POPULAR AUTOCRACY

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Carlos Pérez Crespo

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First assessor:Prof.Dr. Peter Niesen

Second assessor:Prof. Dr. Reinhard Mehring

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“L'autorité vient d’en haut et la confiance d’en bas”

Emmanuel-Joseph Sieyès

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Introduction

On December 7, 2022, President Pedro Castillo attempted a coup d'état in Peru with the political goal of convening a constituent assembly. It was the last coup attempt in Latin America. Against a backdrop of polarization between the executive and legislative branches and allegations of corruption, Castillo portrayed his unconstitutional decision as the execution of a "popular mandate" to dissolve Congress, declare a state of emergency, and reorganize the judicial system (Pacco, 2022). Castillo's coup was reminiscent of Fujimori's 1992 coup that set in motion a constituent assembly. In the 1990s Fujimori's coup was compared to that of Louis Bonaparte in 1851 (Cameron, 1997). Unlike those coups, however, Castillo's coup failed. The events in Peru took place against the backdrop of Chile's September 2022 constitutional plebiscite. While the latter has received considerable attention in the literature as the implementation of a democratic constituent assembly (Fasel, 2022; Verdugo, 2022), this was not the case with Castillo's coup attempt to activate the constituent assembly. This is not surprising, as the literature still assumes that the president's autocratic attempts to activate a constituent assembly should not be considered a true exercise of constituent power. Rather, this should be seen as a kind of pathology, an instrumentalization of the constituent power by populist politicians in the broader context of a "populist constitutionalism" (Blokker, 2019a; Doyle, 2019; Halmai, 2019). Thus, the concept of constituent power and its exercise are usually considered alien to autocratic activations of constituent assemblies.

Virtually all contemporary discussion of the concept of constituent power revolves around its relationship to the concept of democracy. Kalyvas (2018, p. 87) has pointed out that "constituent power is the truth of modern democracy" because the concept is consistent with the modern doctrine of popular sovereignty and also with the idea of democracy understood as the exercise of acts of self-legislation and self-change. The studies of Arato (2017b) and Colón-Ríos (2012, 2016, 2020) have also highlighted this link between the concepts of constituent power and democratic constitutionalism. From the perspective of intellectual history, an extensive literature has been written on the concept of constituent power in the context of theories of popular sovereignty from the 16th century to the Atlantic revolutions (Lee, 2016; Loughlin, 2017; Rubinelli, 2020a). There is an extensive bibliography showing how the concept of constituent power relates to the democratic constitutionalism of the American Revolution. Thus, it has been pointed out that the origin of the concept of constituent power lies in the doctrine of "We the People" and in the writings of the Federalists (Arato, 2017b, pp. 112–116; Bofill, 2021, pp. 115–119; Frank, 2010, pp. 12–18; Partlett,

2018, pp. 963–967). In the works on constituent power in the supranational arena, the concept of constituent power also remains in this theoretical approach on popular sovereignty and democracy (Habermas, 2017; Patberg, 2020). Only recently have the problems in the relationship between constituent power and democracy been highlighted.

In recent years, the literature has begun to question the relationship between the concepts of constituent power and democracy, emphasizing instead the relationship between constituent power and populism, that is, the rise of "populist constitutionalism" (Blokker, 2018, 2019a; Doyle, 2019). Verdugo's study (2023) is one of the most important summaries of all the criticisms of the concept of constituent power. One of the central criticisms is that populism is not only a political phenomenon directed against elites, but also has an institutional form that instrumentalizes constituent assemblies and constitutional reforms (Arato & Cohen, 2021; J. Müller, 2017). The literature highlights cases in which there is an interplay between authoritarianism and the idea of representing the "will of the people." Nevertheless, the treatment of populist constitutionalism remains controversial, as it has been pointed out that the term may be an oxymoron, since constitutionalism is by definition limited government (Halmai, 2019; Landau, 2021). In all of these discussions, it is often assumed that the relationship between constituent power and populism is a pathology and a misuse of the concept of constituent power. Thus, the concept continues to be associated only with democratic constitutionalism and its misuse with populism. There is no real examination of the autocratic character that might be contained in the very concept of constituent power.

The main objective of my study is to show that there is a conceptual and intellectual-historical relationship between the concepts of constituent power and autocracy, dating back to the work of Sieyès (1789/2002, 1789/2003) in the French Revolution. In my work, the autocratic exercise of constituent power is not dismissed as pathology or instrumentalization of the concept, but rather this autocratic exercise is analyzed as part of the tradition of the concept of constituent power itself initiated by Sieyès in 1789.

The relationship between constituent power and autocracy is usually treated as alien to Sieyès's idea of *pouvoir constituant* (constituent power) in the French Revolution, so that Carl Schmitt's influential concept of constituent power is often seen as an instrumentalization of Sieyès's work. There is an extensive literature on the differences between Sieyès's and Schmitt's conceptions of constituent power (Breuer, 1984; Fasel, 2022; Thiele, 2003). Schmitt's autocratic reading of constituent power (1928/2008, Chapter 8, 1921/2014, Chapter 4), expressed primarily in his concept of *sovereign dictatorship*, has been treated in recent literature not as a symptom but as a use and abuse of Sieyès's ideas. Thus, Schmitt's theory of

constituent power is not seen as an intellectual development of Sieyès's original idea, but as part of Schmitt's illiberal political intentions (Rubinelli, 2020a, pp. 135–139). In contrast to this traditional reading, my study aims to show that there is an autocratic conception of constituent power that is compatible with Sieyès's idea of 1789. On the basis of this original idea, an important intellectual development took place, especially through the work of Carl Schmitt in the Weimar Republic and the influential distinction between *original* and *derived* constituent power by Roger Bonnard (1942) in Vichy France. The term coined by Sieyès in 1789 found its most sophisticated and important intellectual development among these autocratic readings. Schmitt's and Bonnard's autocratic conceptions of constituent power have become anchored as an intellectual tradition in political and constitutional theory.

In order to avoid the use of the term "autocratic constituent power," which could lead to confusion, I have decided to introduce a new concept in the literature: Popular Autocracy. This concept has the dual function of explaining the relationship between constituent power and autocracy and of allowing a rethinking of Sieyès's idea of *pouvoir constituant* itself.

My study presents an intellectual history of the origins, conceptualization, intellectual development, and reception of the concept of popular autocracy from the 18th to the 20th centuries. It examines its origins in Sieyès's idea of *pouvoir constituant* in the French Revolution and then its conceptualization with Schmitt's political theory in the Weimar Republic. I also analyze the intellectual developments of the concept of constituent power by lesser known authors in the literature, such as Léon Duguit, Maurice Hauriou, and Raymond Carré de Malberg in the French Third Republic. My work also focuses on Bonnard's new autocratic conception of constituent power in Vichy France, the reception of Schmitt's conception by Francoist ideologists after the Spanish Civil War, and the transatlantic reception of the concept by Peronist ideologists in the Argentine Constituent Assembly of 1949. My study contributes not only by discussing case studies, but uses these cases as conceptual models to rethink constituent power. The concept of popular autocracy opens a new theoretical approach to rethink all traditional readings of the concept of constituent power. In my view, there is already enough literature on the history, limitations, and new applications of the concept (Arato, 2017b; Colón-Ríos et al., 2021; Patberg, 2020; Rubinelli, 2020a, 2020b; Verdugo, 2023). What we need now is a refreshing of the meaning of the term through a conceptual reconsideration of its origins, its intellectual development, and its reception. I will briefly explain the concept of popular autocracy in my work.

1. Popular Autocracy

My study is not the first to introduce the term "popular autocracy" into the literature, but it is the first to introduce the concept. In fact, the term has already been used in the title of a political biography of the Greek dictator Ioannis Metaxas (Vatikiotis, 2014), but without any conceptual meaning or development. In contrast, my concept of popular autocracy points to the close relationship between the concepts of autocracy in its various forms and Sieyès's idea of *pouvoir constituant*, which originated in the French Revolution.

The concept of popular autocracy should not be understood in terms of popularity, but as the idea of an "autocracy of the people." It is important to point out that while this concept has a descriptive function in my analysis, the idea of popular autocracy has a prescriptive dimension for the authors, works, and discussions analyzed in my study. There is a difference between my concept describing the autocratic tradition of constituent power and the prescriptive character that authors ascribe to popular consent as the basis of political legitimacy (Peter, 2017). Here, the term "people" is not used in its historical or sociological sense, but in its political conception. The authors examined in my work do not refer to the people in the sense of the population, nor to the electorate, nor to a social class. The term "people" refers to the political conception of the people, that is, to the entity that is the bearer of sovereignty, so the term necessarily refers to the theory of popular sovereignty (Kalyvas, 2018; Lee, 2016; Loughlin, 2017; Vinx, 2013). The concept of the people must be understood from the perspective of political and constitutional theory. In the intellectual tradition of Rousseau (1762/2008) and Sieyès (1789/2003), the concept of the people is understood as the bearer of sovereignty capable of creating a constitutional order. This is a prescriptive rather than a descriptive conception of the term, and this is the meaning that the political conception of "the people" has in the authors, works, and ideas that I analyze in this study.

The term constituent power (*pouvoir constituant*) was coined by Sieyès (1789/2003) in the French Revolution and refers both to the people as the bearers of sovereignty and to the exercise of sovereign power by the elected representatives of the people in the drafting of a constitution or the fundamental laws of the state. In my work, this second element is emphasized. Sieyès's idea of constituent power is understood as the power that creates the fundamental laws of the state. In contrast to Rubinelli's work (2020a), which does not present a definition of the concept of constituent power but analyzes its various meanings throughout history, my intellectual history of popular autocracy proposes a minimalist concept. *The concept of constituent power is essentially a political theory about the delegation of powers to*

create a new constitutional order. However, this minimalist concept has two main conceptions in my work. For Sieyès (1789/2003) and Schmitt (1921/2014), this delegation is essentially a *mandate* or *commission* from the people as sovereign power to create a constitutional order. The representatives are merely executors of this commission, so for Schmitt the *sovereign dictatorship* is an agent on behalf of the people. In contrast, the positivist concept of constituent power, as interpreted by the tradition of French legal positivism and Bonnard, essentially conforms to the minimalist definition, so that it is irrelevant whether it is a mandate or commission from the people. For Bonnard (1942), the *derived constituent power* is synonymous with any delegated authority empowered to amend or create constitutional laws within the framework of the existing constitutional order.

This minimalist definition of the concept of constituent power brings us to the concept of autocracy. The term autocracy comes from the Greek *autos* (αὐτός, "self") and *kratos* (κράτος, "power") and refers to the government of a single person or entity. Historically, autocracies were also capable of creating the fundamental laws of the state, and thus the literature finds the origin of the minimalist concept of constituent power in the dictatorships of Sulla and Julius Caesar, and in Theodor Mommsen's conception of the Roman dictatorship (T. Mommsen, 1874/1952; Nippel, 2011; Pasquino, 2021). The concept of autocracy, however, requires more conceptual precision. In the Middle Ages, the term autocracy was associated with the power of the emperor. In modern history, the term autocrat was also used to refer to the authority of the Tsar in Russia. In the 20th century, the term autocracy was used as a synonym for the terms dictatorship and authoritarianism and referred to fascist and military regimes. In the 21st century, however, the term autocracy has already been expanded to include forms of government in which power is not only in the hands of a single person, but also in those of a group, such as a ruling party. For this reason, the political systems of China and Venezuela are referred to as "autocracies" in contemporary literature (Corrales, 2023; Truex, 2016). Meanwhile, there is an extensive literature on how autocracies promote the establishment of other autocracies (Bader et al., 2010; Fong, 2021; Gratius, 2022).

The distinction between the terms autocracy and authoritarianism is very important. The two terms are to some extent synonymous, but I have chosen to use the first term to distinguish it from the meaning of the second term in comparative politics. In comparative politics, the term authoritarianism essentially refers to the description of a hybrid form of political system (Bogaards, 2009; Diamond, 2002). Linz (2000) developed the concept of authoritarianism in his study comparing German, Italian, and Soviet totalitarianism with the authoritarianism of the Francoist state and other traditional forms of authoritarian systems

such as sultanism (Chehabi & Linz, 1998). The concept of authoritarianism has been used to define hybrid regimes that fall between a democratic and an autocratic form of government. For this reason, the term is closely associated with quantitative studies that measure the "quality of democracy" (Morlino, 2010; Morlino et al., 2011). There is the term "competitive authoritarianism" (Levitsky & Way, 2010) to define political systems in which elections are held but there is no truly democratic regime. The term authoritarianism also refers to political systems where civil and political liberties are not respected, but where there is still a small political opposition. Thus, in authoritarian regimes, there is not necessarily an absolute concentration of all the powers of the state in the hands of a single person or entity, such as a ruling party, but there is a transition to this type of concentration of power or a continuous process of "democratic regression" (Schäfer & Zürn, 2021).

