

# Towards an Institutional Vision of Constituent Power?

Rafael Macía Briedis\*

\*Indiana University, USA, email: rmacia@indiana.edu

Joel COLÓN-RÍOS, *Constituent Power and the Law* (Oxford University Press 2020)

Markus PATBERG, *Constituent Power in the European Union* (Oxford University Press 2021)

Lucia RUBINELLI, *Constituent Power: A History* (Cambridge University Press 2020)

## WHY CONSTITUENT POWER?

Constituent power is a tricky idea. At least in its democratic form, it generally refers to ‘the people’s’ authority to constitute a new legal-political order in a fully autonomous fashion, that is, without being bound by the normative strictures of a preexisting legal framework.<sup>1</sup> As such, constituent power is often seen as the ultimate expression of democratic self-determination: it highlights the people’s role as the original, self-constituted source of authority behind the norms governing the polity, and it signals, at least in principle, the people’s capacity to transcend those same norms during extraordinary moments of constitutional transformation.

At the same time, the very idea of a power situated beyond the reach of existing laws and institutions can be easily read as an invitation to arbitrariness and abuse

<sup>1</sup>As the works analysed below make clear, constituent power is in fact a contested concept, one whose actual meaning and implications are very much subject to dispute. Nevertheless, I am providing here a ‘working definition’ to situate any reader unfamiliar with the idea within the boundaries of the discussion.

*European Constitutional Law Review*, 19: 390–414, 2023

© The Author(s), 2023. Published by Cambridge University Press on behalf of the University of Amsterdam. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.  
doi:10.1017/S1574019623000056

by self-interested political actors. Indeed, it is not uncommon for would-be autocrats to invoke the people's constitution-superseding authority as a way of getting around inconvenient amendment norms, thus leaving the path open for reforming or replacing the constitution in a manner that will secure a political leader's or movement's hold on power – oftentimes under the cover of plebiscitary mechanisms designed to avoid supermajoritarian or other checks on the possibility of one-sided constitutional change.

Constituent power's duality – as a vessel of both democratic promise and authoritarian peril – has made it an attractive object of study for scholars interested in understanding the relationship between the people and their constitutional regime. Among the more recent scholarly efforts to make sense of the concept, three works stand out for their rigorous research and nuanced discussion of constituent power's meaning and implications. The works are Joel Colón Ríos's *Constituent Power and the Law* (Oxford University Press 2020), Markus Patberg's *Constituent Power in the European Union* (Oxford University Press 2021), and Lucia Rubinelli's *Constituent Power: A History* (Cambridge University Press 2020).

Each in their own way, the three works make the case that constituent power *can* in fact provide a helpful paradigm from which to advance the people's democratic agency. In making such a case, all three authors put forth (explicitly or implicitly) what may be best described as a moderate view of the idea, one that understands constituent power as an authority potentially subject to norms and limitations, rather than as an unrestrained and arbitrary political force. They do so, however, from three very different perspectives: that of a historian of political thought mapping the different ways in which the language of constituent power has been used since the late eighteenth century (Rubinelli); that of a constitutional scholar seeking to advance a particular understanding of constituent power in its relation to the law (Colón Ríos); and that of a political theorist putting forth his own original theory of supranational constituent power in an effort to articulate a path forward for a more democratic EU (Patberg).

Underlying each of these perspectives is the idea that there exists some fundamental connection between constituent power and modern democratic constitutionalism, a connection that all three books attempt to articulate more or less explicitly. As we will see over the course of the present review, however, grounding that connection – and, particularly, constituent power's alleged quality as the 'democratic' ingredient in constitutional democracy – is a difficult task. Over the next few sections, we will look at how each of the authors navigates the conceptual difficulties of an idea whose political implementation can have very significant consequences for the relationship between democracy and the law.

CONTESTED LANGUAGE/LANGUAGE OF CONTESTATION: RUBINELLI'S  
*CONSTITUENT POWER: A HISTORY*

*Constituent power v absolute sovereignty*

Of the three works being discussed here, Rubinelli's *Constituent Power: A History* is, from a prescriptive standpoint, arguably the least ambitious. Far from being a problem, this is very much in line with the book's own stated goal: to present a history of constituent power, not as a specific idea with a concrete, discernible content, but as a *language* used to articulate, at different points in time, different understandings of 'the meaning and implications of the principle of popular power' (p. 3). This approach clearly distinguishes Rubinelli's endeavour from that of most authors writing on the subject, as it places a unique emphasis on the oftentimes unacknowledged contingency of any one definition of 'the people's' power. As Rubinelli explains in the introduction (p. 29):

popular power is not an empirical object to be observed, an actual attribute of the people [that] exists beyond, and independently from, our attempts to rationalise it. [...] In a way, history shows that instead of describing the reality of popular power, constituent power has been used to bring it into existence. And the way in which it did so changed over time.

How exactly it has changed over time is precisely what Rubinelli sets out to explore, through a narrative comprised of five episodes differentiated either by their respective historical contexts (albeit, I should note, without much geographical diversity) or, in the case of the last two, by the different approaches of the contemporaneous thinkers being studied. Beginning with her discussion of Emmanuel Sieyès and the French Revolution, to which she traces the first systematic use of the language of constituent power, Rubinelli then looks at that language's re-introduction in nineteenth-century France, before moving on to Carl Schmitt's work during the Weimar Republic, to the post-World War II theories of Böckenförde, Mortati, and Vedel, and, finally, to Hannah Arendt's thoughts on revolutionary new beginnings.

It is through her initial exploration of Sieyès's thought, however, that Rubinelli sets the stage for what will become the book's central theme: the inappropriateness of subsuming the notion of constituent power under mainstream theories of sovereignty, in relation to which the language of constituent power has historically played a contestatory role – either by challenging the idea of sovereignty itself, or by endeavouring to re-articulate its contents. Thus, Rubinelli begins by arguing (quite persuasively) that Sieyès's notion of constituent power – far from being (as commonly thought) a theory of sovereignty that portrays the nation's will as an absolute, uncontrollable authority situated above constitutional constraints – was

actually developed as an *alternative* to the totalising idea of sovereignty, be it popular or national. Under this interpretation of Sieyès, grounded in a comprehensive study of his manuscripts and lesser-known writings,

the supreme political authority, the constituent power, entails exclusively the power to authorise the creation of the political order through the election of representatives entrusted with the task of writing the constitution. Once the constituted order is created, the people's constituent power is present only indirectly, as expressed and enforced through the rules established in the constitution (p. 47).

This interpretation, in turn, becomes for Rubinelli a sort of lens through which to look at the way in which the language of constituent power has evolved over time. Indeed, despite the book's genuine commitment to historiographical objectivity, one gets the impression that, for Rubinelli, Sieyès's conceptualisation of constituent power provides the template against which other conceptualisations will be judged, either as developments of the original or as corruptions/misinterpretations. As Rubinelli herself acknowledges in the conclusion (p. 227), her book might actually be read as 'an intellectual history of Sieyès in general and of the reception of his idea of constituent power in particular', with every chapter after the first one focusing on how 'different authors have read, understood and interpreted Sieyès's political thought'.

