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# THEORY AS /OR HISTORIOGRAPHY?
## CONSTITUENT POWER (OF THE JURIST) AND THE LAW (OF THE STATE)

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**ABSTRACT**
Rather than to critique the substance of Joel Colón-Ríos's indisputably important contribution to the scholarship on constituent power, the aim of this essay is to put in question the historiographical mode of theoretical engagement which prevails in the contemporary debates about this important concept, as well as to question its ostensible present-day significance—especially to the politically engaged projects such as Colón-Ríos's—which, at the very least, deserves to be discussed more directly, explicitly, and systematically.

**KEYWORDS**
Constituent Power; Historiography; Legal Order; Legal Change; State.

> Numerous dogmatic ideas of contemporary public law are still entirely rooted in the mid-nineteenth century ... [It] is among the tasks of constitutional theory to demonstrate how much some traditional formulas and concepts are entirely dependent on prior situations, so they are not at all old wine in new bottles, but instead only an outmoded and false etiquette.
>
> Carl Schmitt, *Constitutional Theory* (1928)

## INTRODUCTION

Constituent power is one of the most important constitutional concepts, and Joel Colón-Ríos one of its most eminent theorists. Set against the backdrop of his other major work on the subject,[1] his most recent monograph, *Constituent power and the*

[1] Joel Colón-Ríos, Weak Constitutionalism: Democratic legitimacy and the question of constituent power. (Routledge 2012).

*law*,[2] offers not only a magisterial exploration of the ways in which late-18th and 19th century jurists in Spain and Latin America envisioned the relationship between constituent power and the law, but also a historically-informed critique of currently prevailing approaches to constituent power. Read together, both works advance Colón-Ríos's long-standing theoretical project: to offer a compelling radical-democratic reinterpretation of the fundamental concepts of modern liberal constitutionalism. While *Weak Constitutionalism* did so in a more direct fashion--by offering a sustained critique of the most influential liberal approaches to constitutional government—*Constituent power and the law* pursues the same goal in a more roundabout way: by developing a historically-informed but 'eminently juridical' notion of constituent power.

As articulated by Colón-Ríos, constituent power ought to be understood as both *conceptually distinct* from the notion of the sovereignty of the people, as well as *practically consequential* in the context of the debates about the nature and scope of the jurisdictional authority of constituent assemblies, the extent to which the acts of such assemblies may be determined by the outcomes of constitutional referendums, as well as the situations in which such determinations may be enforced in the courts of law.

Thus understood, constituent power is defended no only against those who worry about its potential to justify 'abusive constitutional practices', but also against those whose notion of constituent power appears in a more sympathetic light; in the context of the debates about 'unconstitutional constitutional amendments'. Though seemingly rejecting the notions of constituent power that prevail in other disciplines, both camps continue to share the same baseline notion of constituent power as a 'substantively unlimited', and hence potentially dangerous, constitution-making 'faculty'.

## CONSTITUENT POWER, THE LAW ... AND WHAT ELSE?

While Colón-Ríos is certainly right to draw attention to this point, it is unclear whether his—or any other scholarly account of constituent power—can evade not making assumptions about the nature of political power in general, or about what, under a particular set of circumstances, makes its exercise 'constituent'. Though such notions need not inform the juridical conceptions of constituent power directly, they must inform them somehow, if only by shaping the understanding of the conceptions from which they are analytically distinguished. If so, this means that rather than conclusively banishing constituent power qua unlimited constitution-making faculty from the sphere of juridical knowledge Colón-Ríos simply evacuated the questions

[2] Joel Colón-Ríos, Constituent power and the law (Oxford University Press 2020).

about its non-juridical manifestations, onto the terrain dominated by the questions about the power of a sovereign people to establish a new constitutional order from scratch.[3]

The sensibility of a distinction between the juridical character of constituent power and the political character of the people that acts in its 'sovereign capacity' hinges not only on the formal distinction between constituent power and sovereignty, but also on some notion of what acting in sovereign capacity—which is to say exercising power as a sovereign—looks like in practice. Just like constituent power, the 'sovereign capacity' that Colón-Ríos attributes to the people is a notion which only makes sense from the perspective of jurists themselves. Or, to put it differently, those who'd consider it advantageous not to specify whether the capacity in question refers to

(a) to the notional *ability* of all peoples to establish new constitutional orders,

(b) to the typical *capability* of most peoples to do so, which varies in space and time, or

(c) to the specific *capacity* of an actually existing people, relative to the its aspirations and circumstances?