For comparative politics, there are important differences between authoritarian regimes in terms of the foundations of their political legitimacy. Fascism is one type of authoritarian regime. However, not every authoritarian regime is fascist. Authoritarian regimes such as Batista in Cuba, Pinochet in Chile, and Erdoğan in Turkey are not totalitarian and fascist regimes from the perspective of comparative politics (Chehabi & Linz, 1998; Huneeus & Sagaris, 2007). In Latin America, O'Donnell (2009) has recognized this distinction, calling Argentina's post-World War II military dictatorship, which was extremely repressive and countered popular mobilization, a "bureaucratic authoritarianism." Fascism, sultanism, and military dictatorship are all authoritarian regimes, but they legitimize their power with different justifications. Linz (2000), in his study of the Francoist regime, notes that it differed from the fascist regimes in Germany and Italy because there was less totalitarian and ideological mobilization of the masses in Spain. Linz's approach opened the empirical inquiry to non-fascist but authoritarian regimes, such as sultanism in Third World countries. Sultanism, a term first coined by Max Weber, is a traditional form of authority of a ruler who exercises power through patrimonial administration without ideology and does not seek to represent a social class or corporate interests; rather, it is maintained through personal loyalties and violence against the population (Chehabi & Linz, 1998).

While the concept of authoritarianism may involve traditional forms of legitimacy, fascism is always based on the corporate representation of the people (*Das Volk* in Nazi Germany, *Il Popolo* in Fascist Italy) within a dictatorial and totalitarian state (Arendt, 1951/1973; Paxton, 1998; S. G. Payne, 1980; Scholtyseck, 2012). The political foundations of fascism are found in Mussolini's *The Political and Social Doctrine of Fascism* (1932). The central philosophical ideas of fascism had already been developed by Giovanni Gentile and

the legal foundations by Alfredo Rocco and Sergio Panunzio (Steiner, 1936). Mussolini points out that fascism is opposed to the traditions of socialism, liberalism, and democracy of the 19th century. The fascist project, he argues, justifies the idea of collectivism and a totalitarian state led by a party: "Fascism conceives of the state as an absolute" (1933, p. 21). The critical point however, is that he presents the fascist state as the aspiration of the Italian people (1933, p. 9). For Mussolini, the appeal to the people within a corporate state is the legal and political form of fascism (1933, p. 25). Fascism rejects democracy as equality and popular sovereignty, but uses the language of "democratic representation" within a totalitarian state: "If democracy may be conceived in diverse forms (...), Fascism may write itself down as 'an organized, centralized and authoritative democracy'" (Mussolini, 1933, p. 16).

In contrast to the descriptive nature of the concept of authoritarianism, the concept of autocracy in the authors and works analyzed in my study refers to the legitimacy of the concentration of governmental power in a single person or group acting as a single legal entity. While the term autocracy has a descriptive meaning in my intellectual history of popular autocracy, this concentration of power has a prescriptive character for the authors analyzed in my work. Autocracy is government by a single entity, and its essential political feature is the abolition of the separation of powers (legislative, executive, and judicial).

Autocracy in the perspective of political theory proceeds from Aristotle's classical distinction between the government of the one, the government of the few, and the government of the many. The government of the one is kingship and tyranny, the government of the few is aristocracy and oligarchy, while the government of the many is polity and democracy. Aristotle (1998, pp. 103–104) does not limit himself to a description, for he prescribes that kingship is the best and tyranny the worst form of government (*Politics*, IV. 2 (1289a26-1289b5). Kingship is an autocracy because all the power of the state is concentrated in the hands of one person. But the Roman concept of dictatorship is also one of the forms of autocracy par excellence because it involves the concentration of all power in the executive. Mommsen (1874/1952, pp. 146–147) praises the Roman dictatorship as the accumulation of constitutional functions in a magistrate, which made it a "constitutional dictatorship" legitimized as an emergency government (Rossiter, 1948/2002). Aristotle's concept of kingship and Mommsen's concept of dictatorship express the essence of the concept of autocracy in this monograph. Because this concentration of power in kingship and dictatorship has a positive connotation for the authors I have studied, the concept of autocracy must be distinguished from the concepts of tyranny and despotism. As with Aristotle, the authors and works examined here define tyranny as a form of kingship that is, however,

corrupt. Similarly, despotic rule is understood as a form of arbitrary power, which is why it differs from the constitutional connotation that the term dictatorship has in Mommsen.

The conceptual history of the terms tyranny and despotism is still very controversial among historians, although it is agreed that both are terms that denote a form of illegitimate power (M. Richter, 2005; Turchetti, 2008). In contrast to the concepts of kingship and Roman dictatorship, tyranny in Aristotle's work refers to an exercise of power for one's own benefit: "A tyranny, as we said, exists when a monarchy rules the political community like a master" (1998, p. 78). The term despotism is also associated with this form of tyrannical exercise of power. According to Turchetti (2008, p. 170), the confusion between the terms tyranny and despotism became entrenched in the 17th century with John Locke's political theory, where despotism is equated with tyrannical power. The overlap of the two terms seems to have solidified in the 18th century with Montesquieu's work, who superimposed the terms despotism and tyranny (M. Richter, 2005, pp. 229–230). In the French Revolution, Mounier (1789, pp. 3–4, 9) speaks of the danger of the constituent assembly becoming a "tyranny of the crowd" and "popular despotism" in the sense of Montesquieu. Turchetti (2008, p. 159) also points out that the term tyranny fell into disuse in the 19th century. While the terms tyranny and despotism have always had pejorative connotations, the terms dictatorship, Caesarism and Bonapartism have also had positive connotations after the French Revolution.

In the 19th century, the term dictatorship tended to refer to the Bonapartist dictatorship. Louis Bonaparte with his coup d'état of 1851 is the exemplary case, which was also understood as a form of accumulation of state power in the authority of the head of state. Richter (2005, p. 239) rightly pointed out that many French liberals and monarchists used the terms dictatorship and Caesarism pejoratively to define Bonapartism, while many others used these terms in a positive connotation. Bonapartism was seen as a way to resolve the dilemmas and conflicts created by the French Revolution and the bourgeoisie through the rule of a single person, and was thus understood as a way to restore order (M. Richter, 2005, p. 239). The term Caesarism first appears in Auguste Romieu's *The Age of Caesars* [*L'ère des Césars*] (1851) (Antonini, 2020, p. 1) and has a positive connotation. This is a conception of dictatorship, which, in contrast to the conflicts of the Second Republic, is recognised as a potential representative of the interests of the majority. However, this concept of autocracy differs from kingship and the Roman dictator because the Bonapartist dictatorship is now legitimized on the basis of popular consent, that is, as a mandate of the *pouvoir constituant*. This new form of political legitimation of autocracy has its origins in the French Revolution.

The concept of popular autocracy acquires a different connotation than the concept of autocracy, since it has its origin in a concentration of power justified by Sieyès's idea of constituent power. In my study, it is important to explicitly refer to the minimalist concept of constituent power when legitimating popular autocracy. Otherwise, any form of Caesarism and plebiscitary representation justified by an alleged popular consent would fit into the concept of popular autocracy. Although Hobbes' state theory is based on the idea of consent, it is not a popular autocracy either. My study excludes legitimations of autocracies that refer to the narrative of popular representation but make no explicit reference to Sieyès's idea of *pouvoir constituant*. Therefore, I do not consider the dictatorships of Sulla and Julius Caesar as popular autocracies. The historical origins of the concept of popular autocracy can only be found in the context of the French Revolution. The *Monarchiens*, Mirabeau and Sieyès defined the monarch as the protector of the "will of the people" (understood as the mandate of the *pouvoir constituant*). However, in his *Memoire pour le Peuple* (1788), Joseph-Antoine Cerutti, Mirabeau's assistant, referred to the French monarch as a "republican dictator." This was the first attempt to unite in a single concept the idea of kingship (until 1788 still an autocracy) with the idea of a dictatorship expressing the will of the *pouvoir constituant*.

The concept of popular autocracy has its origins in the context of the French Revolution with Sieyès's idea of *pouvoir constituant*, but it first finds its conceptualization in the work of Carl Schmitt (1929, 1928/2008, 1921/2014). For this reason I have devoted so much space to the analysis of his theory of constituent power. Schmitt gives shape to the concept when he views it as an autocracy, which he calls a "dictatorship," legitimized on the basis of the idea of the *mandate* or *commission* from the people to create a constitutional order. Llanque (2019, pp. 138–141) has shown that Schmitt was not the only jurist to speak of dictatorship in the context of the Weimar Republic. In fact, the concept has also been commented on extensively by other German jurists such as Richard Grau. However, Schmitt theorizes dictatorship starting from Sieyès's idea of constituent power, which makes him the most important author in the intellectual history of popular autocracy. Schmitt conceptualizes the revolutionary constituent assembly and the Bonapartist dictatorship as dictatorships on behalf of the *pouvoir constituant*, i.e., as *sovereign dictatorships*. He even recognizes the dictatorship of the Reichspräsident as a dictatorship that does not create but protects the constituent power. Because of this close relationship he establishes between dictatorship and constituent power, I consider Schmitt to be the most important theorist of popular autocracy. Bonnard's conception of popular autocracy in Vichy France complements the tradition opened by Schmitt. I will explain the methodological and theoretical approach of my study.

2. Methodological and Theoretical Approach

I develop research on political theory with the methodological approach of intellectual history and the history of political ideas. I specifically point out that this is political science research, as it is not a historical work. It is a political theory study of the origins, conceptualization, intellectual development, and reception of the concept of popular autocracy. The method used to study the intellectual history of popular autocracy is to trace the origins and reception of the concept of constituent power between the 18th and 20th centuries. To examine the relationship between the concepts of constituent power and autocracy, two research methods are employed. First, I develop a conceptual and historical reconstruction of the origins of Sieyès's idea of *pouvoir constituant* in the context of the French Revolution. Then, I analyze the reception of Sieyès's idea in the Weimar Republic with Carl Schmitt, in the French Third Republic with the tradition of legal positivism, in Vichy France with Roger Bonnard, in the Spanish Civil War with the Francoist ideologists, and in Argentina with the Peronists ideologists of the Constituent Assembly of 1949. In both methods, my study attaches great importance to terminology and developmental context.

I will explain my methodological and theoretical approach by briefly discussing the concepts of intellectual history and the history of ideas. The meaning of intellectual history remains controversial in the literature, but there is some consensus that it is the study of intellectuals, ideas, and intellectual patterns over time (Brett, 2002; Gordon & James, 2012; Whatmore, 2016). In this general definition, a distinction is made between "history of ideas" and "intellectual history." The former refers to the method that examines large-scale concepts and how they develop and change over time. The focus is on how the idea has undergone metamorphosis in different contexts. According to Gordon and James (2012, p. 2), this approach presupposes a Platonist attitude, since it assumes that the idea already exists and manifests itself in different ways in different contexts. Intellectual history differs from the history of ideas because it resists the notion that there is an idea that is independent of the context from which it emerged. The focus of intellectual history is on language, culture, and the social processes that led to the creation of the idea. It is not clear, however, whether the "history of ideas" and "intellectual history" are really incompatible, since in both cases an idea is studied in terms of its origin, development, or metamorphosis in particular contexts. The relationship between intellectual history and the history of ideas remains in debate.

As for the relationship between political theory and intellectual history in political science, the focus is primarily on political ideas and ideologies (Gordon & James, 2012, p. 2),

taking into account their specificities in the context of development. Quentin Skinner (1969) contributed most to the conceptualization of the method of intellectual history in the influential Cambridge School. Skinner's study of the work of Thomas Hobbes (2017), for example, places great emphasis on the context and language of the 17th century. However, Skinner's approach has also been criticized for its historicizing position, which negates the possibility of interpretation outside the context in which political ideas take shape (Gordon & James, 2012, p. 7). This deprives the historian of political ideas of the possibility of gaining a holistic understanding of the development and changing meaning of the political ideas he studies. The approach of Münkler and Straßenberger (2016) of the necessary dialogue between political theory and the history of ideas seems to overcome this contextualism attributed to Skinner's approach. For these authors (2016, p. 17), studying ideas in context means taking a historical but primarily analytical approach to central concepts in political science, examining their origins and changes in history. Thus, the history of ideas is much more than a history of an idea in its context. The history of ideas is able to provide a diagnosis and also a prognosis of the concept beyond the context in which it emerged.

The methodology of the history of political ideas emphasizes changes in readings of a political idea over time. Blau (2019) has pointed to the importance of "textual context." This involves discerning the meaning of ideas in texts by extrapolating them from other texts by the same author without exploiting ambiguities in the text. Blau's explanation of the method of the history of political ideas is important because he points out that the reading of political texts also implies the study of the misinterpretations and instrumentalizations of the original meaning of political ideas. Blau (2021, pp. 360–363) therefore distinguishes between "plausible readings," "adaptive readings," and "misreadings." Plausible readings attempt to present the history of a political idea in a credible and acceptable way, that is, to avoid a misinterpretation of the idea that denaturalizes its original context and meaning. This is what my intellectual history of popular autocracy strives to do. Adaptive readings, on the other hand, attempt to make a reading of the original ideas by omitting certain key elements that the idea had in its origin. In contrast, misreadings are all those readings that actually depart completely from the meaning and context that the political ideas had. Blau (2021, p. 362) points out, however, that some misreadings, like the literature caricaturing Hobbes' political ideas, are not entirely "wrong," for even a misinterpretation of a political idea can raise a fundamental question and provide an interesting answer for the history of political thought. Therefore, the study of the misreadings of a political idea is also important.

