

# *The undiminished constituent: Afterword to the Foreword by Sergio Verdugo*

Emilios Christodoulidis\*

*This Afterword is a response to Sergio Verdugo's Foreword. It provides a defense of the notion of constituent power as a necessary element of the constitutional imaginary and ineradicable dimension of any credible account of democratic constitutionalism. It takes issue with what Verdugo identifies as the 'conventional' approach to constituent power, and argues that the collapse of constituent power into constituted power comes, philosophically and politically, at a significant cost. It concludes with a discussion of the recent irruption of constituent power in the constitutional situation in Chile.*

Sergio Verdugo's Foreword, "Is It Time to Abandon the Theory of Constituent Power?," is a monumental cartographic exercise that covers the entire canon of recent and current constitutional thought on the question of constituent power. It answers the title question with an emphatic "yes," constituent power having supposedly run its course and exhausted its dubious promise.<sup>1</sup> On the positive side, the Foreword exhibits an enviably wide acquaintance with the literature, and its ambition is immense. But it is also a highly problematic endeavor, both methodologically and substantively. Oscillating wildly between "descriptive" and "normative" arguments, and suspended somewhere between conceptual analysis and political sociology, it largely fails to realize its ambition as a contribution to either of these fields. Substantively, it invites the question over the point of the "clearing exercise" it engages, of aiming to excise the concept of constituent power from constitutional thought. What exactly is to be gained from this excision? What is to be gained from this draining of constitutional thought of its political energies?

The author's route through the vast complexity is to track the "conventional approach to constituent power" in three steps. In the way Verdugo tells the story, Emmanuel-Joseph Sieyès started it all with his "famous pamphlet."<sup>2</sup> The second step in "the conventional approach" fast-forwards from Sieyès to Carl Schmitt, although

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\* University of Glasgow, Glasgow, United Kingdom. Email: [Emilios.Christodoulidis@glasgow.ac.uk](mailto:Emilios.Christodoulidis@glasgow.ac.uk).

<sup>1</sup> Sergio Verdugo, *Is It Time to Abandon the Theory of Constituent Power?*, 21 INT'L J. CONST. L. 14 (2023).

<sup>2</sup> *Id.* at 24.

“Schmitt’s interpretation of Sieyès was wrong.”<sup>3</sup> It is (only) with the third step along this conventional path that constituent power is reconceived in the direction of democracy in the hands of “the most visible defenders of the theory” such as Ernst-Wolfgang Boeckenfoerde, Antonio Negri, Andreas Kalyvas, and Fernando Atria.<sup>4</sup> This democratic reconstruction has to contend with two key assumptions that constituent power carries: the idea that a constitution is the result of a political *decision*; and the idea that it is authored by the “people,” which in turn assumes that the people are “a unity” and can have “a unified and stable *will* susceptible to interpretation.”<sup>5</sup> Familiar paradoxes accrue around both these assumptions, which ultimately, for Verdugo, defeat the “redemption.” He speaks of the paradox “of needing to have an idea of the people preceding the procedures that need to be used to identify the people and channel their will.”<sup>6</sup> He is of course right to identify “paradox” at this juncture where constitutionalism attempts to reconcile the democratic moment of self-determination that resists confinement, fixity, and limit, and the legal moment of providing institutional forms that channel and enable that expression.

But while the paradox of constitutionalism with all the profound tension it evokes has indeed become the familiar portal into constitutional theory, there is nothing particularly “conventional” about Verdugo’s suggested “conventional path.” Of course, conventions are local, and Verdugo does appear to have a particular axe to grind with regard to South American pathways of the “constituent” (Evo Morales, Hugo Chavez, and especially Rafael Correa). But if the three steps are far from the “conventional way” to tell the story of constituent power,<sup>7</sup> they conveniently stack the cards in his favor. Take Sieyès, and the purported first “step.” The notion that Sieyès’s “famous pamphlet on *What Is the Third State?* . . . was . . . conceived as a way to moderate the Jacobin approach to sovereignty” is anachronistic because *What Is the Third Estate?*, published in 1789, preceded the ascendancy of the Jacobins. What it *did* offer was a defense of constituent power, not an invitation to moderate it. When, in 1789, the deputies of the Estates General, convening in Versailles, declared themselves the National Assembly, no longer assembled at the behest of the monarch but as representatives of the people of France, political modernity was born in a sweeping exercise of constituent power. It would be difficult for any constitutional history not to recognize this *self*-authorization as an act of constituent power and of democracy in tandem. Why, then, introduce Sieyès into the narrative as *curbing* the Jacobin constituent excess? Verdugo’s suggestion with regard to the man whom Robespierre called the “mole of the Revolution”<sup>8</sup>

<sup>3</sup> *Id.* at 25.

