

# REPUBLICAN AND SCHMITTIAN CONCEPTIONS OF CONSTITUENT POWER

## COMMENTS ON COLÓN-RÍOS'S *CONSTITUENT POWER AND THE LAW*

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### **ABSTRACT**

This paper discusses Colon-Rios's reconstruction of the idea of constituent power in relation to his interpretations of Rousseau and Schmitt. It distinguishes a republican reading of constituent power as immanent to the juridical order from Schmitt's attempt to join constituent power with dictatorship.

### **KEYWORDS**

Immanence, rule of law, republicanism, Rousseau, Schmitt

### **AN IMMANENT CONCEPTION OF CONSTITUENT POWER**

For a long time the concept of constituent power lay at the margins, if not entirely outside, of jurisprudence. These days, constituent power is often understood as the key component in any attempt to resolve the tensions between constitutionalism (rule of law) and democracy (rule of people). As Niklas Luhmann pointed out, the idea of a constitution became an essential part of modern societies because it allowed for the symbolic articulation of the legal and political systems, or legal authority and political power, in their functionally differentiated roles. Indeed, a modern constitution is like light: just as the latter can be understood to be both wave and particle, so a constitution can be understood to be both legal norm and political act. A constitution can both set legal limits to political power and determine politically who gets to make law. The concept of constituent power, because it joins to the point of indistinction a political and a juridical valence – or, stated otherwise, because it unifies within it both a moment of sovereignty and one of constitutionalism – consequently holds a crucial function in modern politics, as well as being itself an object of dispute between political and juridical sciences. At the

same time, and for the very same reason, the concept of constituent power also risks becoming the Trojan Horse of one or the other social system.

In my opinion, Colón-Ríos's new book positions him as first among equals in the field of studies on constituent power. This is not only because of its impressive range over the history of modern and contemporary jurisprudence. And not only because it contains convincing illustrations of the explanatory power of its hypotheses when it comes to the empirical analysis of constituent processes in modern and contemporary history. In my opinion the main merit of the book consists in its bold, systematic attempt to offer a reconstruction of the concept of constituent power such that its jurisprudential meaning can no longer be denied, while at the same time vindicating its democratic pedigree.

When in *Political Theology* Schmitt described the development of the theory of the state in modern Europe, he claimed that the 19<sup>th</sup> century saw a concerted attempt to think about the state from “representations of immanence.”<sup>1</sup> He was referring both to the rise of democracy and socialism after the abolition of “divine right” monarchies, but also to the rise of scientific naturalism as paradigmatic form of explaining reality. For Schmitt the origin of the concept of constituent power is to be found in this immanent turn taken by the discourse of legitimacy. This requirement of immanence is not only applicable to society as a whole, but also within its sub-systems as well. At a minimum, it should be possible to offer an account of constituent power that is “immanent” to modern jurisprudence itself. Thus, from the start of his book Colón-Ríos speaks of the “idea that *in any juridical order* there is a supreme constituent authority” (1, emphasis mine). In another formulation, he says that the “question of constituent power” refers to “whether the original constituent power can manifest *after a constitution is in place*” (16, emphasis mine). Colón-Ríos considers that the question *must* be answered in the affirmative if a constitution is to be able to play its role as structural articulation of functionally differentiated subsystems: setting limits to what governments can legally do (e.g., try to amend constitutions in top-down fashion), but also bolstering the political power of the people, viz. democracy (e.g., when constitutional courts take up social demands for inclusion and equality that the political system is unwilling to process). In short, the great merit of Colón-Ríos's book is to be the first real attempt to provide such an immanent account of constituent power and reveal the “juridical potential of the theory of constituent power” (16). This is an important goal given that historical experience shows how easy it is to employ the concept of constituent power within political projects that seek to destroy the autonomy of the juridical

<sup>1</sup> “All the identities that recur in the political ideas and in the state doctrines of the nineteenth century rest on such conceptions of immanence [*Immanenzvorstellungen*]: the democratic thesis of the identity of ruler and ruled, the organic theory of the state with the identity of state and sovereignty” (Schmitt 1988: 50)

order, viz. the rule of law, in favour of the naked assertion of force from a part of society.

