has the dual function of dismantling one constitutional order to rebuild another. Indeed, constituent power is often discussed as a 'break' within contemporary constitutional scholarship.<sup>83</sup> As explored in the section on 'Utopia in Constitutionalism', utopia is often used in constitutional scholarship to suggest that the break was 'too radical.' Chile's constitutional process, for Landau and Dixon was so radical that it was unrealistic and unfeasible.<sup>84</sup>

For Jameson that unrealizability is part of the function of utopias. Utopias are also 'no-places,' and as such invoke an impossibility or unrealizability. Jameson argues that utopias are unrealizable because we cannot imagine beyond the current societal constraints.<sup>85</sup> He stresses that the 'transformative potential'<sup>86</sup> of utopia lies in a radical departure from contemporary societal, institutional and political structures, but this break is not possible and therefore a function of utopia is to show what cannot be imagined. Literary utopias, in particular, for Jameson, highlight the limits of our current political imaginaries and our inability to imagine something different.<sup>87</sup> This means that the 'cognitive estrangement'<sup>88</sup> function of utopia is paramount, because utopia works to show the limits of the imagination and to expose the structural, epistemological and methodological barriers that hinder the imagination.

Jameson's assertion of the impossibility of utopia acts as a reminder to interrogate the radical nature of the departure from current constitutional structures.<sup>89</sup> We might consider,

<sup>80</sup>Jameson, 'Utopia as Method' (n 48) 25.

<sup>81</sup>Miguel Abensour, 'Persistent Utopia' (2008) 15(3) *Constellations* 406–21.

<sup>82</sup>Levitas, *Utopia as Method* (n 17).

<sup>83</sup>Jacobsohn and Roznai, (n 10) 229. See also, Joel I. Colón-Ríos, Eva Marlene Hausteiner, Hjalte Lokdam, Pasquale Pasquino, Lucia Rubinelli, and William Selinger, 'Constituent Power and its Institutions' (2021) 20 *Contemporary Political Theory* 926–56, 932; Massimo Fichera, 'The Idea of Discursive Constituent Power' (2021) 3 *Jus Cogens* 159–80, 164; Andrew Arato, 'Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making' (2012) 1(1) *Global Constitutionalism* 173–200, 188.

<sup>84</sup>Landau and Dixon (n 2) 232.

<sup>85</sup>Jameson, 'A New Reading of *Capital*' (n 15) 13.

<sup>86</sup>Moylan, 'Next Steps' (n 20) 186.

<sup>87</sup>Jameson, 'A New Reading of *Capital*' (n 15) 13.

<sup>88</sup>Darko Suvin, *Metamorphoses of Science Fiction: On the Poetics and History of a Literary Genre* (Yale University Press, 1979) 13.

<sup>89</sup>Jameson, 'A New Reading of *Capital*' (n 15) 13.

for example the extent to which normative constraints on constituent power work to mute the radical potential of constituent power. This might be the case if there are normative requirements for democratic legitimacy, for example, or if there are procedural requirements outlined within the constitution for exercises of derived constituent power.<sup>90</sup> For the constitutional revolution, there is an implicit substantive threshold that needs to be met (a sense of radical change or departure from the constitutional order), before it can be conceptualized as an exercise of constituent power.<sup>91</sup> One such structural constraint is that an exercise of constituent power in domestic constitutionalism and international law is tied to the constitution of a State or State entity;<sup>92</sup> within international law, a people can only externally self-determine as a state and internal self-determination is about participation *within* a state,<sup>93</sup> and as such, constituent power is limited to the creation of a state.

Using Jameson's approach reminds constitutional scholars to interrogate the potential constraints. Illan rua Wall, for example, shows how 'the concept of 'the people' acts as a centripetal force' because it pre-determines a 'unity under the sovereign' and as such 'pre-determines the movement [towards the state model]'.<sup>94</sup> In other words, 'the people' acts to fix 'the state as its destiny'.<sup>95</sup> Kalyvas provides another constraint where he argues that constituent power is always aimed towards law; 'Its true finality, is to fulfil the idea of law'.<sup>96</sup> In that respect, current approaches to constituent power are not 'utopian' from Jameson's perspective, because they do not break from our current political imaginaries.