<sup>4</sup> *Id.* at 26.

<sup>5</sup> *Id.* at 28.

<sup>6</sup> *Id.*

<sup>7</sup> Chris Thornhill and Richard Albert are referenced here as the origin, and while I have not read Albert, Thornhill’s exceptional sociologically informed history of constitutionalism does not tell the story Verdugo imputes to it. See Verdugo, *supra* note 1, at 18 n. 34, citing Chris Thornhill, *Rights and Constituent Power in the Global Constitution*, 10 INT’L J. L. IN CONTEXT 357 (2014); RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* (2019).

<sup>8</sup> See John CLAPHAM, *AN ESSAY IN THE POLITICS OF THE FRENCH REVOLUTION* 2 (1912) (“the creature whose secret working undermined the ground on every side”).

is, inadvertently, revealing. The radical phase of the French Revolution did in fact come to a close in 1794 with the fall of the Jacobins. Immediately, the Thermidoreans dismantled the regulations fixing a maximum price for essential goods, which led to a collapse of stocks and rampant speculation. In the last expression of the constituent of that troubled decade, the “hunger barricades” were set up by the sans-culottes in May 1795 in the Bastille area, and they echoed with the slogan “Bread and the 1793 constitution.” To stem the reaction, the Convention adopted the decree proposed by Sieyès “against seditious gatherings.” The constituent had become seditious, and its expression was defeated in a bloodbath.<sup>9</sup>

This historical detail may tell us something interesting about the unease that the invocation of “constituent power” causes mainstream constitutional theory. But let us go back to the “conventional story.” If, with Sieyès’s famous pamphlet, constituent power took its first step, the second step, we are told, involves it being funneled, filtered through, and harnessed to Schmitt’s notion of sovereignty. The two controversial assumptions at the root of constituent power—the idea that the constitution is the result of a political decision, and the idea that it is authored by the “people”—receive, in Schmitt, as we know, highly disturbing iterations. Constituent power as sovereignty is tied to the *decision over the exception*, and the *subject* of the constitutional decision, the subject of the constitution, is the organic group, conceived along pre-political, essentialist lines. With Schmitt, the constituent remained immanent in the constituted order but was carried as autonomous in the order of the decision that should not, and could not, be reduced to the order of the constituted; and as far as the subject of constituent power was concerned, it was conceived as concrete, immanent origin. For Schmitt, the pre-institutional determination of “the people”—political, existential—is what breaks the double-bind of the “paradox of constitutionalism” in assuming the collective subject as formed independently and prior to the ascription.

It is against this fascist deformation that the theory of constituent power must redeem itself. Note how conveniently the theory has thereby been placed on the back foot, as it were, needing to offer and sustain a democratic corrective to its exercise as “absolute power.” And is this recourse to totalitarianism,<sup>10</sup> against which the “redemption” of constituent power is called upon to produce a credible corrective, not the familiar strategy of invoking the Jacobin Terror, Bolshevik oppression, Nazi atrocity—along with Pol Pot, Suharto, Pinochet, and every other genocidaire in history—in order to ward off the evil of constituent power now cast as unchecked power abuse? On this rendering, the exercise of constituent power is already weighed down by the enormity of the injury it has caused, and is forever tainted with its actual or *potential* complicity with totalitarianism. Into this aperture step the democratic “redeemers”—how loaded

<sup>9</sup> For an informative account of the significance of “constituent power” in revolutionary France, see Lucien Jaume, *Constituent Power in France: The Revolution and Its Consequences*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 67 (Martin Loughlin & Neil Walker eds, 2007).

<sup>10</sup> See REGIS DEBRAY, *CRITIQUE OF POLITICAL REASON* 11 (David Macey trans., Verso 1983) (“Totalitarianism serves much the same function in the arsenal of our political science as fanaticism did in that of the Enlightenment or totemism in primitive anthropology: it is both an excuse for mis-recognition and a rite to ward off evil”).

this term—only to be proven irredeemably naïve (about the agendas of populists, demagogues, corrupt elites, etc.), hopelessly romantic and wildly idealistic, or simply theoretically confused in not realizing that the “people” of popular sovereignty are a fiction, and that the first-person plural (of “we the people”) is untenable as a speaking position. Where counterarguments and counter-theses emerge, often unrecognizable but always meek, Verguro spends sections 2–6 of his Foreword knocking them out of play. His message? Time to abandon constituent power and get comfortable with the smooth expanses of the constituted order with its overlapping consensus, and where that overlap is missing, its consensus-building vernacular.