The central thesis of the book is the claim that “the juridical nature of constituent authority” is preserved as long as one does not “obscure the distinction between constituent power and sovereignty” (3). Everything therefore depends on gaining clarity about what “sovereignty” means *in distinction* from “constituent power”. For one can draw distinctions in a weaker and a stronger sense. One can say, for example, that sovereignty and constituent power are different, yet compatible, and we need both; or, one can also say: sovereignty and constituent power are opposed and mutually exclusive. To anticipate my thesis, it seems to me that Colón-Ríos is ambivalent about what kind of distinction he wants to make here. Although the entire book can be read as one long argument explaining what he means by this distinction, given my area of expertise in the history of political thought, in my comments I shall focus on those chapters that seem to me to offer the politico-theoretical underpinnings of how Colón-Ríos articulates this crucial distinction as well as evidence to his ambivalence. These are the chapters on Rousseau and on the idea of constituent power as “sovereign dictatorship” advanced by Schmitt and adopted by Colón-Ríos.

As I understand the historical argument, Colón-Ríos believes there are two sources for the idea of constituent power in modernity: one is Rousseau, the other is Sieyès, who baptized the term *pouvoir constituant*. Sieyès inaugurates the tradition that identifies constituent power – understood as the “unlimited constitution-making faculty” (3) – with a *transcendent* origin of the juridical order, viz., with an instance that is absolute or ab-solved from law, and in this sense “sovereign”. This transcendent origin can be located in a moment of extra-legality and revolution that acts as a *deus ex machina* with respect to the “machine” of the legal order. But for Colón-Ríos, I think correctly, the more widespread understanding of constituent power – often associated with Carré de Malberg – as the power of amending a constitution via legal procedures is *also* ultimately “transcendent” of the juridical order, except that it locates the instance of legal ab-solution *within* the machinery of the law, as a *deus in machina*. An example of which could be the indistinction between sovereign and legislative powers in the Westminster Parliament as “a legally unlimited power of constitutional change” (15).

The innovative historical thesis of the book is that we owe to Rousseau the other possibility of thinking constituent power as *immanent* within the juridical order. Rousseau has a juridically immanent idea of constituent power because he distinguishes sovereignty from constituent power. At the same time, Rousseau gives us the key to understand constituent power as *truly* democratic, as an expression of popular sovereignty, whereas Sieyès disconnected constituent power from the

power of the people and handed it over to the legislative power of their *representatives*.<sup>2</sup>

As I understand the systematic argument, Colón-Ríos's thesis is that constituent power can play a democratic role only if it is identified with a species of dictatorship. This surprising claim derives from Schmitt, whom Colón-Ríos rehabilitates by arguing that his account of both sovereignty and constituent power is misunderstood if placed on the side of transcendence, and politically on the side of a "conservative revolution" that favours the coup d'État. Rather, Schmitt's identification of constituent power as a form of dictatorship is the only account that is faithful to the rule of law *and* to its democratic, political legitimacy. While I tend to agree with Colón-Ríos's first thesis, I will disagree with his attempt to give a "republican" or Rousseauian employment of Schmitt.

## ROUSSEAU, CONSTITUENT POWER, AND NEO-ROMAN REPUBLICANISM

Colón-Ríos's thesis is that Rousseau's famous distinction between sovereignty and government is the royal road to a correct understanding of constituent power as immanent within a juridical order. In principle I agree with him, but everything depends, of course, on how one understands the idea of "sovereignty" or the "general will" in Rousseau. Here things risk getting immediately off to a false start in so far as Colón-Ríos seems to agree with recent commentators like Richard Tuck who see a strong continuity between Rousseau's idea of sovereignty and those developed by Bodin and Hobbes before him. The Bodinian and Hobbesian idea of sovereignty presupposes that all political power and all legal authority are united *in one single point*, namely, the sovereign (who, in turn, is a representative personation of the state). As I have argued elsewhere, this is a profoundly anti-republican conception of popular sovereignty.<sup>3</sup> For the key Roman and neo-Roman insight is that a republic is a polity based on a constitution that *separates* political power from legal authority. That said, for the most part Colón-Ríos's actual reading of Rousseau quickly recovers its basic neo-Roman stride in so far as it adopts the Roman principle that a "people" is *correlative* to the law.<sup>4</sup>

Thus, Colón-Ríos emphasizes that Rousseau's concept of sovereignty is always connected to the adoption of "fundamental laws". In typical republican fashion, he

<sup>2</sup> On Sieyes and constituent power, see now (Rubinelli 2020).