This explanation of the methods of the history of political ideas is very important for the theoretical and methodological approach of my study. Among the authors I have studied, there is, of course, an "adaptive reading" and also "misreadings." Since the authors I examine are mostly intellectuals who also pursue a political goal, they do not reduce their arguments to "plausible readings." Many authors and texts I have analyzed look for a reinterpretation of the concept of constituent power, which also falls into a use and misuse of the original idea. This raises the question of why I study these authors. The reason is that the responses of these authors do not preclude their readings from raising fundamental questions about the concept of constituent power. This is the case, for example, with the works of Schmitt and Bonnard. There is an extensive literature on how Schmitt misunderstands and appropriates the concepts of political thinkers such as Bodin, Hobbes, Rousseau, and Sieyès (De Wilde, 2021; Schröder, 2012). The same criticism could apply to Bonnard's conception of constituent power in Vichy France. What is important, in my view, are the questions raised by these authors. Critical studies of Schmitt's work assume that criticizing his answers also disqualifies his questions, which is a methodological flaw in the study of political ideas. Schmitt's and Bonnard's questions and answers about the relationship between the concepts of constituent power and autocracy are important for a comprehensive intellectual history of constituent power.

In examining the origins of the concept of constituent power, I have mainly followed an intellectual historical approach. This methodological approach places great emphasis on examining the context in which ideas develop. In order to examine the meaning of the term coined by Sieyès in 1789, my study begins not only with an analysis of his texts and speeches, but also focuses on the etymology and vocabulary of the term *pouvoir constituant*. I develop an etymological reconstruction in the original language and as understood by the author in his context. I have chosen this approach because the concept of constituent power has a long intellectual history and has undergone various changes of meaning in its development. Therefore, my study starts with a reconstruction of the meaning of constituent power in the French Revolution. I have drawn on dictionaries and other texts from the period to obtain a precise definition of the meaning that the term *pouvoir constituant* had for Sieyès. Based on this approach, I could contrast the original meaning of the term with contemporary English translations. When I have found incompatibilities between the translation and the original meaning, I have explicitly pointed them out in order to draw attention to how Sieyès's idea of *pouvoir constituant* should be understood. With this method I succeeded in finding a minimalist definition: *The concept of constituent power is essentially a political theory about the delegation of powers to create a new constitutional order*.

In my study of the reception and intellectual development of the concept of constituent power, I have tended to emphasize the continuities and ruptures between the meaning of Sieyès's original concept and that of his intellectual receptors. The methodological and theoretical approach to reception enjoys an important development in the literature, even if a method has not yet been systematized. Generally, a distinction is made between "reception history" and "impact history" (*Wirkungsgeschichte*) (Knight, 2010). My study, however, avoids reception research that is limited to a few bibliographical citations or a meaningless reference to the concept of constituent power. In my methodological approach to reception history, three essential conditions must be met. First, the authors and texts studied must understand Sieyès's idea of constituent power. Second, they must extend the concept, that is, they must interpret, critique, and analyze the concept. Third, they must use the concept of constituent power in their context and look for an application of Sieyès's idea in their own political and constitutional theories. In my intellectual history of constituent power, it is perfectly acceptable for authors and texts to instrumentalize or modify the meaning of the term originally coined by Sieyès in 1789. But they must discuss, directly or indirectly, at least the minimalist definition that I found in the origins of the term *pouvoir constituant*.

This method of reception research allows us to see the intellectual relationship between the concepts of constituent power and autocracy. I emphasize that I speak of conceptual relations and not of historical causality. Since there is already extensive literature on the differences between Sieyès and Schmitt, I have tried to reconstruct mainly the forgotten similarities between these two authors. However, since I do not want to present an intellectual history of popular autocracy without ruptures, I have used the study of the jurists of the Third Republic and Vichy France as an important case-control study. It is a case-control study that allows us to observe a serious discontinuity in the original meaning of Sieyès's idea of constituent power in 1789, removing from it such cardinal ideas as the *mandate* and the *commission*. It is also a case that suffers from the influence of Schmitt's concept of constituent power. I tried to examine here whether or not, despite the absence of Schmitt and the important features of Sieyès's idea of constituent power, the relationship with autocracy remains latent. The cases of Francoist Spain and Peronism in Argentina are also case-control studies of the reception of constituent power, allowing to control the deviations from the original meaning of the concept and its intellectual development outside the context of the larger development of the theory of constituent power (France and Germany). As in the study of the Third Republic and Vichy France, the point of these cases is to examine whether the relationship between the concepts of constituent power and autocracy is latent.

In addition to examining the origins and reception of the concept of constituent power, my study draws on an examination of the current state of the literature, a survey of historiography, and documentary research. Each chapter of my study begins by contextualizing the topic within a literature review of an unresolved or developing theoretical debate. This makes each chapter an essential contribution to ongoing research. In each chapter, my study aims to make a new contribution to the evolving research so that my whole research has stated its own positioning vis-à-vis each debate. This procedure is consistent with my goal of rethinking the concept of constituent power. In developing the analysis, I have placed a strong emphasis on historiography and have therefore drawn on authors and books that are little known in the literature and whose perspectives or ideas are relevant to the debate at hand. Finally, when I find that a debate cannot be resolved by analyzing the literature and historiography alone, I have decided to turn to documentary research. Only in debates that require strong verification, such as the discussion of Schmitt's idea of the Reichpräsident and his conceptual relationship to the work of Sieyès, have I chosen to cite and show documentary sources. For this reason, my work also relies on archival research that is not known in the literature. The aim of this documentary method is not to end the debate, but to provide the reader with new clues and evidence for possible answers to the debates that have arisen, which have not yet reached consensus among experts.

The method of historical documentation used in my study is inspired by Mehring's theoretical approach to Schmitt's work. Mehring's work (1999, 2021) focuses not only on Schmitt's ideas, but also on the historical material that supports them. Thus, Mehring has placed an important emphasis on the letters and documents in Schmitt's *Nachlass*. I have tried to include this type of material in the sections where it was necessary to look for further evidence to clarify disputed topics in the literature. Mehring's method has been extended to the study of other authors who have dealt with Schmitt's international reception. This is the case with Molina's work (2019), which is also based on the study of Schmitt's letters and documents with 20th century Spanish intellectuals. The aim of using this type of archival material is not only to verify the hypotheses and ideas raised in the research, but also to pose new conceptual questions that are important for the intellectual history of popular autocracy. Unfortunately, I was unable to apply this documentary method to the works of Sieyès and Bonnard. However, I have found texts by authors who are not known in the literature, such as the Vichy jurists, so they also have important historical and documentary value.

3. Research Findings: Four Variants of Popular Autocracy

Through the methodological and theoretical approach of intellectual history, I have found four variants of the concept of popular autocracy. Three of these four variants belong to Schmitt's theory of dictatorship (1921/2014, 1931/2016). The first variant of popular autocracy is the dictatorship of the revolutionary constituent assembly. Schmitt conceived of the constituent assembly of the French Revolution as a *sovereign dictatorship*, that is, a dictatorship that carries out a *mandate* or *commission* from the people as *pouvoir constituant* to create a new constitutional order. This mandate is synonymous with revolution. The second variant of the concept of popular autocracy is the Bonapartist dictatorship, which is also a form of *sovereign dictatorship*. Unlike the first variant, in this dictatorship the mandate of the people is carried out by an individual rather than an assembly. The mandate is not a revolution, but is given in the form of a constitutional plebiscite. The third variant is the idea of the Reichspräsident as the "guardian" of the constitution (understood as the will of the *pouvoir constituant*). This variant is complex and has led to extensive debate and confusion in the literature. Schmitt's president does not create a new constitutional order, as his role is to protect the constitutional order through emergency powers under Article 48 of the Weimar Constitution. It is a *commissary dictatorship* legitimized by the protection of the *pouvoir constituant*. Two variants of popular autocracy thus create a new constitutional order, while the last variant is concerned with protecting the constitutional order created by the people.

The fourth and final variant I have found is Bonnard's theory (1942) of the distinction between an *original* and a *derived* constituent power. It is inspired by the interpretation of the concept of constituent power by French legal positivism in the Third Republic. Unlike Sieyès and Schmitt, Bonnard does not understand the constituent power as a *mandate* from the people to create a new constitutional order. His concept is more in line with the minimalist concept of constituent power as a delegation of powers to create the new fundamental laws of the state. For this reason, it is irrelevant to Bonnard whether the legitimacy of the *pouvoir constituant* takes the form of a mandate from the people. What is important is the person who exercises the constituent power. In the context of Vichy France, Bonnard held that the constitutional order was first created by the autocrat (Pétain) and then accepted by the people. This is an autocratic conception of constituent power alien to the idea of the mandate from the people, which is in the tradition initiated by Sieyès. It is a completely different conception of popular autocracy compared to Schmitt's concept of sovereign dictatorship, since the people are not recognised as the source of the constitutional order. In contrast, in Bonnard's theory of

constituent power, it is the autocrat who first creates the constitutional order, and then the people who support it. I will now explain how I encountered these variants of the concept of popular autocracy in the main ideas I discuss in each chapter of my study.

In Chapter 1, I present Sieyès's idea of *pouvoir constituant* (1789/2003). The main objective is to demonstrate that this concept in the French Revolution is essentially a mandate (*procuration*) of the people for the creation of a constitutional order. For my analysis, I introduce my discussion in the context of the contemporary debate on the limits on the content and exercise of constituent assemblies. With this contextualization, I point out that the concept of constituent power as a mandate is not sufficiently clarified. That is why my study emphasizes Sieyès's concept of representation as a mandate (*gouvernement exercé par procuration*). The concept of *mandate* or *commission*, terms that are synonymous, is understood as a *delegation of sovereignty*. Sieyès's term *pouvoir constituant* expresses this sense of the *procuration* to carry out a commission that the principal (the people), by impossibility or indisposition, cannot carry out himself. The extraordinary representatives, defined as agents or *délégués*, are simply mandataries of the will of the *pouvoir constituant*. An important finding I have made in this chapter is that Sieyès's concept of constitution does not begin with the drafting of the representatives, but much earlier. Sieyès defines the birth of the constitution in the will of the people (*volonté commune*). The deputies thus exercise a mandate to draft a constitution that must reflect the already formed will of the people. This chapter ends with a reference to the latent illiberal character of the sovereign constituent assembly as theorized by Sieyès and its relation to Schmitt's concept of constituent power.

In Chapter 2, I examine Sieyès's idea of the king as protector of the will of the people. This is a new reading in intellectual history, as the relationship between the concepts of monarchy and constituent power has not been considered in the literature. Sieyès, who was a monarchical political thinker, not only introduced the distinction between *constituent* and *constituted* power, but also the idea that the *pouvoir constituant* can be reconvened by one of the representatives (parliament or king). This chapter will show that the origins of the concept of popular autocracy can be found in the writings and speeches of Sieyès (1789/1989a, 1999b, 1999c) about the king as a potential activator and protector of the constituent power. Sieyès's king is not an absolute monarch, but a head of state subordinate to the constitution. However, if he sees a threat to the constitutional order, he has a mandate to use his constitutional powers to protect it by convening a constituent assembly. The king of Sieyès is a very important case because it is the origin of two variants of popular autocracy. First, it activates the variant that the head of state is an authority that helps to execute the will of the *pouvoir constituant*. This

is very close to the conception of the Bonapartist dictatorship as a *sovereign dictatorship*. Second, in Sieyès the king is conceived as the "guardian" (*gardien*) of the constitutional order (conceived as the expression of the will of the people). Here we are very close to Schmitt's idea of the Reichspräsident as "guardian of the constitution." The chapter ends with a discussion of the reception of Sieyès's ideas in 19th century Bonapartism.

In Chapter 3, I analyze Schmitt's conceptualization of popular autocracy. This chapter presents a new reading of Schmitt's concept of constituent power and is also an attempt to clarify a century-old confusion in the literature: the conflation of the concepts of *sovereignty* and *sovereign dictatorship*. I aim to show that Schmitt's concept of sovereign dictatorship in *Die Diktatur* (1921/2015) is compatible with Sieyès's idea of constituent power as the mandate from the people to create a constitutional order. In contrast, Schmitt's decisionist idea of sovereignty in *Politische Theologie* (1922/2015) refers more to the restoration of order and *homogeneity* in the face of a situation that threatens the existence of the state. Using this distinction, I was able to distinguish the two main variants of the concept of popular autocracy in Schmitt's work: the revolutionary constituent assembly of the French Revolution and the Bonapartist dictatorship. In both cases, popular autocracy is understood as a dictatorship carrying out a *mandate* or *commission* from the *pouvoir constituant*. In this chapter, I have also made two other important findings. First, I show that the distinction between the concepts of *sovereignty* and *sovereign dictatorship* is clearly expressed in Schmitt's analysis of Cromwell's dictatorship, which he recognizes as sovereign but not as a sovereign dictatorship. Second, for Schmitt, the mandate of the constituent power must be *explicit*, so there are two forms of the mandate: Revolution and constitutional plebiscite. Popular autocracy thus implies an *explicit* mandate from the people to a dictator to create a new constitutional order. This chapter ends with a discussion of the important distinction between *sovereign dictatorship* and the *commissary dictatorship* of the Reichspräsident.