But what if we picked the democratic thread earlier (than the third step of the “conventional path”) and recognized its constitutive—rather than corrective—significance for constituent power? For this, we must get off this “conventional road” and follow a different lineage back to a concept of constituent power that arises as coincident with popular sovereignty and as constitutively democratic. Constituent power broke onto the scene of modernity with the French Revolution. Its origin is Jean-Jacques Rousseau’s *Social Contract* rather than Sieyès’s pamphlet. Rousseau’s theory of the “general will” is the first direct attempt in modern thought to give expression to the radical democratic impulse in constitutional thought. He is the first, in effect, to confront us with the “enigma” of the general will, testament to the tension that inhabits political constitutionalism from the start.

This is not the time to discuss Rousseau’s radical argument at any length, or how it informed the radicalism of the Jacobins. Suffice it to recall that *The Social Contract* offers a constitutive connection between democracy and constituent power, co-original at the moment of the expression of the “general will.” Collective political capacity—self-legislation—thereby acquires a reflexive dimension because the measure of self-determination of a collective must remain open to democratic scrutiny, as a condition of what it means for any collective to be “self”-determining.<sup>11</sup> This is what cannot be substituted about the constituent, and this is why its collapse into the constituted comes, philosophically, at a significant cost.

To defend the undiminished conception of constituent power is not to suggest that constituent practice should remain perpetually alive like some Trotskyist invitation to “permanent revolution.” It is instead to suggest that the constituent remain the live underpinning of a constitutional order as its promise, and pulse, which it must so long as the constitutional order aspires to remain a people’s democratic achievement. Which means that whatever the available institutional channels for its expression at any one time, the fact that we begin, as we must, from constitutionally embedded positions (yes, the “we” cannot rise above this embeddedness to proclaim “its” will) takes nothing away from the meaning and unequivocalness of the constituent. Because whatever institutional channels are available for the expression of the democratic will, their adequacy will be measured against the constituent as collective political capacity and as self-legislation, and for that reason will remain reconfigurable, provisional, and

<sup>11</sup> For the most comprehensive analysis here, see ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* (Mauruzia Boscagli trans., Univ. Minn. Press 1999).

revisable, answerable to their adequacy to carry collective self-determination. Not because constitutional thinking forever attaches to such radical unsettledness, but because the constituent runs within the constituted as its highest possibility. It is the limit that equips political constitutionalism with its self-understanding as democratic. That is what justifies the emphasis on the constituent as *both* necessary reference *and* as irreducible to the logic of the constituted.

This more ordinary invocation of constituent power also means that the moments of its expression that we treat as paradigmatic need not be chosen from the repertoire that its opponents have been so successful at imposing. When it comes to the social constitution, let us think not of Hannah Arendt's recourse to the Terror but of Karl Marx's to the Commune. If for Marx the Commune "at last discovered" the "political form under which to work out the economic emancipation of labour,"<sup>12</sup> it was because of its emergent-constituent nature. With the Commune, the problem of the inadequacy of the extant order, the problem of the shortfall in the categories of the "constituted," gets caught up in the unfolding of action whose *élan* molds them as appropriate to its unfolding, the moment of form-giving coincident with the praxis of the Communards. What fascinates Marx about the Commune is that the form runs alongside the workers' reorganization of production in a moment of democratic self-assertion.<sup>13</sup> The dialectic between constituent and constituted power is incarnated in the Commune. When it comes to workers' self-management, let us think not (only) of the Soviets, but also of the Polish Solidarity movement in 1980, as pure an expression of the constituent as we encounter in the history of the twentieth century. The democratic self-assertion of the movement (what we have been calling its constituent power) is expressed *against* the categories of constituted power on offer to accommodate the constitutional expression of a "workers' republic" in the categories of state socialism that would rob the Gdansk dockworkers of the meaning of their action. These are constituent moments that have graced our constitutional histories with the real promise of collective empowerment.

Perhaps the most surprising part of Verdugo's Foreword is where he fails to discern the meaning of the constituent moment closest to home, in the extraordinary events in Chile in 2019. How perplexing that the appearance of constituent power in his own country makes such a fleeting appearance in his text, and receives such a cursory dismissal: "In the Chilean process the constituent power theory was invoked without much success."<sup>14</sup> Yet in 2019, thirty years after Pinochet's coup, the constituent process emerged, with a vehemence and a dynamism that took the world by surprise. If the movement erupted as anti-systemic, successfully challenging its representation by Piñera's government, it was because the constitutional channels of political change were blocked. The "cheating constitution," to borrow a term popularized by

<sup>12</sup> The formulation is to be found in Marx's text on the Paris Commune: KARL MARX, *THE CIVIL WAR IN FRANCE: ADDRESS OF THE GENERAL COUNCIL OF THE INTERNATIONAL WORKING MEN'S ASSOCIATION* (1871), available at <https://www.marxists.org/archive/marx/works/1871/civil-war-france/ch05.htm>.

