

the Court's perspective on the election's invalidation, which seemed to further undermine the legitimacy of the constitutional reform. The case could also serve as a starting point for a broader discussion on epistocracy versus democracy, and potential conflicts arising from the application of the methods of open democracy.

All in all, this book certainly offers a thorough overview of one of the greatest democratic endeavors in twenty-first-century Europe to date. It meticulously explains every step of the reform and takes into account the interests of diverse actors engaged in the process. As Dupré notes, the fact that this huge reform did not produce any textual outcome should not deceive us nor lead us to disregard the whole project (at 252). To support this claim, she compares Iceland and Hungary. Dupré reminds us that the roots of the Hungarian constitution-making project can also be traced back to the financial crisis, which allowed for the election of a new government with Victor Orbán as its Prime Minister. However, in the Hungarian case, the Constitution was thoroughly rewritten and enacted in 2011 after the landslide victory of Fidesz, and now serves as a basis for the exercise of autocratic powers. The design of the Hungarian Fundamental Law made no room for deliberation whatsoever (at 254–5). Juxtaposing these two processes might give us cause to think more deeply about the distinction between popular and populist constitution-making—the latter deliberately excluding the majority from the reform, the former welcoming ideas from each individual. In contrast to Hungary, in Iceland democracy won the day, and continues to deliver new inclusive ideas under the leadership of the new Prime Minister.

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Joel Colón-Ríos, *Constituent Power and the Law*. Oxford University Press, 2020. Pp. 334. \$99.00. ISBN: 9780198785989

*Constituent Power and the Law* is a well-documented, thorough study of how the concept of constituent power has been employed by thinkers, lawyers, and politicians in the modern and contemporary history of constitutionalism. The book's main aim is to challenge the widely held view that constituent power is an unbound, extralegal force, and instead to show that it has been theorized, and actually exercised in application of, channeled by, and/or limited by the law. Colón-Ríos's is the first systematic analysis to bring to the surface the hitherto under-theorized and even neglected juridical nature of constituent power, and to show the limits that distinguish it from other concepts such as sovereignty, revolution, and constitutional change.

Along the way, *Constituent Power and the Law* discusses the theorists central to the development of the concept (e.g., Jean-Jacques Rousseau, Emmanuel-Joseph Sieyès, John Locke, George Lawson, Raymond Carré de Malberg, Carl Schmitt, Hans Kelsen, Georg Jellinek), and unearths the ideas of a number of scholars and politicians seldom considered in Anglophone constitutional theory (e.g., Luis Sánchez Agesta, Gaspar Melchor de Jovellanos, Rafael Fernández Concha, Juan Germán Rocio, Miguel A. Caro, Joaquín Lumbreras, Luigi Taparelli, François Guizot, Juan Donoso Cortés, Costantino Mortati). It thus provides us with theoretically informed and historically contextualized arguments on concepts ubiquitous in the literature on constituent power and on other related topics (e.g., imperative mandates, nation, representation, original and derived constituted power, revolutions).

The book advances its goals as follows. It first analyzes Rousseau and Sieyès, whose views represent the poles of the range of possible answers to the question of the nature of constituent power: respectively, either a juridical or a volitional category. These viewpoints bear on who should exercise constituent power and what kinds of limits are placed on that subject. Colón-Ríos shows how these positions were asserted by thinkers and politicians and how these views manifested themselves in actual episodes of constitution-making throughout the eighteenth, nineteenth, and twentieth centuries. The book concludes by arguing for an original distinction between constitutional power and sovereignty, which is then applied to an analysis of the legal implications that electoral participation through referenda may have on constitutional events.

However, the book is more complex than what the preceding paragraph might convey. Its scope, the topics covered, the extensive historical research it displays, and the fact that a number of chapters elaborate self-standing arguments make it difficult in places to keep track of the red thread running through the monograph. Some words about each section are thus in order.

The monograph is in nine chapters, excluding the introduction and conclusion. Chapters 2 and 3 examine Rousseau's and Sieyès's alternative views on the notion of constituent power, which inform most of the arguments discussed in the book. In an original way, Rousseau is presented as anticipating the juridical character of constituent power by depicting it as exercisable through legal procedures. Sieyès, on the other hand, reserves the creation of new constitutions to the domain of the extra-legal exercise of political will.

Chapter 4 studies how the idea of constituent power originated in the politics of eighteenth-century France, especially in Sieyès's speeches, who prioritized the power of representative institutions over "the people," and presupposed that constitutional change was generally undesirable and should happen exceptionally (at 100). This move anticipates subsequent discussions on constituent nations.

Chapter 5 examines constitution-making episodes in Spain (1812), Venezuela (1811), and Colombia (1886), and shows that the approach tagged by Colón-Ríos as the "constituent power of the people" (at 21, 104–5), which emphasizes popular participation in constitution-making events, was overshadowed by the approach of

the “constituent power of the nation” (p. 106), which emphasizes representation. As shown by the examples discussed in the chapter, the adoption of latter approach warranted constitutional arrangements where the citizenry was disregarded as an active decision-maker (at 21, 101ff.). Accordingly, the preference for the constituent power of the nation accounts for the virtual disappearance of primary assemblies and the imperative mandate, and bears on discussions about the scope of parliamentary sovereignty and, importantly, about who is the subject of constituent power.