In Chapter 4, I examine Schmitt's idea of the Reichspräsident (1931/2016) as a third important variant of the concept of popular autocracy. This popular autocracy does not create a new constitution, but rather protects the constitution created by the *pouvoir constituant*. As in the previous chapter, I attempt here to resolve a decades-old confusion in the literature: the conflation of the concepts of *sovereign dictatorship* and Reichspräsident. I show that Schmitt's idea of the Reichspräsident is not a sovereign dictatorship, but a *commissary dictatorship* that protects the constitutional order, understood as an expression of the will of the *pouvoir constituant*. The guardianship does not refer to the constitutional laws, but to the political order as an expression of the people's unity and will. The Reichspräsident cannot be

the "bearer of constituent power" because there is no explicit mandate from the people to create a constitutional order. The mandate of the Reichspräsident is to protect the constitutional order with the emergency powers of Article 48 of the Weimar Constitution. While these powers make the president a potential *sovereign*, they do not make him a *sovereign dictator*. One of the most important findings of this chapter is to have found the relationship between Sieyès's idea of the king in the French Revolution and Schmitt's idea of the Reichspräsident as "guardian of the constitution." I present new historical evidence of this relationship and call attention to how the literature has overlooked this connection between Sieyès and Schmitt in the concept of popular autocracy. This chapter ends with a brief explanation of how Schmitt understood the concept of guardianship in National Socialism.

In Chapter 5, I analyze an important discontinuity in Sieyès's idea of *pouvoir constituant* as a mandate from the people to create a constitutional order. It is a case-control study that attempts to explain how positivist jurists of the Third Republic sought to neutralize the danger of illiberal exercises of constituent power that could end in revolution or popular autocracy. This chapter represents a new contribution to the literature as it sheds light on the forgotten theories of constituent power by little-known authors such as Léon Duguit, Maurice Hauriou, and Raymond Carré de Malberg. I aim to show that, thanks to Mommsen's concept of the "constituent function" in his study of Roman law, French jurists understood the concept of constituent power as a constitutional delegation to change or create the fundamental laws. The French jurists believed that they had thus found the forgotten legal meaning of the *pouvoir constituant*, which had only been distorted by Sieyès in the French Revolution. Thus, the positivist concept of constituent power as a "constituent function" exercised by a constitutional authority emerged. Since the Third Republic was a parliamentary democracy, these jurists legitimized the idea that the constituent power was exercised within the powers of the legislature. Parliament had thus become the "bearer of the constituent power." With this positivist solution, which is completely independent of Schmitt's concept of constituent power, the positivist jurists attempted to neutralize the danger of popular autocracy. This chapter ends by pointing out that this positivist conception also led to a new conception of popular autocracy in Roger Bonnard's work in Vichy France.

In Chapter 6, I present Bonnard's theory of constituent power as an important variant of popular autocracy. This chapter begins with a contextualization of the importance of Bonnard's distinction of *original* and *derived* constituent power in contemporary literature. The major contribution of this chapter is to systematically explain the meaning of this terminology. For Bonnard, the *original constituent power* is unlawful and synonymous with

the conception of Sieyès and Schmitt, who understand the concept as a mandate of the people to create a constitutional order. On the contrary, Bonnard interprets the *derived constituent power* as the "constituent function" that already belongs to the parliament of the Third Republic. This is Mommsen's concept of the "constituent function" within the constitutional order itself. The *derived constituent power* of Vichy France is understood as a transfer of this function from parliament to the authority of Pétain in the constitutional laws of July 10, 1940. Bonnard draws here on his study of the Enabling Act of 1933 in Germany. An important innovation of this chapter is that I have recognized how other Vichy jurists attempted to develop a Sieyèsian and Schmittian reading of Pétain's constituent power. Against these readings, Bonnard's popular autocracy does not recognize the people as the source of the constitutional order, but as a support to the order created by the autocrat (Pétain). I have decided to continue to use the concept of popular autocracy in Bonnard's conception because of the relationship he establishes between the concepts of autocracy and constituent power and also because he continues to maintain the minimalist concept of constituent power.

In Chapter 7, I examine the reception of Schmitt's concept of constituent power among Francoist ideologists after the Spanish Civil War. I introduce this case to the discussion that took place in Spanish historiography about the Francoist state, which was defined in Schmitt's terms as a *sovereign dictatorship*. Through a reconstruction of the ideas of Francoist ideologists, I explain how Schmitt's concept of constituent power was introduced into the conception of the Francoist state and in the Spanish-speaking world in the 1930s. The main result of this chapter is not only a contribution to the historiography of Francoism, but I explain how this discussion among Francoist ideologists led to the first distinction between Schmitt's concepts of *sovereignty* and *sovereign dictatorship*, but also to the first important conflation of these two concepts. *Decisionist Francoism* does not distinguish between the concepts of sovereignty and sovereign dictatorship, so Franco is conceptualized as a sovereign dictator who, faced with a state of exception, decides to restore order in Spain. In contrast, the case of Conde, a direct disciple of Schmitt, shows how Schmitt's concept of sovereignty is received in Spain to conceptualize Franco as a sovereign in the sense of a new monarch. Following Max Weber's theory of charismatic and traditional leadership, Conde conceptualizes Franco as a "caudillo" (leader) who expresses the continuity of the Spanish Catholic tradition. Conde thus rejects Schmitt's concept of sovereign dictatorship because he denies that Franco is an agent or commissioner of the constituent power to create a new constitutional order. Only in the case of *decisionist Francoism* could we find the concept of popular autocracy, while Conde conceives the Francoist state as an autocracy.

In Chapter 8, I examined the Peronist ideologists of the Argentina Constituent Assembly of 1949. I placed this case in the context of the international discussion on "populist constitutionalism" (Blokker, 2019a; Doyle, 2019; Halmai, 2019). This case is considered the archetype of populist constitutionalism in Latin America (Negretto, 2012, p. 344), as the head of state activates the constituent power by exploiting his popularity, and then uses his majority of deputies to draft a constitution to stay in power. My study represents a new contribution to the literature because it examines how this constituent assembly is legitimized with Schmitt's idea of popular autocracy. The most important finding is that this is the first relevant case in which Schmitt's and Bonnard's conceptions of constituent power clash. For the Peronist ideologist Díaz de Vivar, the legitimacy of the constituent assembly convened by Perón and confirmed by parliament rested on Schmitt's concept of the plebiscitary decision of constituent power. For Sampay, who was a connoisseur of German and French theories of the state, the constituent assembly, on the other hand, expressed Bonnard's concept of *derived constituent power*. Sampay thus makes the first attempt to unify the idea of constituent power as a *de jure* exercise, while conceptualizing Perón as the "guardian of the constitution." Sampay defines the president as a caudillo and plebiscitary leader, and thus considered Perón as the "bearer of constituent power." The Argentine case is an example of how Schmitt's and Bonnard's conceptions of constituent power has been received transatlantically and continues to serve to legitimize a popular autocracy.

In these eight chapters I have tried to show how the concept of popular autocracy goes back to Sieyès's idea of *pouvoir constituant* in the French Revolution and how it finds its conceptualization in the work of Carl Schmitt. The new conception developed by Roger Bonnard shows that despite the absence of Schmitt's concept in the tradition of French legal positivism, the relationship between autocracy and constituent power is very strong. The absence of Schmitt does not diminish or prevent the emergence of a new notion of popular autocracy. The results of my study suggest that the autocratic tradition of constituent power should not be viewed as a pathology or instrumentalization of the concept coined by Sieyès, but as part of its own intellectual history. From its inception, the concept of constituent power was tainted with an autocratic element, which then found its development and application in Europe and South America. In order to understand the concept of popular autocracy, we must first explain what Sieyès's idea of *pouvoir constituant* is and how it developed in 1789.

First Section: The Origins

Chapter 1: Sieyès's idea of Constituent Power in the French Revolution[1]

> "The second epoch [in the development of political society] is characterized by the action of a *common will*. (...) We have seen how the birth of a constitution took place in the second epoch" (Sieyès, 1789/2003, pp. 134, 136).
>
> "The representatives of the Third Estate will undoubtedly have been mandated by the twenty-five or twenty-six million individuals who make up the Nation" (Sieyès, 1789/2003, p. 149)

Introduction

Sieyès's idea of constituent power (*pouvoir constituant*) in *What is the Third Estate?* (1789/1985, 1789/2003) is a mandate from the people to create a constitution. The terms people and nation are synonymous and refer to the *sovereign*. The mandate is exercised or implemented by delegates or commissioners (called *extraordinary representatives*) who have the power to act on behalf of the people. For this reason, the term *pouvoir constituant* does not refer only to popular sovereignty or representation in constitution-making. The aim of this chapter is to show that Sieyès's idea of constituent power in the developmental context and political vocabulary of the French Revolution essentially refers to the creation of a new constitutional order as a mandate from the people. For Sieyès, extraordinary representation is a *delegation of sovereignty* subordinated to the imperative of reflecting the will of the people. Authors such as Duguit (1911/1928, p. 646) and Carré de Malberg (1922, p. 210) emphasized how the National Assembly between 1789 and 1791 legitimized its powers with the notion of a mandate, and conceptually define Sieyès's idea of constituent power as a "representative mandate" (*mandat représentatif*). Schmitt (1928/2008, p. 127) echoed this idea with his theory of constituent power as a commission (*Auftrag*). Colón-Ríos (2020, p. 88) has partially revived this concept of constituent power with his idea of the "free mandate." However, the meaning of Sieyès's idea of constituent power as a mandate from the people has not been

[1] This chapter is an expanded and revised version of my article "Constituent Power: A Moderate and Illiberal Idea of Sovereignty in the French Revolution," forthcoming in the journal *History of European Ideas*. In this section, I have highlighted the concept of the mandate to better clarify my discussion of the illiberalism of the concept coined by Sieyès in 1789.

clearly explained in contemporary literature, which tends to focus on the limits of the mandate. I will briefly explain the debate over Sieyès's concept of the mandate.

In recent years, an important literature has developed on the limitation of the mandate of the constituent power (Duke, 2020; Duke & Arcioni, 2021; Fasel, 2022; Stacey, 2016). A distinction is made between the concepts of the *imperative mandate* and the *mandate of the constituent power*. The former refers to the position of politicians such as Pétion in the French Revolution, who understood the deliberations of the assemblies as an imperative mandate to the extraordinary representatives (Rubinelli, 2020a, pp. 36–43). The second refers to the act of will of the people as a mandate. Colón-Ríos (2020, p. 65) echoes this last concept, noting that Sieyès starts from the idea that the people give a mandate, which is then expressed in the constituent assembly: "What was needed was for the nation to give a set of extraordinary representatives 'a special mandate to draft the constitution of an ordinary assembly'" (2020, p. 74). Colón-Ríos therefore introduces his notion of a "free mandate" to emphasize that the content of the mandate to draft a constitution must be filled in by the representatives: "Instead of the imperative mandate defended by Rousseau and his followers, representatives had a 'free mandate' from their constituents" (2020, p. 88) Fasel (2022, pp. 1121–1129) extends this idea of Colón-Ríos by saying that cases like Chile 2022 show that the mandate of the constituent assembly can be limited in procedure and content. For Fasel (2022, pp. 1112–1116), the limitation of the mandate is in line with the natural law ideas of Sieyès, who points out that the constitution must guarantee the *common interest*:

> As indicated, the limits on constituent conventions that follow from the people's mandate are not the only type of constraint that Sieyès's theory yields. Once that theory is properly understood as a natural law theory, an additional constraint emerges: the need to exercise public powers in line with the demands of the *common interest*. This constraint follows from Sieyès's understanding of the goal of representative assemblies and of political associations more generally (Fasel, 2022, p. 1119).

This discussion of the limits of the mandate of the constituent power has reached its culmination in an important article by Verdugo (2023). This work summarizes all the relevant literature of the last decade criticizing and defending the concept of constituent power. Verdugo's central thesis is that the theory of constituent power does not provide analytical tools for knowing how a constituent process should be organized. He also criticizes the concept for facing the challenge of proving its actual democratic nature. Verdugo (2023, pp. 22–30) calls "the conventional approach" to the way in which texts of constitutional law and political theory treat the works of Sieyès and Schmitt. Verdugo's approach is distinguished by

the fact that he analyzes not only the literature on the concept of constituent power, but also the empirical literature that has examined constituent assemblies. Thus, Verdugo highlights cases of democratic exercise of constituent power, such as in Chile in 2022, as well as populist and authoritarian cases, such as in Venezuela in 2017. Although he addresses all of this literature, he does not explain exactly what Sieyès meant by his idea of constituent power as a mandate from the people. Verdugo (2023, p. 24) quotes the passage from Sieyès (1789/2003, p. 137) that the mandate cannot be limited by the representatives' will, but he does not stop to explain the meaning of this concept in the French Revolution.

My study does not attempt to resolve the important contemporary debate about the limits of the mandate of constituent power or the 'caducity' of the concept, but to contribute to that debate by explaining Sieyès's concept of the mandate through an examination of the vocabulary of constituent power toward the end of the 18th century and its revolutionary context of development. My analysis therefore takes an intellectual historical approach and treats Sieyès's pamphlet *What is the Third Estate?* (1789/1985, 1789/2003) as one of the most important political works of the French Revolution. Considered the inventor of French constitutionalism (Pasquino, 1998), his influence at the time was remarkable. The idea of the people as a "sleeping sovereign" (Tuck, 2016) and Sieyès's critique of Rousseau have attracted considerable interest in discussions of the history of modern democracy (Israel, 2013, p. 644). More intellectual historical approaches have concluded that the ex-*abbé* distinguished between the concepts of sovereignty and constituent power (Colón-Ríos, 2020, p. 84; Rubinelli, 2020a, p. 17). Thus, Sieyès's idea of *pouvoir constituant* is portrayed as a liberal attempt to politically moderate Rousseau's account of sovereignty vis-à-vis the Jacobins' radicalism (Rubinelli, 2020a, p. 46). In contrast to such a liberal reading, I show that constituent power is based on the revolutionary creation of the constitution as a mandate from the people. For Sieyès, the extraordinary representatives of the constituent assembly have the mandate to draft a constitution and reflect the will of the sovereign, so that they are dependent commissars of the will of the people, unlike ordinary deputies.