Though (a) seems to be trivially true, the sensibility of (b) and (c) is much more dubious, especially once one confronts the outcomes of popular revolutions and other transformative constitutional changes in a more panoramic historical perspective. I will return to this point in the next section, but what's important to stress at this point is the position of constituent power within a universe of conceptual binaries, starting with the notion of constituted powers. Though set aside by the organizing distinction of the book, Colón-Ríos' conceptual 'demotion' of *constituted powers* couldn't change the mutually constitutive character of those two notions of power. This point is neither conceptually trivial, nor practically inconsequential, especially once we recall that constituted powers refer to

(1) the comprehensive organization of *political*—which is to say—*public* powers, which are assigned to various *institutions* and exercised by different *office-holders*,

[3] For a distinction between potestas and potentia, and the understanding of the latter as s a creative 'societal force', which, inheres in the community at large, see Jiří Přibáň, 'Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism' (2018) 45 Journal of Law and Society S30, 31.

(2) traditionally distributed across three 'branches' of *government*: legislative, executive, and judiciary in conformity with the principle of the separation of powers, and as

(3) distinct from the institutions which, remain beyond the imagination of contemporary (liberal) constitutionalism: the institutions of the state itself.

This concept of constituted powers in turn hinges on the distinctions, which Colón-Ríos, at different places in the book either explicitly recognizes, or the validity of which he must presuppose in order to be able to make a case of a distinction between sovereignty and constituent power of the people—starting with the traditional distinction:

(i) between formal constitutions, as the records of constitutional norms, compiled within a single document, in a written form—and material constitutions,

(ii) between the sovereignty that exists as the attribute of a particular kind of community (i.e. the *people*)—and the sovereignty as the mark of a particular kind of territorial regime (i.e. the *state*),

(iii) between revolutions as the successful uprisings of downtrodden citizens against incorrigibly despotic governments—and *civil wars* as never-ending fratricidal struggles, fueled by sectarian passions;

(iv) between *legitimate* revolutions as the exercises of constituent power that culminate in the adoption of a new constitution in conformity with the ideals of popular sovereignty—and *illegitimate coups* as the events as the events that violate popular sovereignty and that result in the overthrow of democratically legitimate governments;

(v) between the extra-constitutional overthrows of legitimate governments as the illegitimate exercises of (typically military) power—and the extra-constitutional overthrows of illegitimate governments as the legitimate exercises of sovereign's 'prerogative power',

(vi) between constitutional revolutions as the causes of major constitutional changes, (which in many cases amount to constitutional transformation) and constitutional amendments as the modalities of minor constitutional changes,

(vii) between *revolutions* against the rulers of sovereign states who govern despotically (where the foundation of a new constitutional order doesn't *require an act of secession*)—and revolutions against the despotic rule of

imperial governors (where, starting from scratch, the foundation of a new constitutional order begins with secession),

(viii) between the act of secession that results in the formation of a new state in conformity with the will of its people, within an area that used to fall under the sovereign authority of another state —and the act of partition that results in the externally imposed division of the most precious property of a sovereign people: its territory.

Territory is ignored in the study of constituent power, as are the things that allow all who are concerned with the issue of constituent power to imagine it as the territory of a modern state:

(I) a *distinction between* the *core and the periphery*, as the constitutive feature of the territorial units that jurists and non-jurist alike must in mind when they refer to constitutive power in a particular way[4]--not as the people's constituent power, but as the constituent power of the people: an agent whose collective identity can only be discerned in relation to an already existing spatiotemporal referent—and,

(II) the *topography of human sociality*, which most political ideologies mentally carve into distinct and ambiguously antagonistic regions, spheres, domains, and jurisdictions: society and economy, public and private, moral and legal, legal and political, public and private, normal and exceptional, domestic and foreign.