Tushnet's approach to utopian constitutionalism is concerned with reform proposals that go-beyond the current structural frames of reference to push against the norm.<sup>97</sup> Rather than adopting a blueprint model where utopia is in the future, here utopia is conceptualized as a 'radical break' with the present. From Jameson's perspective, the question would be how far the proposals push against the norm, and whether such reform proposals offer a radical departure from the status quo. Moylan warns of 'misdirected celebrations of political maneuvers that may appear to be radically oppositional but in fact are present-bound reforms that are incapable of eluding capitalism's retrieval mechanisms, thus becoming enclosed in the mechanism of an artificial negativity that reaffirms rather than revolutionizes the present order'.<sup>98</sup> Reading Tushnet's theory of utopian constitutionalism and constituent power through Jameson's lens prompts further questions about where the threshold is set for a 'radical' change and whether, instead, the current order has maintained its hegemonic role.

<sup>90</sup> Arato, *Post Sovereign* (n 8); Roznai, 'The Boundaries' (n 8).

<sup>91</sup> Jacobsohn and Roznai, (n 10) 224.

<sup>92</sup> See Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (OUP, 2016) 10.

<sup>93</sup> See Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11(4) *Human Rights Law Review* 609–44; Tom Sparks, *Self-Determination in the International Legal System: Whose Claim to What Right?* (Hart, 2023) 1–39.

<sup>94</sup> Wall (n 2) 380.

<sup>95</sup> *Ibid.*, 380.

<sup>96</sup> Kalyvas, 'Popular Sovereignty' (n 62) 232–33 cited in Jacobsohn and Roznai, (n 10) 234, citing Georges Burdeau, 'the constituent power is not a mechanism of peaceful times but an actor of critical periods.' *Traité de science politique: le statut du pouvoir dans l'état*, vol. IV (Paris: Librairie générale de droit et de jurisprudence, 1983), 177.

<sup>97</sup> Tushnet, 'Utopian Thinking for Progressive Constitutionalists' (n 2).

<sup>98</sup> Moylan, 'Next Steps' (n 20) 186. Nicholson warns of the same effect in international law, where the blueprint utopias fail to break out of the contemporary societal, political, and economic constraints that give rise to structural injustice and inequalities. See, Nicholson (n 22) 3.

In her construction of *feminist potencia*, Verónica Gago approaches constituent power as a desire to rethink everything.<sup>99</sup> It is a call to displace the ‘limits that we have been made to believe and obey’, and as such, constituent power becomes about challenging constitutional theorists to reimagine the very contours of what is possible.<sup>100</sup> *Feminist potencia* reconceptualizes the very foundations of how constitutional scholarship has approached constituent power. It seeks to problematize the binary between constituent and constituted power, as well as dismantle the distinctions drawn between radical revolution and evolutionary reform, and recognize the dual destructive and constructive potential of constituent power.<sup>101</sup> In this respect, Gago’s approach to constituent power is ‘utopian,’ for an exercise of *feminist potencia* would radically break from the current model of constitutionalism and the role constituent power is afforded within that model. Adopting Jameson’s approach, though, adds a cautionary note to check for remnants of hegemonic structures that might scupper the more radical aims of *feminist potencia*.

Jameson’s negative construction of utopia as something that we cannot imagine is, therefore, useful to identify the limits of the current political system. This is to some extent related to the cognitive estrangement role of utopian literature, which allows readers to reflect on the current state of the world.<sup>102</sup> What Jameson is saying is that through engaging with and reading utopias, we are forced to confront how we are trapped by current political and social constraints, and cognitive estrangement works to force readers to reflect on the contemporary structures and to picture how they could be different. Drawing on this cognitive estrangement, Mao argues that rather than focusing on how different utopias might seek to reorient the world, its institutions and practices, the value of utopia is how they can be used to expose the *injustices* in the present.<sup>103</sup> In that sense, Thomas More’s *Utopia* is useful for the critique of Tudor England. If, as Jameson argues, the function of utopia is to identify current limits of our political systems and current limits of our political imaginations, certain claims for constituent power work to expose these.<sup>104</sup>

Jameson’s radical-break approach to utopia raises two questions for studies of constituent power: one question concerns the threshold of ‘radical’ and therefore the need to interrogate the ongoing role of the current or previous constitutional order; the other question is around challenging the limits of current political imaginations. We can revisit Landau and Dixon’s claim that the constitutional process in Chile was (too) utopian and thus (doomed) to fail.<sup>105</sup> Rather than only focusing on the ‘failures’ of the social movements, drawing instead on Jameson’s insistence on the impossibility of the radical break<sup>106</sup> reminds constitutional scholars to ask questions about what the articulation of constituent power demonstrated about the failures of the current order, and to also consider the roles of the

<sup>99</sup>Verónica Gago, *Feminist International: How to Change Everything* (Verso, 2020).