<sup>3</sup> (Vatter 2019).

<sup>4</sup> See Cicero's famous definition of a republic cited by Augustine: "For the people, according to his [Cicero's] definition, is an assembly of the multitude associated by a consensus of laws and by a community of interests [*populum enim esse definit coetum multitudinis iuris consensu et utilitatis communione sociatum*]" (Augustine 1984: 19.21). On this passage in medieval and renaissance political thought, see now (Kempshall 2001).

insists time and again that Rousseau is not a theorist of direct democracy, a doctrine according to which the people ought to govern themselves directly. He clearly states that the people as sovereign only appears when “a body of law is created or altered,” that is, only in constituent moments (40). He shows that for Rousseau constituent assemblies must be convened by law and they attest to “the legal possibility of an exercise of constituent power is for Rousseau an integral part of a legitimate constitutional order” (49). Colón-Ríos emphasizes that Rousseau receives the ideas of Marsilius of Padua according to which the whole body of citizens are the legislators and their constitutions institute the power of the state or prince. Similarly to Althusius and Lawson, in Rousseau the fundamental right of popular sovereignty is a constituent one: it refers to the “power of disposing... and constituting everything necessary and useful for the universal association” (31). In Rousseau, the people become a subject “having the power to create a constitutional order anew, a constituent subject authorized to produce any constitutional content” (32). I am entirely in agreement with his reading of Rousseau as “a clear precursor of the notion of constitutional supremacy under a representative form of government” (43).

The great advantage of a *republican* conception of the people is that popular sovereignty is never construed as anterior to, and therefore also exterior to, the (rule of) law. Whereas for the Hobbesian concept of sovereignty, which understands it as superior to the law, the law is always seen as an impediment of the natural liberty to do whatever one sees fit, for the neo-Roman conception of freedom, laws are what makes for the freedom of a people.<sup>5</sup> Not only do they make for its freedom, they also make for its power. After all, legal rights (for example the right to vote) are evidently not simply protections of an inner space of free choice, but they are also – if not primarily – a way to empower people such that they can no longer be dominated. In that sense, law makes for popular sovereignty, although given the monarchic association of the term, the neo-Roman republican tradition prefers to speak here of a people’s power and independence (which in the German idealist version becomes “autonomy”). This is the real background of Rousseau’s conception of sovereignty, and given that power is immanent to law (or in Spinoza’s formula: *jus sive potentia*) it makes perfect sense to claim, as Colón-Ríos does, that Rousseau stands behind the idea of constituent power as immanent to the rule of law.

This view of Rousseau as upholding the *autonomy* of law runs against a well-known paradox: if the people is a function of the law, how can they, in turn, be the “authors” of the law?<sup>6</sup> As all true paradoxes, there is no evident solution to it. Although I am sympathetic to Colón-Ríos’s attempt to tackle this difficult question,

<sup>5</sup> (Skinner 2001); (Pettit 1997); (Vatter 2012).

<sup>6</sup> See (Honig 2007) and (Vatter 2011) for two distinct approaches to this paradox. See also the approach of (Lindahl 2007).

I fear that his solution may also betray an understanding of the separation between sovereignty and constituent power that has problematic consequences for his overall argument, as I shall illustrate below in my discussion of Schmitt.