[4] In order to be recognized as territories, bounded spaces must not only be immunized from corrosive outside influences, but must also be internally unified, which, first and foremost means centralized: internally oriented toward a single administrative seat of power (most often in the form of a deliberately chosen national capital, the choice of which is typically one of the first provisions one encounters in any state constitution). Once centralized--or to put it even more precisely, capitalized--state theory becomes inscribed with constitutive duality between the core and the periphery, which, in conjunction with the linear (accumulative) and the non-linear (non-accumulative) processes, gave rise to two kinds of forces: (1) centrifugal as the force that causes things to propagate, spread, cascade, proliferate, and disseminate, and (2) centripetal, which makes them assemble, gravitate, and concentrate. Cf. Henri Lefebvre, The Production of Space (tr Donald Nicholson Smith, first published 1974, Blackwell Publishers 1991) 281 passim. The first is inscribed in the images of revolutionary masses which--before they exercise constituent power, must first get together in city squares--streets and horse tracks. The second is on display in the multi-stage conceptions of constitution-making, such as those on display in Sieyes' Third Estate, where national constituent power emerges through delegation, in a way that can be described as bottom-up from the perspective of the hierarchical organization of France, but which in its material manifestation involves the movement of elected delegates: elected by those assembled in their local parishes, assembling in regional centres in order to elect those who will in turn assemble, as their delegates in the national constituent assembly in Paris.

Needless to say, jurists don't preoccupy themselves with the categories that parcel out the universe of human sociability into the discrete regions of reality that are further subdivided into discrete chunks of spacetime. Nor do they worry too much about the ways in which constituent power manifests itself in material reality. Still, the templates and categories whose characteristics they take for granted continue shaping their implicit notions about what the power of the actually existing people typically looks like, in action. Though neglected, the character of both should be of particular importance in the context of the theories which are honest enough about the political gamble that informs their proposal.

The legitimacy of primary assemblies may be grounded in the notion of a sovereign people akin to that advocated by Colón-Ríos, but their intelligibility hinges on the vision of democratic government that is radically at odds with the idea of constituent power regulated by the law—the law of a territorially integral state. The people of that state is 'sovereign' because that state that prefigures its identity is sovereign itself-- not in virtue of the innate capacity of its people to create a new constitutional order for itself from scratch (which would, in effect, endow it with the kind of constituent power that Colón-Ríos argues against).

## CONSTITUENT POWER AND THE CHANGING NOTIONS OF CONSTITUTIONAL CHANGE

The practical concerns that drive *Constituent Power and the Law* cannot but raise the questions about the ability of Colón-Ríos's argument to unearth the 'full juridical potential' of constituent power.[5] This, I think is a fair point to make, especially since it's obvious that that potential—from the perspective of the arguments of the authors that Colón-Ríos reacts against—hinges not on their refusal to make a distinction between constituent power and sovereignty, but rather on their commitment to a highly restrictive notion of basic constitutional structure; itself sustained by a seemingly open-ended, but, on closer inspection, rather tendentious notion of constitutional 'change'.

Billed as a category that encourages more attention to the actual processes not captured by the concepts of amendment and revolution, 'constitutional change' emerged as a term which allowed constitutional scholars to kill three birds with the same stone: (a) to evaluate previously incomparable forms of forms of constitutional change as minor or major, partial or total; (b) to introduce a new category, un-constitutional constitutional changes, which lends conceptual support to the idea of

[5] Colón-Ríos, supra note 2.

basic structure, yet (c) continue exploiting traditional distinction between constitutional and extra-constitutional constitutional change.