In order to understand Sieyès's idea of constituent power as a mandate from the people, it is necessary to explain how it brings together the concepts of popular sovereignty and constitution-making. In 1789, Sieyès's idea of *pouvoir constituant* merged these two concepts. His idea first alludes to the political concept of the people as sovereign, as an entity with a *will* that precedes the constitution and the entire political order. The idea was derived from Rousseau's theory of sovereignty, which presupposes the existence of a pre-state *collective will* (Duguit, 1911/1928, p. 432) In the French tradition, this sleeping sovereign that

precedes the government is the people, in other words, the nation. Thus, constituent power is an account of the popular sovereignty concept. However, constituent power also has a positivist definition that refers to creating a written constitution and the fundamental laws of the state. Constituent power is defined here as the power extraordinary representatives elected by the people exercise in carrying out a *mandate* or *commission* to draft a constitution. Raymond Carré de Malberg, in his positivist theory of the French state, defines constituent power exclusively in this commissarial sense. (Carré de Malberg, 1922, pp. 500–504) In the 20th century, especially in the French and Spanish traditions, authors such as Vedel, Sánchez Agesta, and Pérez Serrano have attempted to synthesize these two elements of constituent power by distinguishing between an *original* (=sovereign) and a *derived* (=constitutionalized) constituent power. (Colón-Ríos, 2020, pp. 13–17; Pérez Serrano, 1947).

Since I emphasize Sieyès's idea of constituent power as a mandate from the people, my analysis focuses on the creation of the constitution. This emphasis on the positivist element of the constituent power concept, the extraordinary exercise of power by representatives drafting a constitution, has opened a discussion on whether Sieyès's idea of constituent power represents a liberal attempt to moderate Rousseau's theory of sovereignty in the French Revolution (Niesen, 2020; Rubinelli, 2020b) The central idea of the moderate and liberal Sieyès (Bastid, 1939/1970, p. 89) is that the ex-*abbé*, with his conception of extraordinary representation and his skepticism about Rousseau's idea of sovereignty, distances himself from the radical theories of popular sovereignty. We believe the readings of radical Rousseau followers, like Robespierre, and more illiberal receptions, like Carl Schmitt (1928/2008, Chapter 8, 1921/2014, Chapter 4) in his theory of constituent power, refer to the unlimited and arbitrary power of the nation's will. In contrast, constituent power as a moderate and liberal idea of sovereignty essentially refers to an exercise of popular power in constituent moments (Colón-Ríos, 2020, p. 58; Duke & Arcioni, 2021, p. 18; Rubinelli, 2020a, p. 57). Historically, this liberal interpretation of Sieyès's idea of constituent power began with Bastid's erudite study (1939/1970), was intellectually developed in Pasquino's influential work (1998, 2008), consolidated in Tuck's idea of the sleeping sovereign (2016), and has found its most important intellectual positioning in Rubinelli's work (2019b, 2020a).

The liberal reading of Sieyès's idea of constituent power has been consolidated in the intellectual historical literature. Craiutu (2012, p. 77) portrays Sieyès as a revolutionary against moderation, although he also says that Sieyès is one of the "moderate representatives of the democratic left" (2012, p. 77). The ex-*abbé* is thus presented ambiguously: Sieyès is a radical opponent of the moderation of the *Monarchiens*, but a liberal and moderate thinker

vis-à-vis the radical democrats. The liberal reading of Sieyès has also understood his works in the broad political approach that encompasses some key elements of liberal thought (Baczko, 1988; Goldoni, 2012; Rubinelli, 2019a). Thus, it has been emphasized that Sieyès was influenced by Adam Smith's theory of the division of labor (Brown, 2022; Pasquino, 1998, pp. 39–43; Sieyès, 2007a, p. 306), so he applies liberal economic thinking about specialization to the case of representatives involved in *extraordinary* and *ordinary* legislation. Sieyès's revolutionary project to dismantle absolute monarchy in France not only defends the separation of powers between the legislative and executive branches, but also insists on the separation of the *legislative* (parliament) and *constituent* powers (Larrère, 2008, p. 205; Rubinelli, 2020a, p. 53; Whatmore, 2002, pp. 75–80). Sieyès's political liberalism is also expressed in his denunciation of the privileges of the clergy and the aristocracy, and then in his participation in the Constitutional Committee that drafted the Declaration of the Rights of Man. The liberal reading of Sieyès's idea of constituent power can be summarized thus: "Sieyès's theory anticipated Constant's and Guizot's, and by opposing Rousseau he developed a specifically French version of liberalism" (Baczko, 1988, p. 122).

My paper departs from this traditional literature by emphasizing the vocabulary and revolutionary context of the concept of constituent power. My analysis is based on three important insights. First, I attempt to show that Sieyès's concept of the constitution is not merely that of a written constitution, as liberal readings have emphasized (Pasquino, 2008, p. 20). For Sieyès, the constitution does not emerge with the extraordinary representatives, but much earlier. In *What is the Third Estate*, Sieyès (1789/2003, pp. 134, 136) states that the constitution is born in the epoch of the *common will*, that is, with the *volonté générale*. Sieyès's political concept of the constitution thus precedes the epoch of extraordinary representation. Second, I analyze his idea of constituent power in the vocabulary of the late 18th century and show that the concept originally referred to a *mandate* or *commission*. In the French Revolution, Sieyès uses the term '*procuration*' to define the creation of the constitution, and shows that the essence of his idea of constituent power is contained in the term mandate. Finally, as a consequence of the previous points, I explain why, for Sieyès, the creation of the constitution as a mandate from the people to the constituent assembly is basically a *delegation of sovereignty*. Delegation as a mandate establishes the imperative to reflect sovereignty. I conclude that constituent power as a mandate from the people is not a liberal conception of constitution-making, but an illiberal idea of Rousseau's theory of sovereignty. I begin with an explanation of Sieyès's concept of the people as sovereign.

1. The Political Concept of the People

Sieyès was born in Frejus in the south of France on the 3rd May 1748, destined to become a clergyman (*abbé*), French revolutionary, political essayist, deputy of the National Assembly, president of the National Convention, the Directory, the Council of Five Hundred, and eventually president of the Conservative Senate and consul in the Napoleonic era. He became famous for his essay *What is the Third Estate?* (1789/2002, 1789/2003) in which he laid out his idea of *pouvoir constituant*. For Israel, this pamphlet "brilliantly captured the mood, phraseology, and *philosophique* terminology of the moment, especially the journalistic campaign of 1788" (2013, p. 770). After the French Revolution, he played a leading role as a conspirator in Napoleon Bonaparte's coup d'état of 18 Brumaire (9 November 1799) (Lentz, 2014, pp. 57–59) This section, however, is not as focussed on biographical detail as on the political foundations of Sieyès's idea of constituent power.

An intellectual history of constituent power must distinguish between this term coined by Sieyès and its precursive ideas. Extensive literature has emphasized an intellectual history *avant la lettre* of the two elements of Sieyès's idea of constituent power. As an account of popular sovereignty, Zweig's (1909) seminal work was one of the first to highlight that the idea of constituent power existed centuries before the French Revolution. Taking this historical approach, Kalyvas (2018, pp. 92–104) indicated that the idea is already captured in the political theories of Marsilius of Padua, the Monarchomachs, and mainly Hobbes's and Rousseau's theories of sovereignty. Lee (2016, pp. 142–149) has pointed out that the idea of constituent power is linked to the theories on popular sovereignty in 16th century France. Further, Loughlin (2007) claimed that the idea of constituent power emerged in England in the 17th century with George Lawson and the English radicalism of the *Levellers*. In the past decade, constitutional scholars give preference to the reading that, as a concept, constituent power has existed at least since the democratic tradition of 'We the People' in the first American Constitution, and in the writings of the Federalists (Arato, 2017b, pp. 112–116; Bofill, 2021, pp. 115–119; Frank, 2010, pp. 12–18; Partlett, 2018, pp. 963–967).

In contrast to these readings, I argue that Sieyès's idea of constituent power developed under certain conditions that were unique to France in the years 1789-1791. To understand this concept, the developmental context is important. I begin by explaining Sieyès's political concept of the people as the *pouvoir constituant* and then his concept of the constitution.

a. The People as Pouvoir Constituant

Sieyès's great invention in the French Revolution is the distinction between the *pouvoir constituant* as a synonym for a sovereign power and the *pouvoir constitué* as a synonym for a constituted power, i.e., as the notion of a government subordinated to the will of the people. His concept of constituent power is linked to his revolutionary context against absolute monarchy. The Estates-General met at Versailles on May 5, 1789, and disputes arose over the votes of the Estates. On June 17, 1789, the members of the Third Estate declared themselves the sole members of the National Assembly. On July 9, the Assembly gave itself the name National Constituent Assembly. On July 14, the Storming of the Bastille took place, symbolized as the end of the *Ancien Régime*. In his speech of June 15, Sieyès said that the representatives of the Assembly were sent by the absolute majority of the nation (Furet & Halévi, 1989, p. 1002). He also explains that the Assembly has the task of interpreting and presenting the general will of the nation (*volonté générale de la nation*). In his June 25 speech, Sieyès presents the legitimacy of the Assembly as a mandate from the nation to create a constitution (*elle nous demande une Constitution*) (Furet & Halévi, 1989, p. 1003). For Sieyès, then, the exercise of constituent power consists in carrying out a mandate from the nation in the form of a revolution that creates a new constitutional order:

> We should ask ourselves what powers we have and what mission we have gathered here from all corners of France. Are we only agents [*mandataires*], officers of the king? [If so, then] we must obey and withdraw. But since we are the emissaries [*les envoyés*] of the people, we should fulfill our mission, freely and courageously. (...) We have sworn, Messieurs, and our oath will not be in vain, we have sworn to restore the rights of the French people. (...) The nation urges us and demands from us a constitution. And who can do it without us? Who, if not we, can do it? Is there any power in the world that can deny you the right to represent your constituents [*commettants*]? (Furet & Halévi, 1989, p. 1003).

Sieyès presented his idea of constituent power in his famous essay *What is the Third Estate.* The vocabulary and political goal of the French Revolution are summarized in its first pages. The text is divided into six chapters. In the first and second chapters, the Third Estate is theorized as *la nation*, underscoring the famous phrase "What is the Third Estate?—Everything" (1789/2003, p. 94). The third chapter denounces the political power and privileges of the clergy and aristocracy in the Estates-General of 1789, leading to the conclusion that the Third Estate was "nothing" until now. In this chapter, Sieyès makes three demands that revolve around the equality of votes and the recognition of the Third Estate as

the representative body of the nation. The fourth chapter is a critique of the actions taken so far by the government in the face of the Third Estate's demands. Here, Sieyès's critique of the suggestions that the French government should imitate English monarchical-constitutional government stands out (1789/2003, pp. 127–130). The fifth chapter is most important to my analysis, as it is here that Sieyès (1789/2003, p. 136) introduces the term *pouvoir constituant* and explains how this concept relates to the delegation of extraordinary representatives to create a new constitution. The final chapter concludes with Sieyès's reflections on the next steps in recognizing the members of the Third Estate as representatives of the nation. His concept of the nation as a constituent power requires explanation.

The basic principle of Sieyès's idea of constituent power is rooted in the political concept of the French term *nation*. In *What is the Third Estate*, Sieyès conceptualizes this term in three different ways. First, from a historical point of view, focusing on territorial and geographical aspects, the nation is understood as the totality of a country's inhabitants and citizens (*tous les habitants et tous les tributaires de la chose publique*) (Sieyès, 1789/1985, p. 165). Second, taking a sociological perspective, it refers to a social class whose interests oppose those of the privileged estates: the aristocracy and the clergy. Here the nation essentially refers to the Third Estate (Sieyès, 1789/1985, p. 118). These two conceptions of the term nation are even used simultaneously in some passages of Sieyès's pamphlet:

> The Third Estate has to be understood as the totality of citizens (*l'ensemble des citoyens*) belonging to the common order. Whoever has a legal privilege of whatever kind has deserted the common order to form an exception to the common system of law and consequently does not belong to the Third Estate. As has been said, a nation is made one by virtue of a common system of law and a common representation (...) As a result, all those endowed with privileges, without exception, constitute a class that is separate from and opposed to the Third Estate (1789/1985, pp. 123, 124).