The prominent role that Rubinelli assigns to Sieyès within her larger historical narrative is perhaps most visible in her analysis of Schmitt, whose theory she sees as marking 'a fundamental turning point in the history of constituent power' (p. 140), insofar as it signalled the concept's full identification with the notion of sovereignty – understood by Schmitt as the power to adopt the final (discussion-ending) decision on political matters for which no norm can provide a definitive answer, as is the case with the truly *constituent* decision (the one that decides on the existence of a legal order or on the suspension of an already-existing one). Importantly, for Schmitt, the pre-normative nature of sovereignty meant that its exercise could not be made to depend on established institutions or procedures. Therefore, as Rubinelli correctly notes, the attribution of a sovereign (constituent) power to 'the people' or 'the nation' (itself a purely existential reality grounded in a friend-enemy distinction) was premised for Schmitt on the intervention of an existential 'representative' capable of giving concrete shape to the nation's pre-legal will and of translating it into a specific constitutional outcome, typically through extra-procedural means like an 'acclamation' endorsing (and giving force to) the representative's vision for the polity.

Here, Rubinelli argues, Schmitt is appropriating Sieyès's idea of constituent power (particularly, its emphasis on representation) and twisting it in support of his own preference for a dictatorial figure whose decisionistic power may

provide an antidote to those features of parliamentary democracy that he considered so harmful to the ideal of national unity. In Rubinelli's words, Schmitt 'was careful to read in Sieyès what interested him the most: that constituent power did not belong to the multitude but only to the nation which, being an abstract entity, could only act through representation and only in rare moments of constitutional founding'. This, in turn, would have allowed Schmitt to 'reinsert, through the figure of the president as the representative dictator, the personalistic and decisionistic elements of sovereignty he feared would be lost in modern democracy' (p. 137). But, and here's the crux of Rubinelli's point, 'neither the intellectual premises nor the institutional consequences of Schmitt's reasoning are consistent with Sieyès's thought and intentions'. Rather, 'Schmitt's misinterpretation of Sieyès's intellectual premises' is what allowed him to turn the office of the president into what Sieyès had dreaded the most: an all-powerful figure claiming the exclusive representation of the nation (p. 138). This she finds particularly problematic, in that Schmitt's reading of Sieyès has become, despite its 'peculiar and tendentious nature', the standard lens through which the French thinker has been interpreted ever since; indeed, it has by now been accepted as a reliable insight into the origins of the idea of constituent power (p. 139).

Yet this critique also tells us something about Rubinelli's own historical analysis. For it shows that, despite the seeming normative detachment underlying her narrative, the author *does* have an axe to grind. In particular, she appears to be concerned about the elevation of Schmitt's theory to the standard by which the idea of constituent power will be understood – to the detriment of Sieyès. Rubinelli's challenge to Schmitt's interpretation, in turn, is indicative of a wider normative aim: to rescue the Sieyèsean (moderate) vision of constituent power from the danger of being subsumed under Schmitt's theoretical framework and thus rendered obsolete as a theoretical contribution with a value of its own, having instead become a mere stepping stone in the road towards Schmitt. By denouncing Schmitt's 'misinterpretation' of Sieyès's conceptualisation, then, Rubinelli's book arguably seeks to carve out a space where that conceptualisation – and an institutional ideal of representation more broadly – may still claim a role in our understanding of constituent authority.

### *The spectre of Schmittian decisionism*

Schmitt's shadow, however, is not as easy to evade as Rubinelli's critique suggests. Indeed, if the German thinker's conceptualisation of constituent authority ultimately eclipsed the Sieyèsean one, it may have been precisely because of its effort to overcome the theoretical limitations of Sieyès's thought by centring on a question that the latter never satisfactorily explained (and that Rubinelli's historical narrative is not centrally concerned with): the meaning of 'the nation' as a

constituent entity somehow situated at the source of the very law that determines the nation's nature as an articulate unity.<sup>2</sup> This is in fact a difficulty that plagues much of the discussion around the people's constituent power, and for which Schmitt's decisionism may be understood as a coherent (if troubling) solution: because the precise make-up and internal workings of 'the people' (as a unity capable of willing) is a *political* (and therefore, we may add, inherently contestable) question, the attribution of a legible, law-authorising will to said people outside of a preexisting normative framework (the constitution) presupposes some pre-democratic 'decision-maker' positioned to determine at what point, and in what manner, 'the people' have spoken, thereby allowing us to retrospectively ascertain the *actual* nature of the popular sovereign (its actual participants and modes of participation).

Schmitt's theory, in that sense, makes it possible to identify the nation as the source of a pre-legal constituent power, but only insofar as we observe it through the lens provided by the 'existential' interpreter of the national will – an interpreter whose title, being prior to any norm (and definitional of the very people it is supposed to represent), can only rest on power. This is a reality that Rubinelli is very much aware of when she notes that, under Schmitt's theory, the dictator's intervention 'would *create* the nation as the unitary subject, give shape to the will of the constituent power and enforce it in the form of a sovereign command' (p. 129, my emphasis). But she is then quick to dismiss the significance of Schmitt's authoritarian conclusions as a self-interested misrepresentation of Sieyès's thought, without pausing to consider whether the latter, looked at a little more closely – and regardless of what Sieyès's political motivations may have been – might not in fact lead to similar implications.

Indeed, in her effort to present a historically rigorous account of the uses of the language of constituent power – one that takes the relevant authors' claims at face value instead of judging them on their (theoretical or normative) merits – Rubinelli sometimes leaves unexplored the threads that bind the different articulations together, especially when those threads are hidden underneath the explicit formulation of an idea. Thus, for example, when (in Chapter 2) she recounts the 'success' of the notion of constituent power in post-1848 France, she grounds such success in the fact that '[t]he temporary government not only decided that popular sovereignty would be voiced through a proper Constituent Assembly (as opposed to previous constitutional commissions) but also established that it would be elected by the universality of male French citizens, so

<sup>2</sup>Indeed, Sieyès's own definition of nationhood referred to 'a body of associates living under a common law', and he later repeated that 'a nation is made one by virtue of a common system of law and a common system of representation'. See E. Sieyès, 'What is the Third State?' in M. Sonenscher (ed.), *Political Writings* (Hackett 2003) p. 97, 99. Thus the law, supposedly a product of the nation's original will, was at the same time turned by Sieyès into a definitional element of that same nation.

as to make it representative of the sovereign will' (p. 96). What we are never told, however, is how exactly 'the people' can be in any way sovereign (even if 'sovereign' is understood as 'constituent') when their sovereignty appears to rest on the *decision* of a temporary government capable, not only of determining how the 'sovereign' people shall exercise their power, but also of defining *who* shall be entitled to partake in that power (in this case, the universality of *male* French *citizens*). If this is indeed the meaning of 'the people's' constituent power within the French tradition, then perhaps Schmitt was on to something; at the very least, there would seem to be more of a continuity between his decisionistic theory and that of the nineteenth-century French intellectuals than Rubinelli cares to admit – even if their political projects radically diverged, and even if the French jurists did not bother to inquire into the underlying implications of their own proposals.<sup>3</sup>

This is precisely the reality that Hannah Arendt sought to highlight through her critique of the French preference (beginning with Sieyès) for attributing constituent power to a 'nation' whose sovereign 'will' some political figure(s) could then claim to represent. For Arendt, the very idea of a unitary national will was antithetical to the notion of popular power, since it substituted an authoritarian-prone abstraction (still requiring a figure capable of formulating the precise content of that will) for the concrete experience of politics (with its presupposition of human plurality). Rubinelli, however, takes issue with this critique, as she argues that Arendt read Sieyès only through the lens provided by Schmitt, rather than through a careful study of the French thinker's own normative aspirations: 'Arendt assumed that Sieyès's support for centralisation, representation and nationhood was enough to demonstrate his commitment to the idea of sovereignty in general and to a proto-Schmittian version of it in particular' (p. 203). In so doing, Rubinelli argues, Arendt ignored that the purpose behind Sieyès's conceptualisation of constituent power was to put forth an alternative to the totalising idea of sovereignty – the very purpose espoused by Arendt herself.