Instead of directing attention to the truly neglected forms of 'change', the concept of 'constitutional change' functions as a device which draws our attention away from what could, in principle, make such changes 'constitutional'. Had it been taken more seriously, the idea of constitutional *change* would have resulted not in the reaffirmation of the essentially etymological conception of constitutional amendment, but in a more radical rethinking of the appropriateness of the terms used to discuss it: from constitutional 'revision' and transformation, to constitutional amendment and dismemberment.[6]

For Richard Albert, 'the distinction between amendment and revision, [the] basic structure doctrine is predicated on the theory that amendment cannot be used to transform the constitution or to change its identity.'[7] As a result, 'self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations', irrespective of their conformity with formal requirements of constitutional change, are actually, not amendments at all'. Unlike amendments—whose aim is to 'better achieve the purpose of the existing constitution'—the changes whose aim is to 'dismantle the basic structure of the constitution' and establish a new one, 'rooted in principles contrary to the old', ought to count as the acts of 'dismemberment'.[8]

Dismemberment is a curious metaphor to use, not only because it aspires capture a wide array of constitutional changes—from those which are hard to imagine as dismembering anything (such as those that would establish a republican, instead of monarchical form of government) to those which could be understood as the acts intended to 'destroy' the 'foundations', only from the perspective of those who interpret those foundations in a very specific, and invariably contestable way. The 'dismemberment' of the United Kingdom that would appear as a destructively unilateral secession of Scotland from the perspective of the Westminster government (for instance) would from the perspective of Scottish government appear as a perfectly legitimate outcome of withdrawing from a constitutively composite constitutional order. From the perspective of a unit that sees itself as a withdrawing *member*, the very term

[6] 'Transformative constitutional change': an act of constitution-making that: (1) resulted in the formation of an institutional configuration, (2) was intended both as a replacement as well as the supersession of notional 'predecessor', (3) that commits to memory that what it (intended) to irrevocably leave behind, (4) even though their respective distinguishing features and intended functions make them mutually incommensurable.

[7] Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 Yale Journal of International Law 1–3

[8] Ibid.

'dismemberment' would probably appear as suspiciously colourful, if not tendentious and partisan.

Though there are scholars, such as Yaniv Roznai, who critique Albert's 'dismemberment' along similar lines, but still agree that the term 'amendment' cannot be used for the forms of constitutional change which aim to 'transform', 'revolutionize', or 'replace' existing constitutions.[9] Unlike 'anti-constitutional' forms of constitutional change—which, according to Carlos Bernal, 'undermine' extant constitutions by aiming to 'replace' them in entirety—constitutional amendment only implies a 'minor' change *in the* 'non-essential elements' of the constitution.[10] Rather than arbitrary, this understanding of constitutional amendment follows directly from its root-verb, *emendere*, which in Latin means 'to improve', or 'correct'.

If 'correct' derives from Latin *corrigere*, whose original meaning was to literally 'make a crooked thing straight', amendment would need to be understood in a highly restrictive sense: as a form of constitutional change that brings a *deviating* part in conformity with the rest of constitution or which substitutes a malfunctioning component with the one which is more fit for its purpose. The form of constitutional change that truly conforms to the etymology of amending in the sense of *emendere-reparare-corrigere* would only be 'constitutional' to the extent to which it could be seen as replacing something that was either a minor factory mistake, or something that got broken or crooked through use, over the course of time.

If amendment were truly a constitutional change that is intended to cor-*rect* or re-*pair*, the only way to amend the constitution constitutionally would be to remain truthful to the exact specifications that come with its model.[11] The issue here lies not only in the inevitable tendentiousness of constitutional metaphors, but also in the inherent limitations of the theoretical arguments that derive so much argumentative force from an eminently parochial constitutional terminology which makes little sense from the perspective of languages that make it possible to speak of constitutions as 'passed, 'adopted', or 'voted into effect', not 'amended', 'revised', 'replaced', or 'substituted'.

[9] Yaniv Roznai, 'Constitutional Amendment and "Fundamendment": A Response to Professor Richard Albert' (2018) 43 Yale Journal of International Law, 26.

[10] Carlos Bernal, 'Constitution-Making (without Constituent) Power: On the Conceptual Limits of the Power to Replace or Revise the Constitution' in Richard Albert, Carlos Bernal and Juliano Zaiden Benvindo (eds), Constitutional change and transformation in Latin America (Hart Publishing 2019) 27.

[11] By analogy, if a light on your 1959 Cadillac had to be repaired, the only way to repair it is to take it out, and put a new one which is exactly the same in its place.