However, Sieyès uses the term in a third way, referring to the nation as a political subject (the people), specifically as a pre-state entity that has *existence* and a *will*. For Sieyès (1789/1985, p. 161), the crucial element of this concept lies in the union of all individual wills into *one* single collective will. This concept presupposes that a nation is a political entity with its own will, which possesses a "subjective right" (*droit subjectif*) (Duguit, 1911/1928, p. 432). This will is called sovereign. The nation is the elementary principle of the French state's constitutional theory, which Sieyès defines as follows:

> Every nation on earth has to be taken as if it is like an isolated individual outside all social ties or, as it is said, in a state of nature. The exercise of their will is free and

> independent of all civil forms. Since they exist only in the natural order, their will needs only to have the natural character of a will to produce all its effects. However a nation may will, it is enough for it to will. Every form is good, and its will is always the supreme law (Sieyès, 1789/2003, pp. 137–138)

This concept of the nation resembles Rousseau's theory of sovereignty in the *Contrat Social* (1762/2008). Sieyès's concept of the nation is Rousseau's idea of the people. The will of the people is referred to as sovereign. In the sixth chapter of the first book, Rousseau explains that individual wills make a pact that forms a general will (*volonté générale*). He summarizes his idea with the following sentence: "'Each of us puts in common his person and all his power under the supreme direction of the general will; and in return each member becomes an indivisible part of the whole'' (1762/2008, p. 164). The goal of this pact is the *common good* or the *common interest* (1762/2008, p. 170). In the seventh chapter of the first book, Rousseau asserts that a *collective will* is formed from this pact, which is the bearer of sovereignty. Thus, the general will is now an expression of the concept of sovereignty, which is tied only to the original pact of individual wills: "But the body politic or sovereign, deriving its existence only from the sanctity of the contract, can never bind itself, even to others, in anything that derogates from the original act" (1762/2008, p. 165). This leads Rousseau to say that sovereignty is inalienable because it is always an attribute of the collective: "The sovereign power, which is in fact a collective being, can be represented only by itself" (1762/2008, p. 170). Rousseau (1762/2008, pp. 170–171) affirms that only "the people" is the bearer of sovereignty, and therefore he calls the will of the people as sovereign.

Rousseau points out that the will of the people is both *inalienable* and *indivisible*, so that the creation of the fundamental laws of the state is an "act of sovereignty" (1762/2008, p. 171). For Colón-Ríos (2016), these passages of Rousseau's work are the origins of Sieyès's idea of constituent power. In the second chapter of the second book of the *Contrat Social*, Rousseau explains (1762/2008, p. 171) that sovereignty cannot be divided among the powers of the state. Thus, he points out that sovereignty cannot be divided into a *force* and a *will*, the executive and the legislative, respectively. Sovereignty is only an attribute of the collective. Thus, in the sixth chapter of the second book, Rousseau develops his concept of legislation, in which he grants the people the right to create their fundamental laws: "It is no longer necessary to ask whose office it is to make laws, since they are acts of the general will" (1762/2008, p. 179). These acts of sovereignty also refers only to the *general*, not to the particular: "Whatever the sovereign itself prescribes respecting a particular object is not a law, but a decree, not an act of sovereignty, but of magistracy" (1762/2008, p. 179). Only the people can be the bearer of the creation of laws: "The people, being subjected to the laws,

should be the authors of them" (1762/2008, p. 179). In chapters seven and eight of the second book, Rousseau presents his conception of the *législateur* as the architect of the state's design. But in the twelfth chapter of the same book, Rousseau defines the people not only as the creator of the fundamental laws, but also as the only one with the power to change them:

> The laws governing this relation bear the name of political laws, and are also called fundamental laws, not without some justification if they are wise ones; for, if in every State there is only one good method of regulating it, the people who discovered it ought to adhere to it; but if the established order is bad, why should we regard as fundamental laws that prevent it from being good? Besides, in any case, a nation is always at liberty to change its laws, even the best; for if it likes to injure itself, who has a right to prevent it from doing so? (Rousseau, 1762/2008, p. 191).

The consequence of Rousseau's theory of sovereignty is that government is understood as a *mandate* or *commission* from the people. In the third book of the *Contrat Social*, Rousseau (1762/2008, p. 193) emphasizes his view that the power to legislate rests with the people alone. Thus, there is a *will* charged to the legislative power and a *force* charged to the executive power (the government). The actions of the government are subject to the mandate of the sovereign, because the government does not create laws, but executes them. The government cannot be identified with the sovereign because it serves the sovereign. The concept of government is referred to by Rousseau (1762/2008, p. 194) as "kings" or "governors". Thus he arrives at his famous and influential thought that government is nothing more than a commission from the sovereign: "Those therefore who claim that the act by which a people submits to its leaders is not a contract are quite right. It is absolutely nothing but a commission, an employment" (1762/2008, p. 194). Rousseau further radicalizes his conception of government when he says that the members of the government are merely "officers of the sovereign" because they exercise in the name of the sovereign "the power of which it has made them *depositaries*" (1762/2008, p. 194). The people as sovereign can "limit, modify, and take back" the power of the government if they wish. Rousseau concludes: "The alienation of such a right, being incompatible with the nature of the social body, is contrary to the object of the association" (1762/2008, p. 194).

This concept of sovereignty as the will of the people is echoed in the fifth chapter of *What is the Third Estate*. Here Sieyès (1789/2003, pp. 134–135) explains the three epochs of the formation of political society. This topic is extremely important to understand what Sieyès's concept of the nation as a *pouvoir constituant* is. I will briefly explain these epochs.

In the first epoch there are only single wills: "In the first of these epochs, one can imagine a more or less substantial number of isolated individuals seeking to unite"

(1789/2003, p. 134). Sieyès says that the individuals as a collective already have all the rights of the nation, it only depends on their *will* to exercise these rights. In this first epoch, Sieyès echoes the idea of the individual wills in Rousseau's theory of the pact: "This first epoch is characterized by the activity of individual wills. The association is their work. They are the origin of all power" (1789/2003, p. 134). In contrast to the first epoch, the *common will* (*volonté commune*) is formed in the second epoch: "Power resides solely in the whole. A community has to have a *common will*" (1789/2003, p. 134). In this epoch, power is understood to relate exclusively to the *common good*. The will of the individual still exists, but it has united into a *one* single will, which is identical with Rousseau's account of sovereignty: "Without this unity of will, it would not be able to make itself a willing and acting whole. It is also certain that this whole has no rights that are not connected to the common will" (1789/2003, p. 134). Finally, in the third epoch, a representative government is formed with the mandate (*procuration*) to draft a written constitution that reflects the will of the nation expressed in the second epoch. In these passages, Sieyès's idea of constituent power resembles Rousseau's idea of the people's capacity to create their constitutional order:

> But how, in the light of this, is it possible to claim that the nation itself ought to have been given a constitution? The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation there is only natural law. (...) In each of its parts a constitution is not the work of a constituted power but a constituent power. No type of delegated power can modify the conditions of its delegation. It is in this sense, and in no other, that constitutional laws are fundamental (Sieyès, 1789/2003, p. 136)

This passage shows that Sieyès's idea constituent power means that the nation's will has the capacity (Doyle, 2019, p. 162) to give itself a constitution. Sieyès articulates the same idea in the draft Constitution written in 1789: "A constitution implies, above all, a constituent power. The Powers included in the public establishment (*l'établissement public*) are all subject to laws, rules, and forms, which they cannot change as they are not their masters" (1789/1989b, p. 35) In the French tradition, this political conception of the nation, which continues to echo the *volonté générale*, became institutionalized. Article 1 of Title III of the Constitution of 1791 states: "Sovereignty is one, indivisible, inalienable, and imprescriptible. It pertains to the nation; no section of the people nor any individual may assume to exercise it" (*Constitution de 1791*, n.d.). Underpinning this conception of sovereignty is Sieyès's distinction between *pouvoir constituant* and *pouvoir constitué*. The latter is subject to the will of the former. The constitution results from the exercising of constituent power so that the nation cannot be subject to any positive law. For Sieyès, the nation is always in a state of

nature (following Spinoza's idea of *natura naturans*) (Schmitt, 1921/2014, p. 123) so that the constitution is a *creatio ex nihilo* (Colón-Ríos, 2020, p. 60).

In recent intellectual historical literature, however, Sieyès's idea of constituent power has been separated from Rousseau's theory of sovereignty. The works of Pasquino (1998, pp. 177–180) and Rubinelli (2019b) have attempted to establish the distinction between *sovereignty* and *constituent power* in Sieyès's work. Indeed, the term sovereignty does not actually occur in *What is the Third Estate* and appears only thirteen times in Sieyès's writings (Sieyès, 1999e, p. 492). In his manuscripts written after the Terror (1793-1794), Sieyès rejects this term. In the Year III of the French Revolution, Sieyès said in his *Bases de l'ordre social*: "Sovereignty in the sense of a supreme power (*pouvoir suprême*) which dominates and embraces everything does not exist. It is not embodied in the collective mass of all the public officials" (1999a, p. 515). He also said in his *Observations* that "raw democracy is absurd, even if it were possible" (Sieyès, 1999f, p. 519). For Rubinelli (2020a, pp. 20, 23), Sieyès's critique of Rousseau's concept of sovereignty shows that his idea of constituent power was a liberal attempt at moderation vis-à-vis the more radical readings such as those of Robespierre, the Jacobins, and other illiberal receptions such as those of Carl Schmitt in the Weimar Republic. From the perspective of political theory, however, this presents a paradox. While it is true that Sieyès did not use the term sovereignty in 1789, we should remember that Sieyès's idea of constituent power theorized the creation of a new constitutional order in the French Revolution as an act of sovereignty, i.e., an act of the *common will*. This is a key element in recognising the sovereign character of the *pouvoir constituant*.

The act of sovereignty of the people is always in the form of a supreme power. Although Sieyès refers negatively to the term sovereignty after the Terror, even the definition he presents here appeared earlier in *What is the Third Estate*. In the final section of his *Bases de l'ordre social* (1999a), Sieyès elaborates on the notion of *incontestable decisions* in his concept of sovereignty. Sovereignty is associated with the exercise of supreme power or with sovereign decisions by a supreme authority: "It is clear that the words supreme or sovereign authority (*autorité suprême ou souveraine*) can only mean the final decision (*la décision finale*) of several particular/special authorities whose judgment remains without appeal (*reste sans appel*)" (Sieyès, 1999a, p. 515). Rousseau (1762/2008, p. 175) also defined the act of sovereignty, the act of will of the people, as the stable exercise of public force and "supreme power." Thus, although the term sovereignty does not appear in Sieyès's writings of 1789, this does not mean that he does not consider the constituent power as sovereign. There are three expressions by Sieyès that allude to the act of the *pouvoir constituant* as sovereign:

"supreme law," "supreme master," and "supreme judge." These three definitions of the nation as constituent power refer to *one* and the same entity that has the supreme power to make laws, give mandates, and resolve conflicts between the powers of the state.

In 1789, Sieyès's idea of constituent power as sovereign was developed in the fifth chapter of *What is the Third Estate*. Here Sieyès presents the nation as the supreme legislator, saying that it is good in every form and "its will is always the supreme law [*loi suprême*]" (1789/1985, p. 162). Moreover, as *pouvoir constituant*, "is always the master [*maître*] of every reform to its constitution" (1789/1985, p. 166). Likewise, he presents the nation as the supreme commanding power: "It is enough for its will to be made known for all positive law to fall silent in its presence, because it is the source and supreme master [*maître suprême*] of all positive law" (1789/1985, p. 163). Sieyès then asks what would happen in a situation where the members of the legislative body disagree. Referring to the nation, he says: "Who is to be the supreme judge [*juge suprême*]? There is always a need for one because, without one, order will give way to anarchy" (1789/1985, p. 163). In his speech on the royal veto, Sieyès (1789/1989a, pp. 22–23) takes up his idea of constituent power in terms of a supreme court (*l'unique Tribunal*). The nation as constituent power is the only arbiter who can make the supreme decision in case of conflict between the powers of the state. Although he may have changed his political position after the Terror, all these definitions of a supreme power show, in my view, that Sieyès's concept of the nation as *pouvoir constituant* in 1789 is undoubtedly sovereign. This brings me to Sieyès's concept of the constitution.

b. The Constitution as the Will of the People

Sieyès's concept of the constitution is that of the will of the people. It is often forgotten that in *What is the Third Estate* Sieyès explicitly says that the constitution is not born within the epoch of representation, but much earlier. For Sieyès, "the birth of a constitution took place in the second epoch [the epoch of the *common will*]" (1789/2003, p. 136). This is important because it shows that the mandate from the nation is to write a constitution that expresses the general will. However, Sieyès uses the term constitution in three different meanings in his work, which has led to confusion. The ex-*abbé* uses the ancient or classical term constitution when speaking of a political order of the state. Moreover, Sieyès refers to the constitution as the written constitution, the constitutional concept of the American and French Revolutions. Finally, and this is Sieyès's idea, he speaks of the constitution as the will of the people. This last concept does not contradict the other concepts mentioned, but emphasizes the idea that the constitutional order is the result of a mandate from people as the *pouvoir constituant*. We must distinguish between how Sieyès conceptualizes the constitution and how it is more broadly understood in the context of the 18th-century democratic revolutions. First I briefly present the meaning of the constitution in intellectual history, and then continue with Sieyès's three conceptions of the constitution.

Distinguishing between different concepts or types of constitution still characterizes a classical approach (Beaud, 2019; Grimm, 2012; Vorländer, 1999/2009) Historically, the constitution was understood as a concept denoting a political order (*τάξις, táxis*), while from the 16th century onwards, it was also conceptualized as a fundamental law. The term has existed since the 6th century BC when it portrayed the "good-order," an idea related to 'eunomy' (*εὐνομία, eunomía*), i.e., having good laws (Mohnhaupt, 1995, pp. 5–6). But from the 4th century BC onwards, the term was directly associated with the state (*πολιτεία, politeia*). In particular, Aristotle (1998) relates the term *politeia* to the political order: "A constitution is the order of a polis in respect of its various offices… (*πολιτεία μὲν γάρ ἐστι τάξις ταῖς πόλεσιν ἡ περὶ τὰς ἀρχάς…*)". This classic Greek definition refers to the constitution as a status of unity and order (Schmitt, 1928/2008, p. 60). Interestingly, the term *constitutio* in the classical view was also related to medical biological terminology (Beaud, 2019, p. 2). The constitution in this sense alludes to "the state of the human body" (Grimm, 2012, p. 100) to speak of a good *constitutio* in terms of a well-organized body (Mohnhaupt, 1995, p. 26). The constitution continued to be conceptualized as a political order, status of unity, and the organization of the state until the 18th century.