Here, however, we see Rubinelli once again choosing *not* to explore the possibility that Sieyès's motivations and beliefs might not have the final word regarding the implications (and underlying premises) of his ideas. For one might rightly wonder whether, in the final analysis, Arendt was actually correct in reading Sieyès as a theorist

<sup>3</sup>A similar point, incidentally, may be raised with regard to the post-World War II theories of Böckenförde, Mortati, and Vedel, who, Rubinelli argues, overcame Schmitt's authoritarianism by 'empirically proving' *the people's* role in 'taking the fundamental political decision that is at the origin of the political order' (p. 162), despite her earlier claim that 'popular power is not an empirical object to be observed' (p. 29), and despite the decisionistic underpinnings of any effort to identify as the source of the (unitary) 'decision' grounding the constitutional framework a normative-political abstraction like 'the people' – whose law-authorising agency must remain, at the time of its identification, a contestable construct no matter how much we may try to sociologically rationalise it after the fact.



of sovereignty *even against Sieyès himself*. After all, no matter the 'extraordinary' nature of the constitution-superseding power that the French thinker attributed to 'the nation', and no matter the moderating effects that he ascribed to the exercise of popular authority through elected representatives with limited authority, his concept of a pre-legal constituent power still presupposed a self-standing nation capable of *willing* even in the absence of a legible normative framework to determine how the nation's will is to be constructed in the first place.

And this is the case even if the exercise of such will is for the limited purpose of authorising the task of constitution-making and electing representatives, both of these being acts that, in the absence of a specific normative referent, still beg a myriad of questions regarding the nature, size, and composition of the relevant constituencies, the qualifications for individual enfranchisement, and indeed the very conditions that will warrant the 'decision' to convene an extraordinary assembly for a given (or perhaps not so given?) population and territory. An answer to any of these questions, then, would seem to presuppose some kind of (Schmittian) 'sovereign', some *concrete* wielder of power capable of issuing a concrete will and endowing it with a binding character even against the opposition of those who disagree. Otherwise, there would be no 'unity' behind the nation and, without it, no national 'will'. *Precisely* because 'the nation' is an abstract entity whose will can only be a mediated one, then, its elevation to the (pre-legal) subject of constituent power must itself bring about the domination-related dangers of sovereign will-formation that Arendt was so concerned about, despite any attempt at presenting the nation's agency in a more palatable way. Rather than simply 'misunderstanding' Sieyès's thought, it is therefore possible to conceive of Arendt as looking beneath the surface of the French thinker's claims and discovering that, in the final analysis, his assumptions may not have been as far from Schmitt's decisionistic ideal as it might initially appear.

### *Historical objectivity and its limits*

None of this is to say that Rubinelli's rigorous historiography is itself somehow faulty. Rather, my doubts relate to the larger question of whether the kind of normative detachment that Rubinelli seeks through her purely historical account is even attainable when it comes to the study of a political-theoretical idea like constituent power; or whether, on the contrary, the aspiration towards historical objectivity, though itself legitimate, risks glossing over (or even obscuring) issues that are in fact key to a complete understanding of the language under consideration. Which would in turn entail a normative positioning of sorts, especially considering the normative nature of the categories being debated. Thus, the choice to take the different authors' claims at face value (instead of critically assessing their viability), far from being a neutral one, ends up privileging those earlier (and arguably less sophisticated)



iterations of a conceptual language whose unstated assumptions and implications later formulations may attempt to challenge or make explicit.

In that sense, we can perhaps see Rubinelli's book as taking an active role in the very history it sets out to describe. By assigning a seemingly irrefutable presumption of conceptual validity<sup>4</sup> to even the crudest articulations of 'the people's' (or 'the nation's') constituent power (to the point of dismissing later criticisms as simple misrepresentations), her narrative is contributing to normalising the association between *popular* and *pre-constitutional* authority, despite that association's not too uncommon dependence (particularly in its eighteenth- and nineteenth-century iterations) on abstract generalities that raise as many questions as they provide answers – e.g. what does it mean for 'the people' to elect 'extraordinary representatives' or to 'make the fundamental decision' about their constitutional regime during 'exceptional circumstances'? What other powers are involved in the concretisation of these issues, and who will be involved in exercising such powers? Whose voices will be privileged or displaced (based on what authority) when we attribute a legible, unitary (constitution-authorising) voice to an abstract (collective) subject?

These are questions that *need* to be answered if the notion of a democratic constituent power is to remain conceptually viable. Rubinelli's goal, however, is not to defend the conceptual viability of that notion, but to explore the way in which it has been formulated by some of its key proponents. Therefore, it may be too much to ask of her work to provide such answers. Rubinelli's contribution, rather (beyond the intrinsic value of her rich historical narrative), lies in helping us understand the contested nature of an idea whose correspondence to a preexisting reality is all too often taken for granted. By emphasising how the language of constituent power has been deployed by different thinkers for radically different normative projects – and doing so in a spirit of historical objectivity that, though inevitably informed by the author's own normative end (to reclaim the space for a non-authoritarian reading of constituent authority), provides a fresh new perspective in a field loaded with prescriptive contributions – Rubinelli brings to our attention like no other scholar the contingent, contestable meaning of 'the people's' constituent authority. Whether, in the face of that contingency, the concept of constituent power can provide a useful paradigm for resolving some of the basic dilemmas surrounding the relationship between

<sup>4</sup>See L. Rubinelli, 'Constituent Power: A Response to Critics', *Verfassungsblog*, 21 December 2020, <https://verfassungsblog.de/constituent-power-a-response-to-critics/>, visited 14 March 2023 (arguing that, because of the lack of an intrinsic reality to the idea of constituent power, all accounts of said idea are 'at a conceptual level, [...] equally valid'). This argument, in my view, does not take into account the possibility that, even in the absence of an external referent, some attempts to articulate the meaning of 'the people's' constituent power may be more internally coherent than others, or more attentive to the meaning and implications of certain categories that earlier iterations simply took for granted.

law, democracy, and the political organisation of the community is a question that other authors will have to take up. Let us then look at two recent scholarly efforts to tackle that very question.

## CONSTITUTIONALISING CONSTITUENT POWER: COLÓN RÍOS'S *CONSTITUENT POWER AND THE LAW*

### *Constituent power as a limiting force*

In *Constituent Power and the Law*, Joel Colón Ríos adopts a historical approach to the study of constituent power, one that might at first look similar to Rubinelli's – except perhaps in its much broader (and less Eurocentric) scope. Despite this initial appearance of similarity, however, we soon find that Colón Ríos's historical narrative is of a fundamentally different nature, one that is informed by the book's guiding question: to determine the proper relationship between constituent power and the functioning of the legal order. This, for Colón Ríos, is a question that *can* be authoritatively answered, and his book adopts an instrumental approach to history in an openly prescriptive effort to articulate a particular meaning of 'the people's' constituent authority, one that may in turn facilitate the concept's reformulation as a *juridically* relevant category. Differently from Rubinelli, then, constituent power is for Colón Ríos not just a contestable language without an objective referent against which to measure its content, but a concept with a core reality of its own, and the object of his work is both to elucidate that reality and to claim for it – and, particularly, for its 'popular' (as opposed to 'national') dimension – a central place in our understanding of democratic constitutionalism.