## CONSTITUENT POWER AND THE LAW(S) OF HISTORY

In contrast to the authors against which Colón-Ríos reacts today, the sovereignty of the people—which in Stephen Holmes the mid-1990s classic liberal constitutionalism, *Passions and Constraint* appeared in the guise of Ulysses--constrained by the norms of its own choosing, written down in the text of the constitution—not divined from that constitutions ethereal basic structure. If so, why bother with the concept of the 'basic structure'—why bother, that is, if it's almost impossible to imagine constitutional changes that would undermine the capacity of the 'people' to exercise self-government, without at the same time undermining at least one of the elements of basic constitutional structure, as it's currently understood?[12]

Which brings us to a broader—equally important—point. The historians who 'have at various times expressly asserted that their subject should have very little relevance for modern theory' have not only 'failed to discourage the philosophers [who] have continued the ancient practice of pillaging the classics in search of ideas and styles to be revived for their own time', but have themselves 'also been distinguished contributors to discussions among political philosophers about issues such as republicanism, democracy or justice'.[13] While one need not agree with Hayden White (who likens 'pessimistic and accommodationist tone of intellectual historiography' to a 'post-coital kind of melancholy') those who do constitutional theory historiographically might do well to historicize their own scholarly style, and consider the possibility that it might 'reflec[t] a more general crisis, either in humanistic scholarship or in society as a whole'.[14]

The oddity of contemporary scholarly fixation on constituent power becomes even more apparent against the backdrop of its marginal treatment in the field-defining monographs over the last 75 years: from Carl Friedrich's *Constitutional Government* (first published in 1937, and then regularly reissued after the Second World War) to Pennock and Chapman's *Constitutionalism* (published in 1979), or Bellamy and Castiglione's *Constitutionalism in Transformation* (published, more than a decade and half later, in 1996). In Friedrich's monograph, for instance, constituent power is discussed in the context of a more fundamental discussion between political revolution and constitutional amendment, which, in turn, are themselves dwarfed by the extensive

[12] Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy (University of Chicago Press 1996).

[13]Richard Tuck, 'History' in Robert E. Goodin, Philip Pettit and Thomas Pogge (eds), A companion to contemporary political philosophy (Blackwell Publishing 2007) 69.

[14] Hayden White, The fiction of narrative: Essays on history, literature, and theory, 1957–2007 (JHU Press 2010) 83.

discussions of the themes which remain of virtually no interest to contemporary constitutional theory: from 'bureaucracy', 'diplomacy', and 'prosperity' to 'interest groups', 'economic councils', 'planning', and 'propaganda and the control of communications.[15]

As for Pennock and Chapman's volume, it gives a passing nod to the ideal of popular sovereignty in the introduction, but many of the concepts that present-day constitutional theorists consider absolutely central to the reality of modern constitutional government—from constituent power to (perhaps even more strikingly) political community and constitutional identity—received no mention whasoever.[16] And while constituent power did make a singular appearance in Bellamy and Castiglione's landmark volume on 'constitutionalism in transformation' a decade and a half later its position in the debates about the prospects of constitutional government still appears to have been rather marginal.[17] What contributed to the explosion of interest in constituent power in the years ahead seem to have been four distinct trends:

(1) post-communist constitution-making in Central and Eastern Europe, which, in the case of former communist federations in the Balkans and the Caucausus triggered violent conflicts over territorial sovereignty,

(2) the emergence of secession as a legitimate, or at least debatable, political aspiration of minority nations in Western multinational democracies since the early 1990s,

(3) growing anxiety about the absence of democratic legitimacy in the context of European integration and the attendant debates about the locus of ultimate constitutional authority in the European Union, and finally

(4) the apparent centrality of the language of constituent power in the context of constitutional transformations in Latin America in the late 1990s and early 2000s.

[15] Carl J Friedrich, Constitutional Government and Democracy. Revised Edition (Blaisdell Publishing 1950)

[16] Roland Pennock and John W. Chapman (eds) Constitutionalism: Nomos XX (NYU Press 1979).