<sup>100</sup>*Ibid.*, 2.

<sup>101</sup>*Ibid.*, 251.

<sup>102</sup>Suvín (n 88) 13.

<sup>103</sup>Douglas Mao, *Inventions of Nemesis: Utopia, Indignation, and Justice* (Princeton University Press, 2020) 50. See also Ruth Houghton, ‘Inventions of Nemesis: Utopia, Indignation, and Justice by Douglas Mao, Princeton and Oxford: Princeton University Press, 2020. 284 pp. ISBN: 9780691212302 £20.99.’ (2023) 19(1) *International Journal of Law in Context* 91–5.

<sup>104</sup>For example, Houghton and O’Donoghue highlight the way feminist manifestos – which are forms of utopian-praxis – through the critique and rejection of the political and social order are examples of claims for constituent power. See Ruth Houghton and Aoife O’Donoghue, ‘Manifestos as Constituent Power: Performing a Feminist Revolution’ (2023) 12(3) *Global Constitutionalism* 412–37.

<sup>105</sup>Landau and Dixon (n 2) 231.

<sup>106</sup>Jameson, ‘A New Reading of *Capital*’ (n 15) 13.

contemporary political, social, economic and constitutional order that might have worked to temper the constitutional moment.

### *Impulse or longevity*

As discussed above, there are features that social movements and political parties need to espouse to be recognized as successful constituent power holders.<sup>107</sup> The section on 'Constitutional Change' demonstrates that for Landau and Dixon, there needs to be structural and sociological affinities,<sup>108</sup> and for Niesen, movements cannot be too fleeting.<sup>109</sup> These features include ideas of seriousness and of being organized, but they also include temporal vectors such as being non-ephemeral and having a sufficient longevity. These place limitations on constituent power that might work to render invisible claims that emanate from more marginalized groups of society, and those that might not be sufficiently resourced to meet these standards. The concern is that short-lived, ephemeral, or everyday impulses towards utopia might not be identified, recorded, or archived as evidence of claims to constituent power because they do not meet the temporal vectors associated with 'successful' political movements within constitutional scholarship. Reading constituent power through the Jameson lens of utopia as an 'impulse' challenges the role of these temporal markers.<sup>110</sup>

In his work, Jameson draws a distinction between the utopian 'program' and the utopian 'impulse'.<sup>111</sup> A utopian 'program', like a blueprint, 'aims at the realization of a utopia' and is accompanied with a sense of closure and totality.<sup>112</sup> For Jameson, a utopian program can vary in scale from 'whole social revolution, on a national or even world scale, all the way down to the design of the uniquely utopian space of a building or garden'.<sup>113</sup> In contrast, the utopian 'impulse' seeps into the everyday.<sup>114</sup> The impulse is more fragmentary, diffuse and iterative.<sup>115</sup>

An exercise of constituent power might be conceptualized as a 'utopian program', where that power is exercised to adopt a new constitution. In contrast, if the utopian impulse is fragmentary and diffuse, shifting to the 'impulse' requires a broader view of what activities count as claims to constituent power.

Conceptualizing constituent power as an impulse would both facilitate the possibility of an ongoing articulation of power beyond the constitutional moment and open up discussions about constituent activities that might (in the terminology of Nico Krisch)<sup>116</sup> be understood as an 'irritant.' For Krisch, the *pouvoir irritant* refers to acts that disrupt the

<sup>107</sup>For a discussion, see Ruth Houghton, 'Feminist Critiques of Constituent Power in Global Constitutionalism' in Raffael N Fasel and Lars Vinx (eds) *The Limits of Constituent Power* (Cambridge University Press, forthcoming).

<sup>108</sup>Landau and Dixon (n 2) 231.

<sup>109</sup>Niesen, 'Reframing Civil Disobedience' (n 64) 43.

<sup>110</sup>Jameson, 'Utopia as Method' (n 48) 25.

<sup>111</sup>Ibid., 25.

<sup>112</sup>Ibid.