For that normative object to remain attainable, however, Colón Ríos must first render the idea of a constitution-superseding constituent power palatable from the standpoint of constitutional legality. Perhaps unsurprisingly, then, his narrative shares with Rubinelli's its emphasis on the possibility of reading constituent power as a *limited* authority separate from the notion of arbitrary sovereignty. Even as it remains supra-constitutional in nature, constituent power under Colón Ríos's formulation can be distinguished from absolute sovereignty by its circumscribed object (the creation of a new constitution) and by its self-subordination to the principle of separation of powers. Not only that: for Colón Ríos, constituent power has historically served as a limiting force in its own right. As he puts it, 'a concept otherwise associated with an unlimited jurisdiction and revolutions was strongly linked to different kinds of limits: limits on the ordinary institutions of governments, and limits on constituent power itself' (p. 128). Specifically, the possibility of distinguishing between a constituent and a

constituted power would mean that constituted authorities (i.e. the government) should not be able to exercise constituent functions, while the constituent power cannot itself assume competencies of everyday governance without thereby acting *ultra vires*. Thus, he concludes, ‘it is the rejection of constituent power that facilitates the justification of unlimited governing authority’ (p. 128).

According to Colón Ríos, this is a conclusion that necessarily follows from the concept’s historical development. And that historical development, in turn, would begin with Rousseau, whom, in a rather striking interpretation, Colón Ríos presents as a theorist of representative government, based on the Genevan thinker’s distinction between the power to enact general laws (reserved to the assembled citizenry exercising their sovereignty through the mechanism of the general will) and the task of applying such laws (assigned to a ‘government’ or body of magistrates acting under a commission from the sovereign people). This distinction – grounded in the requirement that the ‘general will’ apply to all citizens equally and therefore refrain from adjudicating particular cases – Colón Ríos translates into the traditional distinction between constitutional and ordinary lawmaking: ‘Rousseau is in fact describing here a typical system of representative democracy, where the basic constitutional framework is seen as resting in a decision of the entire people, who then elects a number of officials who are expected to carry out public acts in a manner consistent with the constitution’ (p. 42) – public acts that would include the enactment of most criminal and civil laws, for example. In other words, under Colón Ríos’s interpretation, Rousseau is simply articulating the division ‘between constituent and constituted power’ (p. 44), and doing so in a restrictive fashion that limits the assembled people’s exercise of sovereign authority to the enactment of a constitution.

This restrictive interpretation of Rousseau – though questionable for taking the generality requirement too far (as even generally applicable laws are somehow treated as ‘particular’) and for depriving Rousseau’s vision of popular sovereignty of much of its normative bite – is crucial for Colón Ríos’s project, as it provides the requisite foundation for the connection he then draws between constituent power and the law. Rightly noting how, for Rousseau, the operation of the general will within an already established constitutional framework becomes itself the subject of legal regulation – as the citizens’ assembly should only be convened in accordance with the law even if it remains free to adopt any (constitutional) laws of its liking – Colón Ríos argues that, even though a ‘properly constituted constitution-making entity’ cannot be bound by any substantive limitations on the scope of constitutional change, it must still be ‘properly constituted’ (p. 55), and its object must be restricted to the task of ‘general’ (constitutional) law-making. ‘A sovereign who engages in functions that have a particular object (e.g. a constituent assembly that adopts ordinary laws or engages in adjudicative or executive functions) is not acting as a sovereign but as a government’ (p. 44).

Colón Ríos then takes up this notion of a limited, legally mediated constituent power and follows its development throughout the eighteenth and nineteenth centuries, in an illuminating analysis that covers questions as varied as the debates around the ‘imperative mandate’ in revolutionary France, the assignation of constituent authority to ‘the nation’ rather than to ‘the people’ in early-1800s constitution-making, or the rejection of any such authority by the doctrinaire adherents to the ideal of a ‘sovereignty of reason’. To some degree, this analysis complements Rubinelli’s narrower and more systematic account by incorporating figures (like Donoso Cortés) that the latter neglects. Unlike Rubinelli, however, Colón Ríos is not *merely* interested in deciphering the historical meaning of constituent power. Rather, as noted earlier, his goal is to advance a particular understanding of the concept, for which purpose he uses the formulations put forth by different personalities as evidence of constituent power’s *actual* implications. In so doing, he is to some extent endorsing those formulations, by enlisting them in support of his normative conclusion, thus implicitly incorporating their conceptual premises into his own theory. Which would then seem to call for a particularly careful inquiry into the contemporary viability of the ideas being relied upon. Such an inquiry, however, is generally missing from Colón Ríos’s analysis. On the one hand, this is quite understandable, given the astonishing breadth of sources from which his narrative draws – ranging from French and Spanish doctrinaires to Latin American political and intellectual figures. On the other hand, considering this same breadth of sources, the absence of critical engagement can sometimes deprive the narrative of the kind of depth that might be expected if the author’s normative prescriptions are to be grounded in it.

Take for example Colón Ríos’s efforts to reclaim for ‘the people’ their proper place as the subject of constituent power, following their initial displacement (at the hands of constituent-power theorists) in favour of the more abstract ‘nation’. In his narrative, Colón Ríos sets out to prove that constituent power need not be the purview of a purely abstract agent, citing as evidence the gradual shift towards a form of constitution-making grounded in the principles of ‘participation’ and ‘majority rule’ rather than ‘exclusion’ and ‘representation’. Portraying the Colombian constituent process of 1886 as somewhat of a turning point in this regard, he quotes in support of his thesis one Cerbeleón Pinzón, a nineteenth-century Colombian jurist who claimed that “‘once it is recognised that sovereignty resides in all the members of the association”, it must be concluded that the right to exercise constituent power can only take place with the authorisation of the entire community’ (p. 143). This, for Colón Ríos, indicates a shift away from the ‘constituent power of the nation’ approach and towards a ‘constituent power of the people’ one. Yet nothing is said about how ‘the authorization of the entire community’ is any less of an abstraction (in need of representation by concrete political actors) than the idea of ‘the nation’ itself. The only qualification

accompanying the statement is that, ‘naturally, in the context of constitution-making, the entire people would elect a number of individuals tasked with the drafting of a constitutional text. And such an election, [Cerbeleón Pinzón] stated, must be direct: “Only direct election faithfully channels the people’s views and is capable of expressing the true popular will” (p. 144). Nothing in this quote – neither the meaning of the ‘entire people’ in nineteenth-century Colombia, nor the ‘naturalness’ of elections as the proper mechanism of popular ‘autorisation’, nor the presupposition of procedural immediacy behind the idea of ‘direct election’, nor indeed the notion of a ‘true’ popular ‘will’ capable of being ‘faithfully channeled’ – is problematised by Colón Ríos. Which in turn risks reducing a complex theoretical problem to a series of maxims that may sound good at the surface level, but that do not bring us any closer to solving the dilemmas of authorisation at the heart of any claim to represent the people’s constituent (pre-constitutional) voice.