<sup>13</sup> *Id.*

<sup>14</sup> Verdugo, *supra* note 1, at 63.

Fernando Atria,<sup>15</sup> was a mechanism of deliberate deadlock, effectively removing from democratic control and democratic redress key elements of the organization of the political and economic systems, including the social state and social security. What arose in Chile was a volatile revolutionary irruption of norm-giving and dramatically emancipatory social activity, a “moment” of large-scale constitutional innovation: a Constituent Assembly was established (supported by 80% in the referendum of 2020) with the mandate of giving Chile a new constitution. These were events that threw *the constituent* into relief, and despite the defeat in the referendum, it remains a constitutional project with unspent claims on the future.

It is difficult to understand how Verdugo missed the constituent dimension of this innovation. Even at a basic, unremarkable level, constituent power is the power to enact that which is not authorized or mandated by the extant constitutional order. At this basic and unremarkable level, any amendment to the rules of constitutional amendment is an exercise of constituent power, let alone the institution of a constituent assembly set up to redesign the constitution from the start. In that precise and unambiguous way, the theory of constituent power expresses the rupture that happened in Chile, and this has little to do with whether the Convention remained bound to “the founding rules [which] were the product of a multipartisan agreement.”<sup>16</sup> Constituent power was expressed in, and as, the “founding rules” that “unlock[ed] the constitutional system” and established the extraordinary institution of the assembly. Whatever else the author argues against it is irrelevant, for the constituent is in the act of instituting that which there was no mandated authority to institute.

But for the author’s question, “is it time to abandon the theory of constituent power?,” to be answered affirmatively, a different, dangerous, “function” had to be attributed to it; hence “invoking the constituent power theory was *functional* in raising the stakes of the political negotiations by putting on the table the idea that the Convention did not need to respect a degree of legal continuity.”<sup>17</sup> By the time we reach the conclusion of the Foreword, the “approach” has become one of managing risks and reducing “transaction costs” (inviting “a more balanced approach [that] signals effective constitutional change with lower risks”<sup>18</sup>), which begs the question who is bearing those costs and who is risking what? Here is Verdugo:

Responding to the risks posited by the constituent power theory, as in Ecuador, Chilean *conservative* scholars argued that the constitutional convention merely had derivative powers. For them, the idea was to provide civilized and institutional continuity between the previous Constitution—initially enacted by the Pinochet dictatorship—and the new constitution, while avoiding the experiences of Ecuador (2007) and Venezuela (1999).<sup>19</sup>

I do not know whether Verdugo includes himself among the “conservative” scholars of the above quotation. I suspect that he does not, because to advocate institutional continuity with the previous constitution would be to accept a very particular

<sup>15</sup> FERNANDO ATRIA, *LA CONSTITUCIÓN TRAMPOSA* (2013).

<sup>16</sup> Verdugo, *supra* note 1, at 74.

<sup>17</sup> *Id.* at 75 (emphasis added).

<sup>18</sup> *Id.* at 77.

<sup>19</sup> *Id.* at 74 (emphasis added).

understanding of constitutional continuity as locked into the Pinochetist design, and the author, however ambiguously, has accepted the need to “unlock” it. But if that particular conservatism is not (fully) endorsed, a more deep-seated conservative malaise hangs over the Foreword’s whole argument. Initially it appears as a jaded skepticism about the efficacy and legitimacy of *any* form of radical political action. Later, with the consignment of the theory of the constituent to oblivion, the conservative objection migrates from radical politics to the category of politics as such, sought to be ousted through “traditional” legitimation, “continuity” demands, etc. What is profoundly detrimental to any understanding of democratic constitutionalism in Verdugo’s Foreword is the loss of the language that might have carried the properly democratic dimension, the terms vacated at the point of the folding-in on itself of the constitutional imaginary that the erasure of the “constituent” entails. I will end on an injunction from Pierre Rosanvallon (not exactly a left-wing radical) who (nonetheless) invites us to ground our constitutional analysis “in the complexity of the real and its aporetic dimension [because it] leads [us] to develop an interest in the ‘very nature’ of the political.”<sup>20</sup> In other words, to focus on the “aporetic” antinomies, between the promise of the constituent and its constitutional expression, as they are revealed in the historical unfolding of constitutional formations, throws the political into relief, and prevents us from identifying with the forms of “closed universalism that has made the West blind to its own history.”<sup>21</sup>

<sup>20</sup> Pierre Rosanvallon, *Democratic Universalism as a Historical Problem*, 16 *CONSTELLATIONS* 539, 546–7 (2009).

<sup>21</sup> *Id.*