<sup>113</sup>Ibid.

<sup>114</sup>Munoz (n 16) 22.

<sup>115</sup>Jameson, 'Utopia as Method' (n 48) 25. For similar ideas about an iterative form of utopia, see 'critical utopias' in Moylan, 'Next Steps' (n 20).

<sup>116</sup>Nico Krisch, 'Pouvoir constituant and pouvoir irritant in the postnational order' (2016) 14(3) *International Journal of Constitutional Law* 657–79.

contemporary constituted powers but fall short of constituent power because they do not aim towards reconstitution. In other words, these ‘irritants’ are activities that critique the system and, as such, call for change, but do not necessarily (as of yet) have fully formed manifestos for alternative constitutional arrangements. Movements such as Occupy have been conceptualized as examples of articulations of constituent power, despite not setting out a programme for constitutional change.<sup>117</sup> These irritant activities might be more ephemeral in nature and possibly short-lived. However, Jameson’s utopian impulse captures these more diffuse or iterative examples and as will be explored in the next section, even these short-lived examples of utopia can have a longer lifespan as they inform future utopian thinking and activities.<sup>118</sup>

Niesen’s distinction between articulations of constituent power and exercises of constituent power can also be read through the lens of the utopian impulse.<sup>119</sup> For Niesen, whilst an exercise of constituent power is constitutive, the function of an articulation of constituent power is to expose the failures and exclusions rendered possible by contemporary constitutional orders, to expose the legitimacy deficit in these orders and to hold the constituted powers accountable.<sup>120</sup> The utopian impulse, through its cognitive estrangement function, also works to expose the failings and limits of the status quo. Reading constituent power through the utopian impulse acts as a reminder that the power can be both constitutive and destructive, for it serves as a critique of contemporary constitutional orders. These impulses, critiques, articulations might be more ephemeral in nature – found in manifestos or overheard in the informal spaces of protest camps – and as such, not only does this reading of utopia offer an alternative temporality or timeline for constitutional change, but also serves as an invitation for constitutional scholarship to revisit the sources it uses to identify and evaluate claims to constituent power.

### A moment in time

In constituent power discourse, the exercise of power is often tied to a particular constitutional moment.<sup>121</sup> This is very often the moment at which a constitution is adopted but might also extend to cover the drafting of the constitution through the processes of a constituent assembly. Some scholars would then conclude that the power is exhausted in that moment.<sup>122</sup> Even for scholars who recognize the possibility of a re-emergence of constituent power, the exercise of such power happens within a particular constitutional moment. For example, for Landau and Dixon, the Chilean moment was a one-off moment (albeit a failure). The risk with this approach is that any ongoing effects, impacts or outcomes after the fact are constructed out of the constitutional analysis.

<sup>117</sup>See Ruth Kinna, Alex Prichard and Thomas Swann, ‘Occupy and the Constitution of Anarchy’ (2019) 8 *Global Constitutionalism* 357–90; Peter Niesen, ‘Introduction: Resistance, Disobedience or Constituent Power? Emerging Narratives of Transnational Protest’ (2019) 15(1) *Journal of International Political Theory* 2–10.

<sup>118</sup>Laurence Davis, ‘Grounded Utopia’ (2021) 32(3) *Utopian Studies* 552–581.

<sup>119</sup>Niesen, ‘Reframing Civil Disobedience’ (n 64).

<sup>120</sup>*Ibid.*

<sup>121</sup>For a discussion see, Fernando Atria, ‘Constituent Moment, Constituted Powers in Chile’ (2020) 31 *Law and Critique* 51–8.

<sup>122</sup>For a discussion see, Loughlin and Walker (n 9) 6.

In contrast, Miguel Abensour's theory of a utopia as persistent<sup>123</sup> can be brought into conversation with constituent power. Rather than equate this persistence to an eternal utopia, which Abensour argues would be a conservative project, 'the expression 'the persistence of utopia' designates a stubborn impulse toward freedom and justice'.<sup>124</sup> This means that utopia is iterative and ongoing, always becoming, rather than momentary or tied to a particular 'event' in time and space. Any political event or experience would need to be continually open to the possibility of change.<sup>125</sup>

Abensour argues that utopianism requires 'incorporating the drive towards alterity'.<sup>126</sup> This is in direct contrast to the critics of utopianism that see utopia as a drive towards homogeneity that ultimately risks totalitarianism.<sup>127</sup> This drive to 'alterity' works to ensure that 'democracy never settles into an absolute form' and instead leaves 'open the possibility of self-renovation or re-founding'.<sup>128</sup> As this quote shows, Abensour's approach to utopia is connected to his conceptualization of democracy,<sup>129</sup> and the idea of a re-founding speaks to notions of constituent power.