### *The commissioning sovereign*

If the distinction between constituent ‘people’ and ‘nation’ is conceptually murkier than Colón Ríos makes it appear at times, something similar can be said of the idea of constituent power as a limiting force. After all, the limits that Colón Ríos derives from the theory of constituent power are themselves premised on the existence of a lawmaking authority superior to all laws. This, in turn, must render any such limits at best provisional in nature: if constituted authorities are restricted in their constitution-amending capacities by the existence of a sphere reserved to the constituent power, for example, such restriction will only remain an effective check on abuses against the constitutional order insofar as there is no successful attempt to claim the constituent power’s concurrence in the abusive endeavour. Except that what makes a claim ‘successful’ – and therefore entitled to engage in constitutional transformation – when it comes to its assumed representation of constituent authority can no longer be a question to be answered with reference to the constitutional order itself. After all, any reference to existing laws as the basis for adjudicating the *validity* of an alleged expression of constituent power would negate that power’s superiority to the law. Importantly, this introduces a fundamental uncertainty regarding the proper bearer of the authority to change the constitution; for even a reference to ‘the people’ will prove unhelpful absent a normative referent through which to ascertain, in a more or less objective way, how such people are to make their voices heard.

To his credit, Colón Ríos does recognise this element of uncertainty – imbedded in the very idea of a constitution-superseding constituent power – when he discusses (in Chapter 8) the connection between Schmitt’s decisionism and the doctrine of the ‘material constitution’. While noting the doctrine’s role in limiting

the constitution-amending jurisdiction of constituted authorities (by reserving constituent power to ‘the people’ as ‘the extra legal author of the constitution’), he admits that ‘this [Schmittian] conception has the potential of justifying unlimited acts of political power’ (p. 207, 216). Which is perhaps why the final two chapters of the book are dedicated to outlining an updated theory meant to uphold the notion of the ‘constituent power of the people’ while allaying the fear of an unaccountable exercise of power, by presenting as constitutionally practicable (and therefore as constitutionally relevant) the proposed distinction between constituent authority and arbitrary sovereignty.

Here, then, Colón Ríos turns from the descriptive to the prescriptive, putting forth a vision of constituent power according to which ‘there are certain things that [the constituent subject] cannot do’ (p. 226). Key among those things would be any action that engages in what, going back to the book’s initial interpretation of Rousseau, should be considered a function of ‘government’ – namely, any judicial, executive, or ordinary-lawmaking action.

Constituent power, from this perspective, is best understood as a special jurisdiction to issue constitutional norms; it is not the sovereign origin of the separation of powers but its creature. It can separate powers in novel ways but cannot engage in the exercise of constituted authority nor of the very powers it creates. It exists because these powers have already been divided and one can therefore speak about a special constitution-making jurisdiction different from the legislative power (p. 244).

Drawing from what he understands to be a fundamental distinction in Schmitt’s thought, between the sovereignty of absolute monarchs and the ‘sovereign dictatorship’ of an existential decision-maker commissioned by the people, Colón Ríos argues that it is precisely the fact of acting under a *commission* from the sovereign demos that prevents the constituent power from claiming for itself an unlimited authority. Thus, ‘if a constituent assembly, even if convened in violation of a constitution’s amendment rule, is acting on a commission from the true sovereign (i.e. the people in a democracy), then it must be bound by the conditions of that commission’ (p. 243). In making this claim, however, Colón Ríos strangely leaves unaddressed a key difficulty that, just a page earlier, he had traced back to Schmitt himself (and for which Schmitt’s decisionistic interpreter of the popular will was supposed to provide the solution): the lack of ‘a clear reference point’ for any entity supposed to be acting under a commission from the people – a people whose will, outside of a predetermined set of procedures, ‘is always “unclear” and has to be “shaped”’ (p. 242). Indeed, once we accept the idea that there is such a thing as a popular constituent power capable of operating outside of the existing constitutional framework, we are compelled to ask ourselves what it means for ‘the

people' to issue a 'commission' independently of the norms of democratic decision-making authorised by that very framework (including, of course, the norms governing the process of constitutional transformation).

### *Whose power?*

This question, in fact, points to a deeper problem underlying the alleged differentiation between sovereignty and constituent power: the unpracticality of such differentiation as a constraint on constituent actors' claims to authority, *precisely* because of its dependence on a legally indeterminate commissioning act. After all, the idea that constituent power is but an attribute of sovereignty being exercised by way of a commission still presupposes a sovereign entity capable of issuing such a commission. This, in turn, means that such entity, if it is to be regarded as genuinely sovereign, should be able to issue a commission that goes well beyond the limited task of writing a new constitution, particularly if it decides that a broader power is necessary to accomplish, say, a radical reorganisation of the polity. Yet, because the attribution of a unitary (law-authorising) voice to a collective entity such as 'the people' is nothing but an abstraction, the content and mode of expression of that voice must become inherently contestable once the latter is recognised to operate beyond the boundaries of a legible constitutional framework – a framework in reference to which the otherwise contingent procedural choices that mark the people's will-formation might be justified. Consequently, any commissioning act attributed to the sovereign 'people' will still require mediation by concrete agents with enough power – in a context of normative uncertainty – to settle the contingencies underlying any such act. And this in turn means that it will largely be up to those agents, now freed from the strictures of constitutional legality, to define the precise contours of the sovereign's commission – for example, by framing the exact terms of the questions to be submitted to voters in a constituent referendum, or even by deciding the specific content of the ad hoc electoral norms that the 'exceptionality' of the constituent act may arguably call for.<sup>5</sup>

<sup>5</sup>Such was indeed the case, somewhat ironically, with the very referendum that Colón Ríos cites to illustrate his vision of a popularly issued constituent mandate: the one that initiated the (extrac-  
onstitutional) 1999 constituent process in Venezuela. Arguably, it was the referendum's extremely  
broad and executive-formulated language (asking voters whether they wanted to convene a consti-  
tuent assembly for the purpose of 'transforming the state and creating a new juridical order') – rather  
than the executive's ex-post manipulation of 'the people's' straightforward commission, as Colón  
Ríos argues – that ultimately facilitated the concentration of all state power in the hands of the  
President's supporters by means of a runaway constituent assembly elected through ad hoc, one-  
sided norms. For the referendum's language, see Consejo Nacional Electoral [National Electoral  
Council], Referendos Nacionales Efectuados en Venezuela (1999-2000), [http://cne.gov.ve/web/  
documentos/estadisticas/e010.pdf](http://cne.gov.ve/web/documentos/estadisticas/e010.pdf), visited 14 March 2023 (my translation).



Thus, to posit the establishment of an extralegal (and plebiscitarily ‘commissioned’) constituent assembly as the proper mode of expression of ‘the people’s’ constituent power – a mode whereby ‘the nature and limits of the commission would be expressed in the process through which the assembly was convened’ (p. 243) – is to leave unexplored the role of individual power-wielders in shaping the contours (and therefore the content) of that expression free from the constraints of the rule of law. To be sure, Colón Ríos is interested in rescuing the constituent process from the possibility of its nefarious manipulation by self-interested political actors. To that end, he argues that the constituent power, though free to create any constitutional content it desires, is itself bound by the existing separation of powers (p. 244). Presumably, this would also include any division of competences regarding the proper (legal) mode of mediating the people’s will (determining who gets to convene or design a referendum, for example). But, even if we set aside the question of why we should demand adherence to certain aspects of the legal process of popular will-formation but not to others – like those regulating the constitutional amendment procedure, where the separation of powers is *very much* involved – and of who gets to decide which particular aspects are worth retaining or setting aside, we would still need to confront the problem of a seeming contradiction in the attribution of (pre-legal) sovereignty to a people whose exercise of such sovereignty would nevertheless be bound by procedural and institutional mechanisms not of their own making.