[17] Richard Bellamy and Dario Castiglione, Constitutionalism in Transformation: European and Theoretical Perspectives (Wiley-Blackwell 1996). In Preuss's case, imagining territorially based 'communities' as the contemporary incarnations of Sieyes 'body of associates' (without considering broader constitutional arrangements which brought them into existence) allowed him to distinguish between illegitimate and legitimate attempts to exercise constitutional authority--with the former, as exemplified by the territorially acrimonious constitutional transformations (in the former Yugoslavia, or Soviet Union) and the later, as manifested display in the formation of notionally liberal constitutional orders (in other parts of Central and Eastern Europe, such as Hungary and Poland).

Whatever the case, those who chose to resort to the language of constituent power throughout the course of history did so not because they suddenly discovered its eminently juridical character, but because treating it as eminently juridical seemed to be politically advantageous--in *concrete situations*, at a given place and time. This—as the epigraph to this article already suggested—might have direct implications for the task of constitutional theory, which, in good part (at least according to Schmitt) ought to consist in 'demonstrat[ing] how much some traditional formulas and concepts are entirely dependent on prior situations, so they are not at all old wine in new bottles, but instead only an outmoded and false etiquette'.[18]

## CONSTITUENT POWER AND THE TASK OF THEORY

Though Schmitt's notion of the task of constitutional theory remains, for the most part, ignored in contemporary scholarship, it's also worth mentioning that some of those who today go against this indifference today carry Schmitt's critical vision even further when they argue—as is the case with Edward Rubin, for instance—that most 'basic concepts that we use to describe our current government are the products of social nostalgia': 'the three branches of government, power and discretion, democracy, legitimacy, law, legal rights, human rights, and property are all ideas that originated in pre-administrative times and that derive much of their continuing appeal from their outdated origins'. While they keep encouraging our 'collective yearning for the pre-administrative state', 'these concepts are [neither] the most useful [n]or meaningful ones that we could find to describe contemporary government'. In consequence, concludes Rubin, '[w]e should then seek an alternative conception that will help us fulfill our emotional commitments, reflect the heuristic quality of thought, and provide a framework for microanalysis.[19]

For reasons that cannot be discussed within the scope of this essay, neither a project to weed out the the allegedly outdated concepts of modern constitutionalism, nor a project to replace them with more fitting ones is likely to pose a serious challenge to the currently hegemonic historiographical style in constitutional theory. What *is* quite possible (desirable, even) is to approach the concepts such as constituent power with keener sensitivity to the factors that shape the character of its conceptions, and which cannot be attributed to the differences between scholarly 'perspectives', professional 'vocabularies', or disciplinary 'traditions'.

[18] Carl Schmitt, Constitutional Theory (Jeffrey Seitzer tr, Duke University Press 2007) 54.

[19] Edward L. Rubin, Beyond Camelot: Rethinking politics and law for the modern state (Princeton University Press 2007).

Put differently: though professional commitments and scholarly self-understandings certainly play an important role in shaping the content of individual conceptions, it is not unreasonable to assume that they play a much more modest role when it comes to the scholarly theories of the concepts that are eminently polemical. To call such concepts 'juridical' only accentuates their rhetorical function: to deny legitimacy to some aspirations, while lending dignity to the constitutional accommodation of others. From that perspective, the notion of constituent power may also be seen as:

(I) a recipe--to be used in the process of constitution-making (such as for instance: take one rotten authoritarian government and expose it to the heat of popular demonstrations; once a despotic government dissolves, turn the people that overthrew it into a body of citizens eager to take part in the constituent process that culminates in the adoption of a new constitution),

(II) a sedative--intended to be consumed by the judges of the apex courts (as well as other legal officials tasked with defending constitutional status quo) should they start panicking about extra-constitutional character of constitutional transformation[20], in which case it also serves as

(III) a pincer—to be used to deflate the political pretensions of liberal constitutionalism by radical democrats, but which is also increasingly used against the agenda of radical democracy, by liberal constitutionalists, but which both sides use as

(IV) a certificate--to be accorded to those who succeeded in establishing a constitutional order which conforms to the preferences of those whose expert knowledge puts them in charge of identifying what counts as the people, and what as constituent power.