Within constituent power scholarship, there is a debate on the relationship between constituent power and democracy. This debate is framed around questions of procedural and normative limitations on constituent power,<sup>130</sup> whether the exercise of the power needs to be democratic, whether it needs to be representative and whether it needs to lead to a democratic outcome.<sup>131</sup> What a focus on utopia shows is that there is also a temporal question. Whilst for Kalyvas, the utopian aspects of democracy are trammelled within the 'normal times' with social movements operating alongside institutions but not departing from the constitutional order,<sup>132</sup> for Abensour democracy maintains its 'utopian' ideals through constituent power; 'democracy must be utopianism to avoid regressing into "normal politics"', where normal politics is understood as being within constituted power.<sup>133</sup> Democracy within constituted power becomes about procedure; elections, representatives, voting and referenda. This is in contrast to the radical potential for democracy to be always becoming – not yet done or achieved – to be open to grassroots movements, to facilitate the voice of the oppressed, marginalized and excluded. Constituent power, instead, allows for this sort of expression of power outside of formal democratic procedures. This reaffirms the radical extra-legal potential of constituent power.

Rather than an account of constituent power that is tied to a particular constitutional moment and understood as exhausted at that point, constituent power in this approach is iterative and ongoing. Other constitutional theorists maintain an understanding of constituent power as ongoing. Lawson for example, argues that constituent power acts

<sup>123</sup> Abensour, 'Persistent Utopia' (n 81).

<sup>124</sup> Ibid., 407.

<sup>125</sup> Paul Mazzocchi, 'Insurgent Democracy and the German Councils' in G Kets and J Muldoon (eds), *The German Revolution and Political Theory* (Springer, 2019) 279.

<sup>126</sup> Mazzocchi, 'Beyond the Education of Desire' (n 72) 106.

<sup>127</sup> For a discussion see, Ibid., 106.

<sup>128</sup> Ibid., 106.

<sup>129</sup> Abensour, 'Persistent Utopia' (n 81) 416.

<sup>130</sup> For example, Arato, *Post Sovereign* (n 8); Roznai, 'The Boundaries' (n 8).

<sup>131</sup> Neil Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39(3) *Rechtsphilosophie & Rechtstheorie*, 206–33.

<sup>132</sup> Kalyvas, *Democracy and the Politics of the Extraordinary* (n 56) 298–99.

<sup>133</sup> Mazzocchi, 'Beyond the Education of Desire' (n 72) 106.

as an ongoing accountability check on constituted power.<sup>134</sup> Yet, Abensour's approach moves constituent power beyond this accountability mechanism and instead shows the recognition of the need for constituted power to be 'open' to radical alternatives.<sup>135</sup>

The more iterative nature of constituent power that this approach to utopia has uncovered raises questions about how to respond to either articulations of constituent power outside of the constitutional moment or potential ongoing effects after an exercise of such power. As will be explored in the next sub-section, utopian thinking can be used to rethink approaches to these concerns.

### *Ongoing effects*

Understanding constituent power either as an impulse or as being persistent challenges the idea of a 'constitutional moment' and necessitates alternative methods for conceptualizing constituent power. Within sociology, Levitas proffers a conceptualization of utopia as a method.<sup>136</sup> For Levitas, there are three methodological functions of utopia: an archaeological method that seeks to uncover the utopian aspirations of political projects, as well as the silences and inconsistencies of these projects;<sup>137</sup> an architectural method that concerns the 'imagination of potential alternative scenarios for the future';<sup>138</sup> and the ontological method which is more concerned with facilitating the development of utopian-thinkers, to create spaces to allow people to 'dream.'<sup>139</sup> It has been shown how Levitas' method can contribute to legal scholarship:<sup>140</sup> the archaeological mode facilitates questions on whose utopia is being supported through law and who is excluded, and can act as a reminder for constitutional scholars to question whose articulations of constituent power or attempts to activating constituent power are ignored, and the architectural mode – with its emphasis on the plurality of provisional visions of the future – prompts constitutional scholars to seek out the utopian impulse in non-traditional sites, locations and sources.