That is, of course, unless we adopt a quasi-mystical view of ‘the people’ as a unitary, inter-generational entity whose will exists independently of the mechanisms that mediate it and is simply reflected in (rather than constructed by) the norms and procedures of democratic decision-making – including the norms of membership and participation in the sovereign demos. Such is perhaps the vision informing Colón Ríos’s theory, particularly when he argues that, absent any more specific limits in the referendum that convenes a constituent assembly, the latter should at the very least be bound to ‘respect the identity of the constituent subject’ (p. 243). For, if we were to adopt any other view (i.e. one that recognises the contingent and essentially contestable nature of the boundaries of peoplehood), we would be compelled to reach the conclusion that the identity of the constituent subject is *precisely* what is at stake the moment we step into the realm of extraconstitutional constitution-making. Rather than a pre-political reality, the constituent ‘people’ would be seen for what it is: the *object* of political contestation, a contestation that, precisely because of its political nature, would only be resolvable through power – the power of those positioned to imprint into the constitution-making act their own (legally unaccountable) vision of how to render legible the normative abstraction that is the popular will.

This is why, in the end, I cannot agree with the practical side of Colón Ríos’s project, even as I find his historical analysis highly informative and his effort to

define the limits of an otherwise arbitrary authority normatively appealing. For, by prescribing the elevation of ‘the people’s’ constituent power to the status of a *juridical* principle – one with not only political but constitutional relevance – his argument risks giving legal credibility to efforts to bypass the constitutional order in the name of a ‘people’ whose meaning will have to be constituted, not through *ex ante* norms, but through *ad hoc* power. Were courts to assume, as the book proposes, the competence to ‘sanction a violation of the constitution’s rule of change’ whenever they decide – based on a ‘balancing exercise’ of dubious constitutional legitimacy – that ‘a more or less democratic act of constitution-making power’ should trump ‘the supremacy of the constitution’ (p. 290), not only would they be situating themselves in a paradoxical position vis-à-vis the same constitutional order from which they derive their own authority. Just as importantly, they would be explicitly positioning themselves as *political* actors within a Schmittian paradigm where any ‘decision’ must take place outside of the law, and be grounded in nothing but itself. Regardless of the political merit that we may attribute to such a decision – which, to be sure, may in certain contexts provide a welcome relief from the strictures of a rigid (and possibly unpopular) constitutional regime – its replacement of constitutional validity with extralegal power as the basis for resolving juridical disputes would spell the end of the rule of law. Which is something strange to demand of a legal order, no matter how primed it may be for fundamental change.

#### THE SUPRANATIONAL DIMENSION OF CONSTITUTIONAL POLITICS: PATBERG’S *CONSTITUENT POWER IN THE EUROPEAN UNION*

##### *‘Higher-level’ constituent power*

If the broad, historical nature of the narratives being deployed by Colón Ríos and Rubinelli keeps them from fully engaging with some of the conceptual difficulties underlying the attribution of constituent power to ‘the people’, it may be useful to look at another work that ditches the historical approach altogether in favour of a theoretical inquiry dedicated to a wholly contemporary issue: that of democratic constitution-making at the supranational level. In his fascinating book, *Constituent Power in the European Union*, Markus Patberg puts forth his own original theory of constituent power as a solution to what he perceives, quite correctly, as a democratic disconnect between the process of expansion of the EU, on the one hand, and the citizens of the member states, on the other. Beginning with the question of who should be entitled to ‘determine the structure and competences of public authorities’ (p. 1), Patberg then applies that question to the context of a supranational polity; for, as he observes, we ‘lack a theory of democratic

authorisation that takes heed of the defining features of such an entity' (p. 4). This lack, Patberg argues, can be best addressed through a resort to the notion of constituent power, which, citing Sieyès, he views as 'articulat[ing] the demand for democratic control over the organization of public authority' (p. 5). Thus, the ultimate goal of the book is to 'reformulate the idea of constituent power for the context of European integration' (p. 4).

The key to speaking of constituent power at a supranational level, according to Patberg, is to look for institutional and procedural mechanisms that will make it possible for citizens to shape their (supranational) polity – here, the EU – in two different capacities: as citizens of their respective nation-states, on the one hand, and as citizens of the larger supranational body, on the other. They must be able to do so, however, 'without interference from those institutional actors whose structure and competences are at stake' (p. 6). Only then, Patberg argues, can we truly speak of an exercise of constituent power – one that may serve as an avenue for the expression of citizens' political autonomy, that is, of their 'ability to determine their collective affairs as both addressees and authors of the law' (including their ability to reorganise public authority). Indeed, for Patberg, any interference by ordinary institutions of government in the process of constituent decision-making would entail a 'usurpation' of constituent power by the constituted powers, a usurpation that he sees as the defining feature of European integration thus far.

As we will see, this issue may need to be further problematised. Indeed, we might even argue that there is some element of tautology involved in the idea of a 'usurped' constituent power, insofar as usurpation is in fact a *definitional* characteristic of any exercise of constituent power, for reasons I will return to below. But, for now, it is important to note that Patberg's perfectly reasonable aversion to the idea of having self-interested institutional actors control the process of (European) constitution making by no means entails a vision of constituent power as a free-for-all or as some sort of permanent, anti-institutional disruption. On the contrary, and drawing in large part on the work of Jürgen Habermas (even as he departs from it on some key points), Patberg emphasises the *procedural* element of a political autonomy that must also be the subject of normative standards if it is to be legitimately exercised. Like Habermas, Patberg seeks to derive those standards from a series of 'rational reconstructions' of the conditions that must be present in any exercise of democratic self-determination by free and equal citizens.

Also like Habermas, Patberg conceives of supranational constituent power in terms of a 'levelling up' of constituent power from the national to the EU level. In particular, the idea is that 'the EU's constituent power is neither independent of, nor equivalent to, nor combined with the constituent powers of the member states, but rather it is delegated by them' (p. 142). This idea carries with it some

significant implications. First, the ‘higher-level’ (delegated) constituent power is not ‘originary’ and therefore cannot decide in a truly sovereign manner. Second, such power is not a natural feature of supranational polities, but must instead be ‘deliberately installed through institutional design’ (p. 148). In the European context, Patberg finds the seeds for such deliberate institutionalisation to be already present in Article 48 of the Treaty on European Union, whose procedural-institutional innovations – namely, the possibility of involving, not only governments, but also various domestic and EU institutions in the process of treaty revision through a democratic body specifically convened for that purpose (the Convention) – point to an underlying conviction that ‘decisions about the EU polity should be the result of democratic opinion- and will-formation at the EU level, which, however, must not gain independence from the national level’ (p. 149). In other words, such decisions should be left to an institution specifically dedicated to the question of EU-wide constitutional change, an institution that would therefore serve as the depository of a delegated, ‘higher-level’ constituent power.