In the French tradition, the concept of the constitution had its most notable intellectual development in the 18th century. Until the 16th century, Bodin associated the idea with the laws of the kingdom (*leges imperii*) which described the relationship between the king and the estates (Mohnhaupt, 1995, p. 38). But in the 18th century, the term became directly associated with the laws that organize the state. In pre-revolutionary France, two understandings are significant. First, the definition in Diderot's *Encyclopédie* presents the term constitution as one that refers to the German Empire, especially to the general laws of the empire and its form of government (Diderot et al., 1751-1772a, p. 63). Thus, the *positivist* concept of written law is merged with the Aristotelian notion of political order. The second definition is found in Emer de Vattel's influential work *Droit des gens* (1758/2008), which despite defining the constitution in the Aristotelian sense, is innovative in stating the term as a legal norm and the nation's establishment of an order (*l'établissement de l'ordre*) (Mohnhaupt, 1995, p. 91). Vattel thus points out that the political laws (*lois politiques*) organize the government, but the fundamental laws (*lois fondamentales*) determine the form of the state (Mohnhaupt, 1995, p. 92). The latter is connected to the French revolutionary conception of the constitution.

The essential element of the revolutionary concept is that it not only describes, but also prescribes; the term articulates the concept of the written constitution, "the constitution as law" (Grimm, 2012, pp. 100, 105) The Glorious Revolution of 1688 associated the constitution with the idea of the "fundamental laws of government," but this refers primarily to the political strengthening of Parliament (Vorländer, 1999/2009, p. 37). In contrast, in the conception of the American and French Revolutions, the constitution presupposes a power that is *constituent* rather than *constituted*. Such power, which precedes all positive law, is vested in the people (Arato, 2017b, p. 113; Grimm, 2012, p. 101; Partlett, 2018, p. 957). Thus, the constitution establishes a legitimate government; it emerges from the people's consent and is not merely a description of the political order (Grimm, 2012, p. 103). In Thomas Paine's words: "Constitution is a thing antecedent to government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government" (Paine, 1791, p. 56). Thus, the constitution is a set of legal norms that emerges from a political decision and is hierarchically higher than all other laws enacted by the government (Grimm, 2012, p. 104). In short, the modern constitution originates with the people as the sole source of legitimacy, thus expressing the distinction between *constituent* and *constituted* powers.

Now we can place the concept of the constitution in the context of the French Revolution. Importantly, the first Constitutional Committee was elected in July 1789.

Mounier and Lally-Tollendal played a leading role in defending the importation of the English constitutional model to France. The Constitutional Committee commissioned Sieyès on the 18th July to draft the *Déclaration des Droits*, which he presented on the 20th and 21st July (Egret, 1950, pp. 111–112). Next, I discuss his conception of the constitution.

The ex-*Abbé* uses at least three conceptions of constitution in his work. The first refers to the English idea of an unwritten constitution. Sieyès (1789/2003, pp. 127–130) refers critically to the "English constitution" as a design for a nobility-dominated parliamentary government. Delolme also has this idea of the constitution in his famous *Constitution de l'Angleterre* (1771). In speaking of the English constitution, Sieyès uses the term as a synonym for a form of government in the Aristotelian sense of *politeia*:

> … There is a real difference between England and France. In England the only nobles with privileges are those granted a share in the legislative power by the constitution. Every other citizen is subsumed under the same interest; there are no privileges that give rise to distinct orders. If, in France, there were a desire to join the three orders together to form one, then every kind of privilege would have to be abolished first (Sieyès, 1789/2003, p. 127).

In contrast to this concept of the constitution as a political order, Sieyès's second conception of constitution, strictly speaking, denotes the written constitution or the "constitution as law" (Grimm, 2012, p. 105). This is the very republican liberal idea that the 18th century's democratic revolutions pursued. Most notably, in Chapter 5 of *What is the Third Estate*, Sieyès (1789/2003, p. 133) uses this conception to point out that France has no written constitution and, therefore, the nation must create one. This view becomes even more evident when he says that representatives have to draft a constitution (Sieyès, 1789/2003, p. 135) In James Bryce's classical sense (1902, pp. 164–177), this legal concept is that of the "rigid constitution." However, for Sieyès, constituent power is related to a purely political conception of the constitution. In his earlier writing, he relates the idea of a *constitution hypothetique* (Sieyès, 2007b, pp. 418–421) to one fundamental law (*loi fondamentale*). This fundamental law he defines as the wish (*vœu*), the will (*volonté*) of the nation:

> Fundamental Law. Since men are united, they undoubtedly have the will to live in society and enjoy its benefits. This will is uniform and general; it is the first wish of the nation. But he who wills the end wills the means; government is needed, for the nation cannot carry out its functions on its own. It must entrust them to a portion of its members, and it must share them in such a way that there is no fear that the agent [*commis*] will ever appear to be the principal [*commettant*] (...) These primitive decrees of the national will [*décrets primitifs de la volonté nationale*] are what I call the fundamental laws, and they precede the first act of the representative social will.

> They are the *source* and the *limits* of any separation of powers (Sieyès, 2007b, pp. 420, 421).

In his pre-revolutionary and revolutionary writings, Sieyès assumes that the constitution pre-exists as the will of the people and precedes the work of the representatives. For him, they are "the interpreters for ordinary/extraordinary current affairs" and also "simple wish-fulfillers [*simples porteur de voeu*] for matters concerning the constitution" (2007b, p. 457). Moreover, Sieyès points out that the creation of the fundamental laws could only be achieved "through the determined will [*voeu déterminé*] of the dispersed nation" (2007b, p. 457). The constitution is an expression of the will of the people, so "the assembled representatives are merely the *carriers* [*porteurs*]" of that pre-existing will. For this reason, Sieyès (2007b, p. 457) says that we should separate *constituent* and *legislative* power. This idea of the will of the people as the origin of the constitution as the fundamental law of the state is also found in the fifth chapter of *What is the Third Estate*, when the ex-*abbé* says that the constitution is born before the representative government, that is, with the *common will* (Sieyès, 1789/2003, p. 136). It was in this last sense that Sieyès conceived the concept of the constitution as expressing the will based on pre-existing constituent power:

> In each of its parts a constitution is not the work of a constituted power but a constituent power. No type of delegated power can modify the conditions of its delegation. It is in this sense, and in no other, that constitutional laws are *fundamental*. The first of these, those that establish the legislature, are *founded* by the national will prior to any constitution. They form its first level (Sieyès, 1789/2003, p. 136).

Based on these passages, Sieyès's idea of constituent power distinguishes between the concepts of *constitution*, *constitutional laws*, and *ordinary laws*. The origin of the constitution appears simultaneously with the formation of the will of the people (Sieyès, 1789/2003, p. 136), the "act of sovereignty" (Rousseau, 1762/2008, p. 171). The constitutional laws organize the powers of the state. The ordinary laws are the laws enacted by a parliament: "The ordinary representatives of a people are entrusted with exercising, according to constitutional forms, that portion of the common will that is necessary for good social administration. Their power is confined to matters of government" (Sieyès, 1789/2003, p. 139). The distinction between *ordinary* and *extraordinary* legislation stems from this statement, as Sieyès asserts that there is a special kind of legislation to create a new constitutional order. He expands on this distinction by saying that unlike ordinary legislatures, "a body of extraordinary representatives [a constituent assembly] is a *surrogate* for an assembly of the nation" (1789/2003, p. 139). Similarly, in his speech on the royal veto, he says that in England there is

no separation between the *constituent* and legislative powers, as both powers are included in the powers of the English Parliament (Sieyès, 1789/1989a, pp. 20–21). Sieyès, however, does not make these conceptual distinctions only for a discussion of constitutional theory. We must keep in mind that he coined the term *pouvoir constituant* to theorize the French Revolution. Sieyès thus emphasizes that the distinction between ordinary and *constituent* legislation is based on the "special mandate" from the people:

> It is a fundamental and constitutional principle that the ordinary legislature may not exercise either the *pouvoir constituant* or the executive power. This separation of powers is of the utmost importance. Under compelling circumstances, if the special mandate of our constituents [*le Mandat spécial de nos Commettants*] compels us to exercise simultaneously or successively constitutional and legislative functions, we at least recognize that this intermingling cannot take place after this session; the ordinary National Assembly will be no more than a legislative assembly. It will be forbidden to touch any part of the Constitution (Sieyès, 1789/1989a, p. 21).

This paragraph brings me to a central point of my analysis. Sieyès's concept of the constitution as the expression of a will presupposes that the entire constitutional order is nothing other than the revolutionary expression of the people as the *pouvoir constituant*. As I mentioned earlier, in his June speeches Sieyès presents the authority of the representatives as a mandate given by the people (Furet & Halévi, 1989, pp. 1002–1003). But how did this mandate come about? In reality, there was no authorization in the sense of a constitutional procedure of the *Ancien Régime*. It would be absurd to look for the legality of the mandate in the case of a revolution. His concept of constituent power assumes that the revolution itself is a will of the people, a mandate to create a new constitutional order. The act of sovereignty is understood here as the content of the mandate. The constitution is born in the epoch of the *common will* and not in the epoch of representation (Sieyès, 1789/2003, p. 136). In other words, for Sieyès, the constitution was already born in July 1789. After the Storming of the Bastille on July 14, this became clear in his draft of the *Droits de l'homme* that Sieyès presented on July 20 and 21, 1789. He declares that the representatives assembled in the National Assembly recognize that they have a mandate from the people, a special commission to draft a written constitution. Consequently, by virtue of this mandate, they temporarily exercise a delegation of supreme powers to create a new constitutional order:

> The representatives of the French nation assembled in the National Assembly recognize that by their mandate [*mandat*] they have the special responsibility [*charge spéciale*] of renewing the constitution of the state. In this capacity they exercise the *pouvoir constituant*, and since the present representation does not correspond exactly

> to what this type of power requires, they declare that the constitution which they will give to the nation, while provisionally binding on all, will not be definitive until a new constituent power, extraordinarily convened for this purpose only, has given it the approval which the rigor of its principles requires. From that moment on, the representatives of the French nation will exercise the functions of the *pouvoir constituant* (Furet & Halévi, 1989, p. 1005).

This paragraph brings us to my distinction between the concepts of *constitution as mandate* and *constitution as contract* in the French Revolution. As I mentioned earlier, Sieyès considers the will of the people as a *mandate* to create a constitution. In contrast, a *contract* means that there is an agreement within the political forces of the state to create the basic law for the government. To understand the difference between these two concepts, it is important to compare Sieyès's idea with that of Jean-Joseph Mounier, as these were the two main concepts of 'constitution' at the beginning of the French Revolution (Egret, 1950, p. 34).

Israel (2013, pp. 927–928) is right in portraying Mounier as the moderate and liberal theorist *par excellence* of the French Revolution. In his speech as a member of the Constitutional Commission, Mounier introduces the idea of the constitution as the establishment of a political order in which there is an agreement between the nation, the representatives and the king (Furet & Halévi, 1989, pp. 863–873). He represented those skeptical of Rousseau's more abstract ideas, and proposed an assembly that should "emulate Britain and ground France's new constitution on experience, monarchy, and aristocracy, turning their back on *philosophique* notions" (Israel, 2013, p. 778). For Mounier, the Revolution also meant that the King of France had become the king of the French nation. Mounier (1789, p. 33) affirms that the king is a delegate of the nation, as are the deputies in the assembly. In his view, the French constitution must be modeled on the English constitution, which is understood as a political order that maintains a *contract* between the people and the powers of the state (king and parliament) (Mounier, 1789, p. 47). Thus, Mounier advocates the royal veto as a mechanism of avoiding the despotism of the legislature. In contrast, Sieyès (1789/1989a, p. 9) flatly rejects the royal veto over the legislature and also the *constitution as a contract*: "To assume that there is a contract between a people and its government is a false and dangerous idea. A nation does not make a contract with those it mandates; it en trusts the exercise of its powers" (Sieyès, 1789/2003, p. 120).

Although Sieyès rejected Mounier's liberal and moderate view, the intellectual historical literature tends to characterize Sieyès's concept of the constitution as moderate and liberal. Pasquino (2008, p. 20) has argued that Bryce's liberal idea of the "rigid constitution" is exactly Sieyès's concept of the constitution. Rubinelli buttresses Pasquino's approach by

affirming that Sieyès "strongly opposed the radical project upheld by theorists of popular sovereignty before, during and after the Jacobin rule" and that he "was quick to realize the dangers of the radicals' initial rejection of representation" (2020a, p. 69). In short, for the liberal reading of Sieyès, constituent power would be a moderate and liberal idea in French constitutionalism that advocates limited government. Nevertheless, constituent power as a liberal idea of sovereignty closer to Adam Smith and Benjamin Constant (Pasquino, 1998, pp. 31–32) than to Rousseau, has a significant problem. As explained, Sieyès's concept of the constitution, posits constituent power as a political concept. The will of the people expressed the birth of the constitution. Sieyès assumes the extraordinary representatives of the constituent assembly exercise sovereign powers because they have received a *mandate* from the people. I will now explain this revolutionary idea of representation as a mandate.