Rousseau's answer to this paradox is found in the obscure figure of a legislator who persuades rather than compels people to adopt a given constitution. Rousseau is clearly drawing here from an ancient tradition that thematizes "philosophical" lawgivers, such as Solon, Lycurgus, Numa, and Moses.<sup>7</sup> Although Michael Walzer has claimed that appeal to such legislators indicates that Rousseau thought a people could not give itself a constitution, Colón-Ríos disagrees. For him the figure of the legislator in Rousseau is not a systematic necessity but a practical one: some peoples, depending on their stage of political development, may need such a figure, but this does not argue against the belief that the people is in principle the only real constituent subject. More importantly, Colón-Ríos offers a deflationary and juridical reading of this figure: "the legislator, in short, is the individual or entity tasked with the responsibility of proposing a body of laws to a constituent people" (48). In a quick footnote he admits that there subsists the problem of how to determine who is such a constituent people, since by definition such a subject has now to be determined *prior to* the choice of the legislator, who is merely delegated by the constituent people to draw up the legal constitution. But precisely such a deflationary reading seems to commit Colón-Ríos to the belief that a people with "plenitude of powers" always precedes the formulation of a constitution, and thus leads him towards the Schmittian view that a constitution is "the concrete, comprehensive decision [by a people or its representative/MV] over the type and form of its own political existence" (Schmitt 2008: sect.8, 125).

Yet, there is no necessity to go down this path. On the contrary, it is possible to argue that the figure of the legislator *as distinct from* the assembled people, points to the distinction between legal authority and political power. The fact that this legislator is also a "philosopher" (or a Ciceronian rhetor)<sup>8</sup> is an allegorical presentation of the principle of legal autonomy – that valid law needs to be produced legally – and of the principle that the rule of law stands under certain constitutional principles (or "basic norms") that are *rational* and call upon the exercise of *judgment* (not acclamation) on the part of the people assembled under this constitution.<sup>9</sup>

In my opinion Colón-Ríos never entirely *disambiguates* his understanding of Rousseauian popular sovereignty. It is unclear whether for him, in the last instance, the "people" are sovereign because they are the source of both political power and of legal authority, or whether, as in the republican tradition, the people's power is

<sup>7</sup> On Moses as founder, see (Karsenti 2012); on philosophical legislators, see (Fraenkel 2012); for the figure in the republican tradition, see (Vatter 2017). For a recent discussion of the figure, see the special issue of *Ética&Política*, vol.23, n.1 (2021) on "ancient legislators in modern thought".

<sup>8</sup> See the treatment of the Ciceronian "legislator" qua founder in (Syros 2011).

<sup>9</sup> I refer to my discussion in (Vatter 2020b).

not only distinct from the authority of the law, but is in turn dependent on the law's autonomy. Phrased another way, it is unclear to me whether for Colón-Ríos the "power of the people" or "popular sovereignty" is a Hobbesian sovereign which delegates part of its power, qua constituent power, to an assembly for purposes of writing a constitution, or whether, as I have argued elsewhere, the power of the people just is its constituent power, and such constituent power is not only active in drafting constitutions, but also in judging, along and in dispute with the organs of the state, of what counts as law. When Colón-Ríos discusses Rousseau, he seems to tend to the latter, republican option. But when he discusses Schmitt, it seems to me that he defends a more problematic understanding of the distinction between sovereignty and constituent power.

### CONSTITUENT POWER AS SOVEREIGN DICTATORSHIP

In chapter 9 Colón-Ríos develops theoretically the basis for his understanding of the distinction between sovereignty and constituent power which is intended to ground the immanence of constituent power within the legal order. He starts from the commonplace that a constitution exists to limit or temper the unbridled or absolute exercise of power.<sup>10</sup> For this reason, a constituent subject cannot be sovereign – there are some things it cannot do. "The exercise of constituent power... only involves a constitution-making authority; it can only produce constitutional norms." By way of contrast, a sovereign subject excludes the separation of powers and can create any legal content whatsoever because its "will" is itself "law": *quod principi placuit legis habet vigorem*.