### *The problem of institutionalisation*

To be sure, Patberg’s ‘rational reconstruction’ of the grounds informing the European process of treaty revision is itself conditioned by the author’s normative priorities. Its method depends on treating some aspects of that process (those that most clearly align with Patberg’s own ‘constituent’ vision for Europe, like the involvement of citizens in the election of representatives to an extraordinary body) as core features in contrast to which other aspects (such as the Convention’s dependence on constituted authorities or its purely consultative role) may be dismissed as mere ‘shortcomings’ – rather than as constitutive elements of a system arguably geared towards the *exclusion* of any form of constitutional change in which ‘constituted’ actors are not centrally involved. Which is not to say that Patberg’s take may not be sustained by its own normative force. But articulating the kind of model of European integration that Patberg envisions entails a *political* effort at reorienting the EU’s path towards a more democratic future – an effort that, to be sure, Patberg himself vigorously undertakes. Rather than ‘rationally reconstructing’ the actual underpinnings of the European project, then, the value of Patberg’s contribution may be in formulating and seeking to disseminate a new ‘public narrative’ – of the kind he analyses throughout the book, when attempting to categorise existing views of European peoplehood(s) – that selectively builds on existing demands for change while reorienting them towards a specific institutional outcome: namely, a permanent constituent assembly ‘empowered to act on its own initiative, with the exclusive competence for decisions on

constitutional matters, and composed of directly elected representatives who have to compete for their seats with programmes for the development of the EU' (p. 209).

This institutional arrangement reflects two key aspects of Patberg's vision of 'higher level' constituent power. First, it gives expression to his claim that the subject of constituent power at the European level should be comprised of 'citizens all the way down' (in their dual capacity as national *and* European citizens), as compared to Habermas's attribution of constituent power to a combination of European 'citizens' and 'peoples'. This allows Patberg's model to turn the member states themselves into potential objects of constituent transformation (instead of serving as its necessary presupposition), since 'their continued existence depends on the political will of their citizens acting as (domestic) constituent power(s)' (p. 159).

Second, the institutionalisation of higher-level constituent power (in the form of a permanent constituent assembly elected through official mechanisms) responds to Patberg's efforts to situate such power within the confines of formal legality, something made possible by the power's 'delegated' quality. For Patberg, the nature of higher-level constituent power as an authority delegated by the national constituent powers – themselves already finding expression in their respective legal-political structures – allows us to sidestep the questions of democratic authorisation that accompany the power's supposed location at the *origin* of all legal institutions and procedures (including those that characterise the process of democratic will-formation). In Patberg's words, 'at the supra-state level we are, by definition, dealing with forms of constitution making that take place between already-constituted entities', so we do *not* need to operate with 'the idea of a collective subject that pre-exists the legal order and brings it about *ex-nihilo*' (p. 32-33). Thus, '[t]he image of an original founding moment, in which an existing order is dismantled and replaced – from an extralegal standpoint, as it were – with a new political system, cannot find an equivalent in the EU' (p. 153).

This is no doubt a reasonable caveat as it relates to the process of European treaty revision. A different question, however, is whether Patberg's deference to 'already-constituted entities' renders his theory untenable *as a theory of constituent power*. For, while the presupposition of an already existing constituent subject may work fine at the supranational level, it does not hold very well once we shift our focus to the *national* constituent power – as we must eventually do if we are truly to speak of an authority whose 'constituent' quality stems from its authorisation by primary (domestic) constituent powers. Indeed, if those primary constituent powers are to remain such, they must be able to transcend even the most fundamental of constituted forms, or else we would be denying the people's ability to serve as the ultimate foundation of the conditions for their own political coexistence.

That is possibly why Patberg finds himself compelled to pay lip service to the ‘ineradicable “non-institutionalized” dimension’ of constituent power (p. 37), and to concede that, despite his own insistence on the need to situate the constituent act within ‘a formal framework that fulfills both enabling and constraining functions’ (p. 197), his theory cannot ultimately rule out the constituent power’s adoption of a revolutionary form (p. 153). This (reluctant) embrace of the potential for extralegality inherent in the idea of a people situated at the origin of all laws is made unavoidable by Patberg’s own choice to frame his vision for a more democratic EU in terms of constituent power. Yet that same embrace also introduces some contradictions into Patberg’s model, whose principles of democratic opinion- and will-formation ultimately depend on certain *constituted* categories without any *a priori* content outside the realm of legal validity.

Indeed, Patberg’s procedural ideal of democratic constitutional change presupposes a number of institutions and procedures – particularly those relating to the conditions of belonging and political participation within a constitutionally defined polity – that are very much part of the legal order and that can therefore be classified as partaking in the realm of constituted authority. This, in Patberg’s view, may not be much of a problem when it comes to his theory of higher-level constituent power, as he argues that ‘the fact that procedures and institutions of [delegated] constituent power must be legally codified does not turn them into constituted powers’. After all, under his definition, the term ‘constituted power’ only applies to those institutions that ‘form part of a normal system of government and whose structure and competence are therefore at stake in constitutional politics’ (p. 37). But, once again, while such a caveat may work well at the supranational level, the same cannot be said of constituent power at the domestic level, where the categories on which Patberg relies – electoral constituencies, conditions for enfranchisement, voting rules, and even the very notion of ‘citizenship’ – are not only part of the ordinary system of government, but are *precisely* what is at stake in constitutional politics. In fact, we could argue that the displacement of those (constitutionally grounded) categories from their role as the necessary condition for political contestation, in order to turn them into the object of such contestation, is precisely what distinguishes properly *constituent* from ordinary (legally authorised) forms of constitutional change.

Patberg’s way of dealing with the categories that define what it means to be a citizen or to participate in the formulation of a legible (and therefore actionable) popular will is to treat them as mere ‘enabling conditions’ in the process of democratic opinion- and will-formation, thereby implying their quality as neutral facilitators of that process. The problem, however, is that these categories are by no means neutral. In their specific substance – with their regimes of inclusion and exclusion, enfranchisement and disenfranchisement, representation and direct participation – they rather amount to coercively enforced manifestations

of a given framework for allocating political power, a framework whose specific contours reflect, to a significant degree, the contingent choices of concrete power-wielders and therefore remain contestable outside of the framework's own norms of validity – the very norms put in question by the emergence of a genuinely *constituent* power.<sup>6</sup>

By arguing that, through the notion of a dual constituent power, 'the citizens of the EU member states can always choose to dissolve their [domestic] political system in favor of other types of (democratic) orders' (p. 176), Patberg thus fails to give due credit to the difficulties involved in the theorisation of constituent authority – the same difficulties that he had dismissed earlier on as the 'so-called paradox of founding' (p. 32-33). For, insofar as we speak of a constituent subject comprised of 'citizens', we are thereby denying to the participants in the constitution-making act the radical autonomy presupposed by the framing of their agency in terms of 'constituent power'. Indeed, to presume the continuity of existing categories of belonging and participation is to limit the agency, not only of the individuals excluded from those categories, but also of those who fall under them, who will be restricted in their choice of who to associate with and how, being instead held to a mode and scope of democratic decision-making demarcated by a power other than their own – a power whose ability to condition the process of 'democratic' will-formation becomes normalised whenever its contingent (and contestable) choices are treated as an intrinsic part of such process.<sup>7</sup>

### *Constituent power or citizen empowerment?*

On the other hand, if we take seriously Patberg's admission that constituent autonomy must include the revolutionary capacity to disregard existing institutions (including the rules of citizenship) even at the domestic level, then the idea of a *normatively constrained* constituent power becomes much less plausible. This

<sup>6</sup>Thus, for example, the notion of 'citizen' will serve to classify political participants according to criteria that not everyone affected may agree with (try telling a Catalan nationalist that her political autonomy presupposes its materialisation within a larger Spanish polity), but that will nevertheless play a crucial role in determining whose disagreement shall be accounted for in what way.