Given the commendable degree of self-awareness that distinguishes his scholarship, it is not unreasonable to assume that Colón-Ríos's might gladly agree with this the gist of this taxonomy.[21] At the same time, it is also likely that he'd still want to insist on an eminently juridical character of the notion of constituent power that he puts forward in his latest book. Even so, one might still wonder how realistic is it to expect that a concept that emerges from a regionally contained, linguistically delineated and theoretically selective inquiry about eminently state-centred doctrines of constituent power (however

[20] Cf. Mark Tushnet, Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power' (2015) 13[3] ICON 639.

[21] Cf. Joel Colón-Ríos, 'Five conceptions of constituent power' (2014) 130 Law Quarterly Review 306.

masterful that inquiry may be) ends up playing 'a *key* role in determinations of legal validity' outside of the contexts in which it emerged?[22]

If historically-sensitive theoretical contributions to purely academic debates could have just as easily produced conceptions that are 'scholarly' or 'theoretical', can calling them 'juridic al' hope to persuade anyone else but those who claim to be in possession of special 'juridical' knowledge that allows them to properly determine how and why the political turn into the legal and legal into the political)?[23] This seems to be a fair question because the hopeful superiority of Colón-Ríos's concept of constituent power, hinges on the *accuracy* of his *historico-political* bet: that situating it firmly within the framework of extant constitutional orders, won't 'domesticate' the insurrectionary potential that inheres not in 'constituent power', but in the citizens themselves, acting in their 'sovereign capacity', as the members of the people.

And even if one accepted that what makes the concept of constituent power 'juridical' is the prominent place it enjoys in the ever-more comparative constitutional jurisprudence, it is still not clear why would one want to think of such concept as '*eminently* juridical' if the motivating expectations of its author happen to be explicitly political. If the identity of a particular concept as 'eminently juridical' depends on it being distinguished from another concept which remains political, calling the first juridical would only seem to make sense if the 'political' character of the latter is also juridical, but not 'eminently'; or if they are both juridical and political at the same time, each in a particular sense of the word, which, on closer inspection--only makes sense if their relationship as simultaneously juridical-political or as co-constitutively juridical and political, is mediated by a notion that sets the terms on which the 'juridical' and the 'political' appear mutually intelligible.

Though absent from the subtly understated title of Colón-Ríos monograph that term become obvious once one pauses to ask a by no means trivial question: Constituent power and the law *of what*? At that point, it becomes apparent that the ongoing references to the 'juridical', refer to the terms on which *the law of the state in the West*—not just any law—makes power constituent, the people sovereign, and the power of the people, 'in its sovereign capacity', political.[24] Irreespective of Colón-Ríos's remarkable

[22] Colón-Ríos, supra note 1, at 305.

[23] For the defense constitutional theory historiographically conceived, see Richard S. Kay, 'Response to the Contributors' (2020) 52:5 Connectictut Law Review 1.

[24] 'Unequivocally, from the twelfth century, one can grasp the autonomy of the legal space in a bi-univocal correspondence with the widespread conviction that the administration of the law must be assigned to a class not of theologians or ideologists, but of technocrats- the jurists [who] carry out activities on the basis of specialist knowledge, [and] which is cultivated by [these] professions themselves, and [which is] perceived by lay persons as independent from the incumbent ruler [who] in the West ...can be legitimately chosen, and function, only according to the law. Thus it is this technical and cultural

scholarly achievement, one once again cannot but wonder which of the following two more likely.

That proposing an alternative notion of constituent power indeed ends up providing, however marginally, the kind of support that radical-democratic emancipatory projects *worldwide* really need to ensure the long-term *survival* of their constitutional projects? Or that insisting on an 'eminently juridical' character of an eminently political concept, ends up lending credibility to something else: the insatiable ambitions of one professional class to achieve complete hegemony over the terms on which political matters turn into legal form (which quite possibly couldn't be further removed from Colón-Ríos own idea of radical democracy)?

framework that sets the background for any discussion of the 'political' dimension of the law.' Mauro Bussani, 'Democracy and the Western Legal Tradition' in Mauro Bussani and Ugo Mattei (eds), The Cambridge Companion to Comparative Law (Cambridge University Press 2012) 388 and 391 (emphasis ZO).