Colón-Ríos argues that it was Schmitt who develops the correct understanding of the "limited" nature of constituent power in contradistinction with absolute sovereignty. On this reading, Schmitt considers the constituent assembly as not sovereign because "it exercises a special jurisdiction which may be substantively unlimited (i.e., it can adopt any constitutional content) but that is still subject to a limited mandate: that of making a constitution" (226). Because constituent power is subject to a mandate, Schmitt introduces a distinction between sovereignty and sovereign dictatorship. Whereas sovereignty is something held by monarchs (or, in modern democracies, by a people), a sovereign dictator acts on the basis of a commission "from a sovereign who is unable or unwilling to exercise its unlimited political force directly" (226). Thus, "constituent power is understood as a non-sovereign power" (226).

The paradox of constituent power, after Sieyès, lay in the idea that legal authority and limited government originated from an a-legal and ab-solute origin. Colón-Ríos's solution to the paradox is that constituent power – as mandated – is actually

<sup>10</sup> For a classic restatement, see (Krygier 2012).

of a “limited” nature. Yet it is not clear in what such a limitation consists in, for Colón-Ríos admits that, even when commissioned by a “democratically elected assembly,” limited constituent power assumes “a jurisdiction formally akin to that exercised by dictators and military juntas.” A paradigmatic example of such a constituent assembly is the revolutionary French National Convention which acted as a “sovereign dictatorship of revolution” (cited on 240).

The concept of a sovereign dictator was introduced by Schmitt in his book *Dictatorship*. In this work, Schmitt sought to trace the idea of constituent power from Sieyes back to Rousseau’s discussion of Roman dictatorship. In turn, Rousseau’s discussion took up Machiavelli’s ground-breaking analysis of Roman dictatorship in the *Discourses on Livy*, which was presented as being of finite duration and acting on commission of the Roman people and Senate in order to confront a present danger to the whole political body, such as a foreign invasion.<sup>11</sup> The important fact is that such a dictatorship, albeit reflecting a surplus of executive power, did not abrogate the constitutional division of powers. Colón-Ríos compares it to the authority granted the executive branch to issue emergency decrees that may contravene certain articles of the constitution (239).

By way of contrast, Schmitt argues that the idea of constituent power is a new form of dictatorship which he calls “sovereign dictatorship”. For Colón-Ríos, as a sovereign dictator, the subject of constituent power is a jacked-up version of the Rousseauian legislator: “if one gives Rousseau’s legislator the power of his dictator (i.e., the power of producing conclusive legal acts) one gets sovereign dictatorship: a dictator authorized to replace the existing constitutional order” (240). But this description gives the impression that there is no difference between the republican, Rousseauian idea of constituent power and Schmitt’s version of it. Instead, in my opinion, with his idea of a sovereign dictator Schmitt deconstructs Rousseau’s *Social Contract*. For Schmitt accuses Rousseau of having resolved the paradox of constitutionalism by separating right from power, legislator from dictator. In other words, Rousseau’s solution is too republican for Schmitt. Conversely, Schmitt’s solution is anti-republican: the legislator must be given “the power of a dictator.... This relationship will come about through an idea that is, in its substance, a consequence of Rousseau’s *Contrat social*, although he does not name it as a separate power: *le pouvoir constituant* [the constituting power]” (Schmitt 2014: 111).

The sovereign dictatorship brings together the executive might of a dictator with the legislative authority of the legislator in what Schmitt calls a “plenitude of powers” previously attributed to Popes or Emperors. The theological odour of his vocabulary is not accidental, since the task at hand calls for the “total negation” of the existing constitution and the creation *ex nihilo* of a new one. This revolutionary situation “should normally relinquish any legal justification – since, by definition, a

<sup>11</sup> For the current debate on Machiavelli’s conception of dictatorship see (Geuna 2015).