<sup>7</sup>Indeed, despite the Habermasian insistence (shared by Patberg) on reducing the conditions of political belonging to 'rationally reconstructed' norms that may be objectively shared 'by everyone' (p. 25), the problem is that, when it comes to questions such as citizenship, it is the very notion of 'everyone' that is at play. Neither can the 'mutual recognition' of those involved serve as the ultimate foundation for political belonging, since the multilateral nature of the relationship among members of a polity makes mutuality logically impossible to establish without some previous demarcation of who is entitled to partake in it – for even individuals who recognise one another as co-participants in a democratic endeavour may extend that recognition to mutually exclusive third parties. Only through the intervention of a prior, demarcating power, then, can something like mutual recognition become conceivable in the first place.



is because the substantive principles of democratic constitution-making assumed by his theory can only provide a self-sufficient basis for discerning legitimate displays of constituent authority if we already know (beyond the possibility of legitimate contestation) the specific participants and fora of participation that they are supposed to govern – precisely the kind of knowledge that is precluded by the disruption of existing institutional structures.<sup>8</sup> Abstract principles, after all, cannot replace either clear ex-ante rules or, in their absence, concrete ad hoc decisions when it comes to determining the ‘proper’ configuration of the law-authorising demos, as such principles are not well suited to answer the organisational questions involved in demarcating the boundaries and forms of political participation – where the decision to include or to exclude, especially in ‘borderline’ cases, will in the final analysis remain normatively unjustifiable. Consequently, to speak of a constituent power capable of reaching all the way down into the constitutional foundations of the polity is to situate the configuration of the constituent subject beyond the realm of *a priori* norms, and to place the decision about the precise scope and mechanisms of constituent democracy in the hands of a power that, far from being exercised by a commonly identifiable demos, is itself definitional of that demos. Which is why I spoke earlier of *usurpation* as one of constituent power’s characteristic features.

Thus, Patberg’s proposal for bridging the gap between the political agency of European citizens and the process of decision-making on European integration, while institutionally sound and normatively desirable, must ultimately confront the very dilemma that Patberg’s own preference for a popular sovereignty brought ‘under law’ leads him to try to sidestep: either relinquish the idea of a *radical* constituent power, or abandon the ambition to frame the constitution-making act as a *norm-driven* one in which ‘citizens’ retain the ultimate say about the nature and structure of the future polity. Having it both ways, I am afraid, is not a tenable option.

Once again, none of this is to say that Patberg’s ultimate normative goal is not a commendable one, or one not worth pursuing in full force. In fact, the democratisation of the EU that Patberg advocates is now more urgent than ever, particularly in the face of nationalist challenges that seek to take advantage of the block’s democratic deficit to push forth an alternative vision for the continent, one grounded in homogeneity, exclusion, and the suppression of those perceived as not properly belonging to ‘the nation’. It is therefore in its institutional

<sup>8</sup>Notably, if this knowledge is to amount to anything more than the retrospective validation of an externally imposed state of affairs, it must be contemporaneous with the constituent act itself. Thus, the resort to *a posteriori* criteria like the ‘all-subjected principle’ (p. 171), which presupposes an already-finalised legislative product allowing us to ascertain who will be subjected to it, can be of no help here.

proposal – thoroughly articulated and convincingly grounded in existing discourse and practices from a variety of institutions and grassroots political actors – that the main value of Patberg's contribution resides. As a theory of constituent power, on the other hand, Patberg's contribution is persuasive mainly in its articulation of an extraordinary constitution-making authority delegated from an already-constituted framework, and therefore capable of escaping the dilemmas of self-constitution that must accompany any attempt at identifying the emergence of a truly constituent subject. The extraordinary nature of a constitution-making body, however, is not in itself sufficient to frame its work as responding to the dictates of a radical-democratic constituent power, since extraordinary institutions can very well exist within a perfectly self-contained framework of legal authorisation. Consequently – and insofar as Patberg refuses to fully answer the question of what it means for 'the people' to express their constituent power without needing to rely for that purpose on already-constituted categories whose concurrence conditions the entire display of popular agency – his theorisation of political autonomy must remain irremediably tied to the same supranational context in which alone the idea of a procedurally bound (for delegated) constituent power may be rendered sufficiently coherent.

The inseparability of Patberg's theory from the European (supranational) context in which it is embedded thus turns his work into a double-edged sword: because its constituent-power paradigm can hardly be exported to any other setting, his contribution, while uniquely tailored to the needs of European democratisation, risks becoming moot if its specific proposals fall on deaf ears. Far from being grounds for criticism, this highlights the boldness of Patberg's wager, which, by assuming the difficult responsibility of adopting a concrete political stance in the debate about the future of Europe, ends up raising the stakes of his work to the level of an all-or-nothing proposition.

Patberg's book thus represents a noble effort to put forth a potential roadmap for citizen empowerment within an ever more complex and technocratic supranational polity. The normative appeal of this effort, in turn, makes it all the more important to emphasise those institutional aspects of Patberg's project most likely to result in a workable framework for involving the citizenry in the process of European treaty revision. If, as I have argued here, Patberg's attempt to rationalise such framework with reference to an all-encompassing constituent power risks undermining the framework's overall integrity – and, by confusing democracy with an impossibly radical act of collective self-definition, actually obscures the pre-democratic elements of decisionistic power underlying any such act, thus normalising their conditioning effect – then we may be justified in downplaying that concrete theoretical ambition for the sake of the book's core normative contribution: namely, the articulation of an understanding of political autonomy that properly accounts for the interest of European citizens in becoming central

participants in the decision-making process about the constitutional future of their supranational polity. This normative goal, and the procedural-institutional ideas that Patberg proposes for its realisation, are something that all of us yearning for a more democratic Europe should keenly subscribe to.

## CONCLUSION

Despite their notable differences, all three of the books reviewed here can be understood as sharing a common goal: to articulate some mode (or modes) of citizen involvement in constitutional decision-making at a fundamental level, without thereby validating potentially abusive claims to represent a normatively unconstrained popular power – one whose indeterminate nature might serve as the foundation for antidemocratic projects seeking to take advantage of any ensuing legal vacuum. While clearest in the works of Colón Ríos and Patberg, this goal can also be appreciated in Rubinelli's problematisation of Schmitt's authoritarian theory and of its elevation to the standard conceptualisation of constituent power. Insofar as the three authors, through their scholarly rigorous and intellectually engaging work, are opening the space for a normatively accountable constitutional politics in which ordinary citizens assume a preeminent role, one can't help but hope that their vision ultimately finds reflection in real constitutional practice. But one has to wonder whether, in the final analysis, the notion of a preconstitutional constituent power is the most conducive to the accomplishment of such vision.

**Rafael Macía Briedis** is PhD Fellow, Center for Constitutional Democracy, Indiana University, USA.