The archaeological approach is a process of revisiting utopias and utopian projects. Part of this approach involves an excavation of the exclusions and silences within previous utopian exercises, to explore who benefited and who suffered, as well as offering an opportunity for an interrogation of the 'fault-lines' to consider why the project failed.<sup>141</sup> This opens up a space for revisiting so-called 'failed' utopias. Davis, for example, reminds us that past utopian experiments and even short-lived examples of utopia can have a longer lifespan as they inform future utopian thinking and activities.<sup>142</sup>

<sup>134</sup>George Lawson, *Political Sacra et Civilis* (Cambridge MA: Cambridge University Press, 1992) cited in Joel Colón-Ríos, 'Five Conceptions of Constituent Power' (2017) *Victoria University of Wellington Legal Research Papers* No 127/2017.

<sup>135</sup>For a discussion on open constituent power see, Wall (n 2).

<sup>136</sup>Tom Moylan, 'Introduction: Becoming Utopian: Dystopian Time, Utopian Turn' in Tom Moylan (with Ruth Levitas, and Philip E Wegner (eds)), *Becoming Utopian: The Culture and Politics of Radical Transformation* (Bloomsbury, 2022) 20.

<sup>137</sup>Levitas, *Utopia as method* (n 17) 61.

<sup>138</sup>*Ibid.*, 153.

<sup>139</sup>*Ibid.*, 153.

<sup>140</sup>Ruth Houghton, Nikki Godden-Rasul, Aoife O'Donoghue and Sara Vincenzotti, 'Abolition Feminism and Utopian Justice: Speculative Visionary Fiction and the End of Gendered Violence' in Nikki Godden-Rasul and Lucia Kula (eds) *Research Handbook on Gender Violence and Law* (Edward Elgar, forthcoming).

<sup>141</sup>For a discussion on fault-lines, see Mathias Thaler, *No Other Planet: Utopian Visions for a Climate Changed World* (Cambridge University Press, 2022).

<sup>142</sup>Davis (n 74).

Levitas' approach to utopia as method<sup>143</sup> offers an alternative starting point for constitutional discussions on constituent power. Utopias can provide evidence of articulations of constituent power – so that even where these 'failed' or go unheard in their contemporary politics – they can be excavated and recovered. Rather than merely stopping at a 'finding' that an articulation of constituent power, such as the Chilean example, was a 'failure', Levitas' archaeological method ensures that these projects continue to have utility; 'Even as they fail, they operate as a critique of the present and a reconstitution of the future'.<sup>144</sup> Where Landau and Dixon write off Chile's constitutional process in 2022 as a failed 'utopian' experiment,<sup>145</sup> revisiting Chile's constitutional processes through Levitas' lens of utopia as a method opens up the potential to see the ongoing impacts of that process,<sup>146</sup> and such effects might inform future utopian thinking, and as such, future constituent processes.<sup>147</sup>

These are only some of the different ways in which utopia can be theorized, but what it shows is that there are different approaches to utopia and utopianism that could be used in constitutional scholarship to expose how constituent power is conceptualized and to offer alternative methodological tools for the study of that power. Moving beyond a blueprint, futuristic or programmatic understanding of utopia, to incorporate ideas of fragmentary utopian impulses, a persistent utopia, or utopia as a method, and complicating utopia's relationship with the past and future, offers different ways for constitutional scholarship to engage with utopia. These approaches to utopia highlight the need to raise questions about the nature of change, to interrogate how hegemonic structures and epistemological foundations can limit the scope of constituent power, and how temporal assumptions around the longevity and the idea of a 'moment' can shape how exercises of constituent power are identified, evaluated and evidenced. Drawing on these theories of utopia shows the need to capture the iterative, ongoing and informal articulations of constituent power.

## Conclusion

Articulations of constituent power,<sup>148</sup> as the radical demand for alternative constitutional structures, can be said to be propelled by a utopian impulse.<sup>149</sup> But commonly, constitutional scholarship utilises utopia as a criticism. To move beyond mere pejorative uses of utopia in constitutional scholarship, this article draws on the wider scholarship on utopianism to provide alternative readings of articulations of constituent power. Reading constituent power through different approaches to utopia exposes the temporal assumptions that underpin constructions of constituent power in constitutional scholarship. In addition to exposing the temporal assumptions and offering alternative temporalities for constituent power, reading constituent power through the lens of utopianism raises a series of questions for constitutional scholarship.