Chapter 6 draws attention to nineteenth-century authors, politicians, and jurists, to their theories, and to the different legal and institutional implications that follow from their answers to the question “who has the authority to replace the fundamental law?” (at 22, 127). Significantly, the chapter shows that constituent power was thought of as limited by boundaries imposed upon the ordinary institutions of government and on the constituent authority itself.

Chapter 7 discusses potential limits of constituent power by analyzing two versions of those constraints: the so-called historical or internal constitution, and the tradition of the Spanish and French doctrinaires. According to the first, the exercise of constituent power was intended to restore an old constitution, thus restricting positive exercises of constitutional authority to a right of resistance. The second rejected the notion of a human constituent power and gave the title of sovereign not to the monarch or the people but to reason. The chapter inspects how these ideas developed in constitutional events taking place in nineteenth-century Spain.

Chapter 8 inspects a third version of the limits to constituent power: the material constitution, i.e. content-related curbs on an authority’s power to decide constitutional issues. It focuses on the work of Maurice Hauriou, Kelsen, Schmitt, Herman Heller, and Mortati, for whom the *material* content of the constitution restricts the amending powers of non-constituent agents. Consequently, Colón-Ríos argues, the *material* constitution entails the recognition of extralegal constituent subjects. He shows that this is the doctrine espoused by several courts endorsing the idea of unconstitutional constitutional amendments.

Chapter 9 distinguishes constituent power from sovereignty. Applying Schmittian categories, Colón-Ríos innovatively portrays sovereignty as the power to create any legal content free from the constraints imposed by the separation of powers. Constituent power, in turn, is the faculty to create only constitutional content (at 226). Accordingly, agents possessing constituent power do not exercise governmental, legislative, executive, or judicial functions. They are bound by a specific mandate, namely, creating a constitution.

Finally, chapter 10 focuses on “the people” as holders of constituent power and on their impact in constitutional law and practice by scrutinizing connections and interactions between imperative mandates and the power to create constitutions. Primarily applied to the Venezuelan 1999 constitutional process, the section shows different ways in which the “juridical people”—i.e. the electorate (at 262ff.)—may participate in contemporary constitution-making events, and even oppose formally institutionalized powers.

*Constituent Power and the Law* has several merits. I will mention three. First, as shown by the current spate of publications on constituent power,<sup>1</sup> as well as on other pressing concomitant matters, such as constitutional change, creation, and/or revolutions,<sup>2</sup> the book is timely and likely to be of interest and use to researchers on these areas.

Second, the book is an encyclopedic resource for constitutionalists, intellectual historians, and political theorists. It provides us with well-documented analyses of scholarly writings and of legal and political interventions by theorists, jurists, and politicians who are not the usual suspects in our discipline. And it does so without being oblivious to the figures who have been, are, and are likely to remain reference points in the scholarly literature. This moves the literature on constituent power to relevant places by considering these neglected names, their understanding of the concept, and their use of it in concrete political battles and constitution-making events. Researchers are offered an original, broad, and informed picture of the ways in which constituent power and the law have historically interacted and have shaped processes of constitutional creation and change.

Third, *Constituent Power and the Law* is a much-needed comprehensive genealogy of the relations between constituent power and the law, as well as between concomitant concepts and institutions, such as nation, imperative mandate, primary assemblies, among others. I use the term “genealogy” intentionally: the book offers neither pure conceptual analysis nor pure history. It is a critical exposition of how the concept of constituent power has been shaped and used as a tool in interventions and battles in real-life constitutional politics, for the establishment, change, and/or replacement of actual constitutions. In this book, law and politics, theory and practice, meet.

I finish with two critical observations. The first is that the book frames its analyses from a rather static, synchronic notion of constitutional change, as occurring in concrete moments, channeled through legal procedures in response to the motivation by constitutional agents expressing themselves either through their pure will, through legal procedures, or through a combination of both. The paradigm of constitutional change from which the book seems to argue, then, does not leave much room for diachronic perspectives from which constitutional change may be examined; perspectives that see constitutional politics as an ongoing process at odds with classic readings stressing “foundings, documents and births of constitutional orders in voluntaristic acts of rational agency.”<sup>3</sup> Colón-Ríos’s genealogy is one that seems too attached to the

<sup>1</sup> See, e.g., ANDREW ARATO, *THE ADVENTURES OF THE CONSTITUENT POWER: BEYOND REVOLUTIONS?* (2017); CONSTITUENT POWER: LAW, POPULAR RULE AND POLITICS (Matilda Arvidsson Leila Brännström & Panu Minkkinen eds., 2020); LUCIA RUBINELLI, *CONSTITUENT POWER: A HISTORY* (2020). See also contributions by Olga Bashkina, Roberto Gargarella, Aristel Skrbic, Jorge Baquerizo, Chiara Valentini, and Joel Colón-Ríos in *Symposium: On Constituent Power*, 41 *REVUS* 73 (2020).