constitution that is to come does not yet exist. Consequently we would be dealing with sheer power” (Schmitt 2014: 111). But this is not so for Schmitt: the sovereign dictator remains a *juridical* figure in so far as “the power assumed is one that, *without being itself constitutionally established, nevertheless is associated with any existing constitution in such a way that it appears to be foundational to it* – even if it is never itself subsumed by the constitution, so that it can never be negated either (insofar as the existing constitution negates it). This is the meaning of *pouvoir constituant* [constituent power]” (Schmitt 2014: 111, emphasis mine). On this definition, constituent power is at once an extra-legal and infra-legal power. What gives it this character is its “sovereign” element, for traditionally sovereignty is simultaneously *inside and outside* of the legal order. In *Political Theology* he will make this feature of sovereignty explicit by defining it as the *legal* power to decide a state of *exception to law*.<sup>12</sup> At the same time, the fact that Schmitt adds the phrase “in such a way that it appears to be foundational” suggests that constituent power may in actuality not be “foundational” of the constitutional order, that is, constituent power is not *really* immanent to a legal order. We shall see what this mysterious phrase could mean below.

Colón-Ríos adopts Schmitt’s solution because he is impressed by Schmitt’s insistence “that once the constitution is adopted, not only does sovereign dictatorship end, but it ceases to exist as a legal possibility: ‘A sovereign dictatorship is irreconcilable with a constitutional form of government’” (241 citing Schmitt). Schmitt is indeed insistent on this point: “Either sovereign dictatorship or constitution; the one excludes the other” (Schmitt 2014: 124). How to read this mutual exclusion? Colón-Ríos takes it to mean that Schmitt limits constituent power out of respect for the popular sovereign and its new constitution. For me, Schmitt’s either/or seeks to establish a permanent dualism between constituent and constituted powers, as if they could not be given a univocal reading. This pits democracy against constitutionalism, and, in my opinion, constitutes a rejection of the very thesis that Colón-Ríos wants to defend, namely, that of the immanence of constituent power in the juridical order.

Another problem is that, to justify a “limited” (yet nonetheless “sovereign”) constituent power, Colón-Ríos has to bring back a non-republican conception of the sovereign: “sovereign dictatorship amounts to the exercise of constituent power on a mandate from *the true sovereign*” (244, emphasis mine). Here the distinction between sovereignty and constituent power is not intended to abolish an absolutist sense of sovereignty, as it was in Rousseau and in the republican tradition. Rather, the concept of constituent power, to distinguish itself as juridical because of its “limited” nature, has become dependent on the prior positing of the absolute unity of power and authority of sovereignty from which it draws its authorization (241). In so doing Colón-Ríos assumes that a “true sovereign” – in its Hobbesian form –

<sup>12</sup> See the discussion in (Agamben 1998).

really exists, viz., in the form of “the people in a democracy” (242). This requires a big leap of faith: the people as “true sovereign” seems more the stuff of populist dreams than an established social fact.

Colón-Ríos is thinking of the possibility of convening a constituent assembly to act as sovereign dictator through a referendum posed to the electorate whose sole question is: “should the constituent assembly be convened to create a new constitution?” (242). However, a brief look at republican sources indicate that the fact alone that such a sovereign dictatorship is commissioned by a “sovereign” people is not enough to justify its employment. Indeed, the problems of this solution were discussed already by Machiavelli when he thematized, and distinguished, the republican institution of dictatorship from the experiment of the Decemvirs, which was a body commissioned to give Rome a new constitution. Machiavelli points out that such a body quickly designed itself as a “permanent” source of constitution-making as a way to maintain absolute power and abolish all legal authority, causing a popular uprising that helped secure once and for all the belief in a constitutional separation of powers that could never be contravened if Rome were to maintain its liberty.

Things get more complicated because in Schmitt’s posterior texts like *Political Theology* and *Constitutional Theory* Schmitt offers decisionist definitions of popular sovereignty that seem to be *indistinguishable* from his idea of sovereign dictatorship. Schmitt was fully aware that there was no going back to monarchic sovereignty in its pre-revolutionary form. The name of the game after the French Revolution was popular sovereignty – but how to understand this sovereignty in the age of mass mobilization? In my opinion, Schmitt believed that only a dictator could take decisions that realized popular sovereignty. As mentioned at the start, Schmitt was entirely aware that in late modernity monarchy was replaced by democracy. But what this means for him is that *dictatorship* has become the horizon within which to understand the new grammar of popular sovereignty.