<sup>143</sup> Levitas, *Utopia as Method* (n 17).

<sup>144</sup> *Ibid.*, 220.

<sup>145</sup> Landau and Dixon (n 2).

<sup>146</sup> Ongoing discussions – especially within feminist constitutional discourse – about the Chilean constitutional process highlight the ongoing effects of this "utopian" exercise. Thank you to Natalia Cerda Morales for introducing me to these ideas.

<sup>147</sup> Davis (n 74).

<sup>148</sup> Niesen, 'Reframing Civil Disobedience' (n 64).

<sup>149</sup> Jameson, *Archaeologies of the Future* (n 15); Levitas, *Utopia as Method* (n 17).

These questions include what limitations are placed on who can hold or exercise constituent power, when can that power be exercised and what changes can be made. As the section on 'Utopia in constitutionalism' shows, the futuristic reading of utopia serves as a critique that can impact how constituent power is identified. The section on 'Beyond the pejorative: Utopias and constituent power' then demonstrates how different theories of utopia offer reflections on constitutional epistemologies and methodologies. As Gago notes, *feminist potencia* requires rethinking everything.<sup>150</sup> Indeed, Levitas states that utopian thinking is a form of knowledge-generation,<sup>151</sup> and Kathi Weeks argues that utopias 'disable those epistemologies and habits of thinking that [...] bind us to the present'.<sup>152</sup> Reflecting on utopian thinking forces us to reconsider our sources, and influences where we look for articulations of constituent power.

This interaction with utopian thinking can also be used to reflect on constitutional scholarship as a discipline more broadly. Though situated within international law, Akbar Rasulov notes the ideological conservatism within international law, and how an anti-utopian stance is driven by the need for self-preservation of the archetypal international lawyer.<sup>153</sup> In a similar vein, the approach to utopia – and in particular the predominance of using utopia pejoratively – can be interrogated for what this can tell us about constitutional law's approach (as a discipline) to the scope and nature of constituent power. For Landau and Dixon, comparing utopian constitutionalism with its transformative counterpart 'ought to be sobering', as a way of curtail the potential of transformative projects.<sup>154</sup> This tempering is not uncommon within constitutional literature, where the power of people can be restrained through certain conceptualizations of constituent power.<sup>155</sup>

An additional utility of reading constituent power alongside utopian thinking is that it has the potential to expose the collective imaginaries that underpin a process of constitutional change. Drawing on Levitas' archaeological method<sup>156</sup> can encourage constitutional scholars to ask about the ideologies that inform a constitutional process; better for whom, being just one question that could be asked.<sup>157</sup> Indeed, Weeks argues that liberalism had 'utopian origins' that it abandoned on becoming 'a dominant ideology'.<sup>158</sup> Operating as Levitasian-archaeologists, constitutional scholarship can interrogate those historical articulations of constituent power based on liberal demands and question who would benefit from those once-upon-a-time utopian experiments and who would be excluded and marginalized from the utopian project.

Utopia is more than just a label we can use to dismiss radical attempts to bring about constitutional change. As this article demonstrates, drawing on cross-disciplinary

<sup>150</sup>Gago (n 99) 2.

<sup>151</sup>Levitas, *Utopia as Method* (n 17) xv.

<sup>152</sup>Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Duke University Press, 2011) 205.

<sup>153</sup>Akbar Rasulov, "From the Wells of Disappointment": The Curious Case of the International Law of Democracy and the Politics of International Legal Scholarship' (2021) 32(1) *EJIL* 17–47. See also Houghton, 'Inventions of Nemesis' (n 103).

<sup>154</sup>Landau and Dixon (n 2) 237.

<sup>155</sup>Jacobsohn and Roznai, (n 10) 256; Colón-Ríos, *Constituent Power and the Law* (n 11) 23; Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press, 2020) 210.

<sup>156</sup>Levitas, *Utopia as Method* (n 17).

<sup>157</sup>See for example, Houghton and O'Donoghue, "Ourworld" (n 31).

<sup>158</sup>Weeks (n 152) 177.

theories of utopia raises questions about how constituent power is identified, evaluated and analyzed within constitutional discourse.

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