<sup>2</sup> See, e.g., BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* (2019); RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* (2019); GARY JACOBSON & YANIV ROZNAI, *CONSTITUTIONAL REVOLUTION* (2020).

<sup>3</sup> Simone Chambers, *Kickstarting the Bootstrapping: Jürgen Habermas, Deliberative Constitutionalism, and the Limits of Proceduralism*, in *THE CAMBRIDGE HANDBOOK OF DELIBERATIVE CONSTITUTIONALISM* 257 (Ron Levy, Hoi Kong, Graeme Orr, & Jeff King eds., 2018). I have championed this view in Donald Bello Hutt, *The Deliberative Constitutionalism Debate and a Republican Way Forward*, 12 *JURISPRUDENCE* 69 (2021). For a recent account along these lines, see Jacobsohn & Roznai, *supra* note 2.

two terms of his book's title, without necessarily accounting for whether exercises of constituent power occur when there are no immediately observable positive actions establishing a new constitution or changing an existing one.

Colón-Ríos could perhaps fall back on methodological considerations and argue that in tracking the use of the notion of constituent power he has been led to a series of findings that ultimately reflect the dynamics I criticize here as static. But I would find this response unsatisfactory. For one thing, his case selection must necessarily have been shaped by what he regarded as a constitutional change in the first place. For example, should the current process of constitutional change taking place in Chile be studied as including the several protests forcing the incumbent government to trigger a formal mechanism of constitution-writing? My impression is that the riots, protests, manifestations, and so on, taking place since 2011, have had a cumulative and incremental effect that culminated in the specific process that is now synchronically described as constituent. It is not clear whether and to what extent Colón Ríos would situate those protests and riots as part of the process of constitutional change, or whether he would put them, to use Ackerman's terminology, in the box of normal and not of constitutional politics.<sup>4</sup>

Second, there are aspects of contemporary legal scholarship and practice that, at least in theory, may represent material limits to constituent power, but which are conspicuously absent in *Constituent Power and the Law*. I here consider two, which I see as particularly problematic: the alleged weakening of the sovereign character of the nation-state, and international human rights law. Scholars have pointed to the wearying of the notion of state sovereignty.<sup>5</sup> This is likely to bear on, for example, the power enjoyed by an allegedly sovereign constituent assembly or by an assembly juridically bound by a mandate to create a new constitution. These allegations that state sovereignty is "on the way out,"<sup>6</sup> as it were, are in my view somewhat exaggerated, as states still enjoy a monopoly in the regulation of almost every aspect of our lives, in a way unparalleled by other agencies. But the claim is there, nevertheless, and *Constituent Power and the Law* was indeed a place where some thoughts on the matter could have been offered. They were not, alas.

Moreover, contemporary fundamental charters circumscribe the government's room for legal action in accordance with the limits set by international human rights law, sometimes incorporating the content of those treaties as material limits to domestic law.<sup>7</sup> I then wonder whether these legal instruments represent limits of the

<sup>4</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

<sup>5</sup> See, e.g., Olga Bashkina, *Nations Against the People*, in *SOVEREIGNTY IN ACTION* 159 (Bas Leijssenaar & Neil Walker eds., 2019); DON HERZOG, *SOVEREIGNTY RIP* (2020).

<sup>6</sup> Frank Ankersmit, *Political Representation and Political Experience. An Essay on Political Psychology*, 11 *REDESCRIPTIONS* 21, 41 (2007).

<sup>7</sup> See, e.g., CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 5: The exercise of sovereignty recognizes as a limitation the respect for the essential rights which emanate from human nature. It is the duty of the organs of the State to respect and promote those rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force.

kind Colón-Ríos has in mind in his book. Of course, one may quarrel over the legal hierarchy of those treaties, whether ordinary, constitutional, supraconstitutional, or otherwise, and depending on the legal theory one champions and/or one's position on the politics of international relations,<sup>8</sup> one may even argue that in some jurisdictions they have nothing but rhetorical force. One might also reasonably contend that international human rights law imposes constraints on constitution-making processes which appear to be somewhat different to the ones present at the domestic level, and therefore to those considered by Colón-Ríos in *Constituent Power and the Law*. Either way, this is a debate that needs to be addressed and not taken for granted.

Notwithstanding these criticisms, *Constituent Power and the Law* is an important, timely, and well-researched book, conversant with a vast array of academic literature. It will be of value to constitutionalists, political theorists, and intellectual historians alike.

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<sup>8</sup> See, e.g., KOLDO CASLA, POLITICS OF INTERNATIONAL HUMAN RIGHTS LAW PROMOTION IN WESTERN EUROPE: ORDER VERSUS JUSTICE (2019).