Colón-Ríos argues that all three of the above cited works by Schmitt form a coherent theory of constituent power. His claim is that the sovereign who decides of the state of exception in *Political Theology* is “an entity or individual who seeks to exercise the powers that in *Dictatorship* Schmitt associated with commissarial and sovereign dictators *by itself*, that is, in the absence (or in violation) of a commission” (245). What this means is that the sovereign dictator is “sovereign” in a different sense than a monarch is “sovereign”. Different how? Schmitt was aware that even in the most absolutist forms of medieval monarchy, the king in some sense was always “under law”. But he is equally convinced that the belief in an anteriority of law with respect to sovereignty is no longer applicable in modernity. Hobbes represents the great watershed moment in which sovereignty, like a black hole, sucks into itself all law. Thanks to the works of Foucault and Agamben on modern governmentality, we now surmise that the actual reason for this major shift is that in

modernity, and certainly by the 19<sup>th</sup> century, the power of government became independent from both constitutionalism and sovereignty. Hence the famous dictum, “the king reigns, but he does not govern.” Governments do not work through laws, nor are they sovereign in the technical sense. Schmitt’s thinking reflects this priority of government over rule of law by incorporating it into his idea of the sovereign, essentially identifying democratic sovereignty with sovereign dictatorship. I think Colón-Ríos’s crucial discussion of the influence of Donoso Cortes on Schmitt shows this clearly.

Colón-Ríos discusses Schmitt’s citation of a famous parliamentary speech by Donoso Cortes on dictatorship in which the Spanish reactionary claimed that it was better to live under a “dictatorship of government” than under one of “insurrection” (246). According to Colón-Ríos this meant that Donoso’s concept of the dictator – in a prophetic anticipation of general Franco – took upon itself the plenitude of powers in order to protect the state against “anarchy.” Such dictatorial powers is what Schmitt calls “sovereignty” in *Political Theology* (246). However, according to Colón-Ríos, Schmitt’s “sovereign dictator, in contrast, was all about the creation of new constitutional orders. Schmitt’s distinction between sovereignty and constituent power is best understood as leading to the conclusion that a constituent assembly authorised to adopt a new constitution is not the sovereign, but a sovereign dictator commissioned to exercise constituent power on behalf of the true sovereign.” The difference between Donoso Cortes’ dictatorial sovereign and Schmitt’s “sovereign dictator” is that the former can abolish constitutions whereas the latter, in so far as its aim is a constituent one, “cannot prescribe a mechanism for its own elimination.” Yet, as can be clearly seen in the long citation that introduced Schmitt’s idea of sovereign dictator, this figure is expressly introduced not in order to preserve an old constitutional order, but to abrogate it and create an entirely new one. Thus, I think it is more correct to say that Schmitt is not simply putting forward the claim that constituent power becomes the “legal” dictatorship exercised by a sovereign people as a means to attain a constitutional government. Rather, such sovereign and constituent dictatorship is from the start an instrument of governmentality, and thus what we have here is the subreption of sovereignty in government, an entirely anti-republican move, made possible in and through a process of constitution-making.<sup>13</sup> Schmitt’s defence of the constitutional role of dictatorship is the path through which constitutionalism is incorporated into democratic governmentality precisely against Rousseau’s point who “systematically argued in favour of a formal means for the people to act independently of government” (55).

Of course, Colón-Ríos is fully aware that constituent activity undertaken under conditions of “emergency” provides “fertile ground for the conflation between sovereignty and constituent power” (259). Indeed, his book is a sophisticated and welcome attempt to exorcize this possibility and still retain the idea of constituent

<sup>13</sup> I refer to my discussion of this hypothesis in (Vatter 2020a).

power. But I think that he downplays the significance of Donoso Cortes's subsumption of constituent power under the "dictatorship of government" in its struggle against "anarchy" and "socialism." Because declarations of states of emergency are governmental acts, his hope that constituent assemblies – "understood as a mechanism for the exercise of the originary constituent power of the people" – will be "more like Rousseau's Legislator than like Schmitt's sovereign dictator" (259) remains a pious one.

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