2. Constituent Power as a Mandate from the People

Constituent power is a concept that accepts the representation of the will of the people. In the context of 1789, it seems to me undeniable that Sieyès, by accepting extraordinary representation in a constituent assembly, is attempting to rationalize and moderate Rousseau's account of sovereignty (Rubinelli, 2020a, p. 47). His idea had already moved away from direct democracy when he claimed in 1789 that the exercise of the *pouvoir constituant* meant the creation of a "public establishment" (1789/1989b, pp. 34–35). In his manuscripts after *la Terreur* (1999a, 1999d, 1999f), Sieyès underscores the same idea with his critical comments on Rousseau, arguing that representation is good for government. In this post-revolutionary period, Sieyès affirms that representation is linked to the pursuit of political order (1999d, p. 481). All of these criticisms of Sieyès relate to an important idea of the *Contrat Social*. Rousseau (1762/2008, pp. 221–222) affirms that representation is a modern concept used for "feudal government" but unknown to the ancients and the Roman Republic. Rousseau thus asserts that the will of the people cannot be represented:

> Sovereignty cannot be represented for the same reason that it cannot be alienated; it consists essentially in the general will, and the will cannot be represented; it is itself or it is something else; there is no middle ground. The deputies of the people, then, are not and cannot be its representatives; they are only its agents [*commissaires*] and can conclude nothing definitively. Every law which the people in person have not ratified is invalid; it is not a law (Rousseau, 1762/2008, p. 221).

I have emphasized Rousseau's term *commissaires* in this paragraph because it takes us directly back to Sieyès's idea of constituent power as a mandate (*procuration*) from the people. Although the ex-*abbé* distances himself from Rousseau's theory of sovereignty after *la Terreur*, in 1789 he theorized representation as a *mandate* or *commission*. This is key to understanding his concept of constituent power as a *delegation of sovereignty*. Sieyès uses a special vocabulary of the 18th century to conceptualize constitution-making: *custody*, *delegation*, *mandate*, and *commission*. For Sieyès, the moderation of Rousseau's theory of sovereignty means that the exercise of constituent power delegates unlimited powers on the extraordinary representatives who draft a constitution, since they have a mandate to act as the people would in their place, i.e., to mirror sovereignty. Constituent power thus represents a moderate and illiberal idea of Rousseau's account of sovereignty in the French Revolution. I begin with an explanation of Sieyès's concept of representation as a mandate.

a. The Concept of Representation as a Mandate

The concept of representation of the *pouvoir constituant* in the French Revolution is synonymous with a mandate (*procuration*) or commission from the people to create a new constitutional order. I have explained that Sieyès (1789/2003, p. 136), in *What is the Third Estate*, says that there are three epochs in the development of political society. In the first epoch there is the individual will, while in the second epoch the *common will* is formed and thus the constitution is already born. When he speaks of the third epoch of political society, he means the epoch of "government exercised by mandate" (*gouvernement exercé par procuration*), not just "government by proxy" (Sieyès, 1789/2002, p. 52, 1789/2003, p. 134). In his speech on the royal veto of September 7, 1789, Sieyès also presents the extraordinary representation in the National Assembly as a mandate from the *whole* nation:

> A deputy is the deputy of the whole nation; all the citizens are his *commettants*; now, since in a bailiwick [*bailliagère*] assembly you would not want the one who has just been elected to take charge of the wish of the few against the wish of the majority, you must not want, a fortiori, that a deputy of all the citizens of the kingdom should listen to the wish of the inhabitants of a bailiwick [*bailliage*] or of a municipality alone against the wish of the whole nation. Thus, there is and can be no imperative mandate [*mandat impératif*] for a deputy or even a positive wish other than [*the mandate of*] the national will [*voeu national*] (Sieyès, 1789/1989a, p. 16).

It is important to explain that the notion of *imperative mandate* cited in this passage does not refer to the notion of *mandate from the nation*, which is implicit in Sieyès's idea of constituent power. The imperative mandate was debated by members of the National Assembly between July and August 1789 and rejected as a vestige of the *Ancien Régime*. The origins of the political concept of the mandate lie in the operation of a monarchical government with a pyramidal structure that established a top-down mandate (Furet & Halévi, 1989, pp. 1556–1557). The kingdom's administration also established that once the three estates were assembled in the Estates-General, they had to vote according to their constituency without the possibility of deliberation (Rubinelli, 2020a, p. 37). However, the idea of the imperative mandate was also understood from Rousseau's theory of sovereignty. As I have already explained, for the Geneva philosopher, government is nothing more than a mandate or commission from the sovereign: "Those delegated to exercise that will do not do so as a right that is their own, but as a right exercised on others' behalf. The common will is exercised as a commision" (1789/1985, p. 160). In the French Revolution, a radicalized

faction emerged that believed that the decisions of the assemblies in the provinces constituted an imperative mandate for the extraordinary representatives (Rubinelli, 2020a, pp. 41–42).

While the imperative mandate was defended by the radical faction in the National Assembly, Sieyès (1789/1989a) was firmly against it. Salle, in his speech of September 1, 1789, expresses Rousseau's idea that sovereignty cannot be delegated or represented because it has an inalienable character (Rubinelli, 2020a, pp. 41–42). Pétion de Villeneuve also expressed this idea when he pointed out that all citizens have the right to participate in the drafting of laws so that they can exercise their mandate in popular assemblies. According to Pétion de Villeneuve, the representation of the *volonté générale* leads to corruption (Rubinelli, 2020a, p. 43). Sieyès rejected the imperative mandate on the grounds that the will of a part of the nation cannot be imposed on those who represent the *whole* nation. His explanation is important because he distinguishes two types of mandates here. The first is the imperative mandate, but the second is the "special mandate" (*Mandat spécial*) of the nation as a whole, expressed in the representation of the members of the National Assembly (Sieyès, 1789/1989a, pp. 16, 21). In other words, Sieyès rejects the imperative mandate because of its democratic radicalism, but he does not reject Rousseau's concepts of the mandate or commission at all, as long as it is compatible with his concept of representation of the nation.

Sieyès's idea of the extraordinary representation of the *pouvoir constituant* is a revolutionary *mandate* or *commission*, not just a delegation for free deliberation as in an ordinary assembly. The content of the mandate lies in the general will (*volonté générale*).

In 1789, Sieyès declared that the *volonté générale* mandated a revolution in order to create a new constitutional order. For him, the representatives are only "emissaries" (*les envoyés*), agents of the general will (Furet & Halévi, 1989, p. 1003). In his manuscripts, he also uses the term "government exercised by mandate" to explain that the representative government "can only be a commission" (Sieyès, 2007b, p. 425). However, his concept of representation as a mandate has been forgotten in the literature on constituent power, although it has been well explained by other authors such as Duguit (1911/1928, p. 646) and Carré de Malberg (1922, p. 210) with the concept of the "representative mandate" (*mandat représentatif*). One reason for the overlooking of this idea in Sieyès's work lies in the English translation (1789/2003). In this edition, the term '*procuration*' is translated throughout as "mandate," but only when referring to government is the French term arbitrarily translated as "proxy" (1789/2003, p. 134). This creates confusion because it gives the false impression that representatives are not subject to the *revolutionary mandate* from the people. In fact, Sieyès is echoing Rousseau's theory of government here (1762/2008, p. 194), for representatives are

nothing more than agents (*commissaires*) dependent on the will of the sovereign. I will briefly explain the meaning of the term of mandate in *What is the Third Estate*.

In *What is the Third Estate*, the term mandate (*procuration*) is mentioned repeatedly to conceptualize the idea of the general will of the nation. The term first appears in the first chapter, where it is criticized that the nobility has power, but it is certainly "not entrusted with any mandate from the people [*procuration des peuples*]" (1789/2002, p. 5, 1789/2003, pp. 97–98). It does not represent the people because "its mandate did not come from the people, and second, by virtue of its object, because this consists in defending, not the general interest, but a particular one" (1789/2003, p. 98). For the same reason, Sieyès (1789/2002, p. 11, 1789/2003, p. 102) says in the second chapter that the members of the Third Estate in the past Estates-General did not have a "true mandate from the people [*véritable procuration du peuple*]" because they did not express a general will similar to 1789. In the fifth chapter, the revolutionary idea of the representative mandate is more clearly expressed when Sieyès (1789/2002, p. 52) defines the representation of the National Assembly as the constitution of a body of delegates (*corps des délégués*). It is thus a delegation resulting from a mandate: "The Nation ought to have been convoked to depute a set of extraordinary representatives to the capital with a special mandate [*procuration spéciale*] to draft the constitution of an ordinary National Assembly" (1789/2002, p. 61, 1789/2003, p. 143). The mandate of the people is expressed in this group of "delegates" or "custodians" of the nation:

> We have already established the need to define the common will [*volonté commune*] as the view of the majority alone. This maxim is indisputable. It follows that in France the representatives of the Third Estate are the true custodians [*dépositaires*] of the national will. They alone can speak in the name of the whole Nation without error (Sieyès, 1789/1985, p. 70, 1789/2003, p. 150).

Sieyès uses the terms custodian (*dépositaire*), delegate (*délégué*), commission, and mandate (*procuration*) to define the representation of the will of the people. It is important to address the meaning of these terms in context. Diderot's *Encyclopédie* defines political authority (*autorité politique*) as a custody (*dépôt*) that "is sometimes entrusted (*confié*) to a certain order in society; sometimes to several chosen from all the orders, and sometimes to one only" (1751-1772a, p. 899). In this custody, "the nation has the right to maintain the contract it has made against all; (...) it has the right and complete liberty to make a new one with whomever it pleases" (1751-1772a, p. 899). Besides, the *Encyclopédie* defines the notion of delegation in two ways. The first refers to a delegation of functions, described as "the act by which someone puts another in his place" (1751-1772a, p. 779). Hence, the delegation

given by magistrates and officers in Roman law. The second definition refers to the French kingdom being organized by commissars the king appointed (1751-1772a, p. 780). This conception of the sovereign's *délégués* refers to commissioning a task that ends as soon as it has been carried out (Schmitt, 1921/2014, Chapter 3). Delegation is thus conceptualized as the *commission* assigned by an authorized official (magistrate) or by the sovereign (king).

In Sieyès's political vocabulary, the concept of representation is synonymous with the concepts of *delegation* and *custody*, since any delegate (*délégué*) or custodian (*dépositaire*) of the *volonté générale* is necessarily a representative of the nation. The intellectual historical literature has drawn a very interesting parallel between Hobbes' and Sieyès's concept of representation as a form of authorization (Forsyth, 1981; Hont, 1994; Runciman, 2009). Pasquino (2016) has developed this point in a very interesting way. For him, the idea of constituent power consists in superimposing the notions of *authorship* and *authorization*. Authorization is understood as consent *ex ante*, that is, in the election of extraordinary representatives, and *ex post*, through ratification by the people (2016, p. 232). For Pasquino, this means that behind the idea of constituent power lies the Hobbesian idea of representation: "Hobbes reduced to a unity the presumed 'author' (the members of the political community) and the 'actor' (the representative/Leviathan)" (2016, p. 233). Thus, "the assimilation of the two concepts suggests (...) that the mechanism of the elections of the constituent assembly or, alternatively, the ratification referendum gives to this *reductio ad unum* some appearance of plausibility" (2016, p. 233). Pasquino (2016) stresses the importance of separating the bearer of sovereignty (the people) from those who exercise the mandate to draft the constitution (the deputies), but acknowledges that this Sieyèsian theory of representation is reminiscent of the Hobbesian theory of representation/authorisation.

However, this literature has overlooked the fact that the idea of representation in Sieyès is more consistent with the vocabulary of the *Encyclopédie*, although the editors of his annotated bibliography have rightly pointed this out (Sieyès, 2007b, p. 428). The concept of representative here is instructive for how Sieyès understands the term: "Representatives presuppose constituents [*constituants*] from which their power emanates, to which they are consequently subordinate and of which they are only organs" (1751-1772d, p. 146). Sieyès also used the term *dépositaire* to define representatives. In his *Constitution hypothetique* he states that "the government of the state in a great nation in 1770 is necessarily representative. It is a custody [*dépôt*] entrusted to a certain number of public officials" (2007b, p. 428). The notion of *dépôt* is recurrently used in all his writing, in expressing his definition of delegation (*délégation*) and delegate (*délégué*). Unfortunately, the English translation tends to blur this

vocabulary of Sieyès's idea of representation by translating the delegates of the general will as "trustees." In *What is the Third Estate*, Sieyès says: "… in France the representatives of the Third Estate are the true custodians [*dépositaires*] of the national will. They alone can speak in the name of the whole Nation without error" (1789/2003, p. 150). Thus, they "will form the whole National Assembly and will have all of its powers. Since they are the *only* trustees [*dépositaires*] of the general will, they do not need to consult those who mandated them about a disagreement that does not exist" (1789/2003, p. 152).

When Sieyès emphasizes that the representation or delegation of the will of the people is mandated to create a constitution, the word *commission* is used, a term strongly associated with Rousseau's *Contrat Social*. We know Rousseau stated that sovereignty "consists essentially in the general will [*volonté générale*], and the will cannot be represented" and that therefore, the people's deputies "are not and cannot be its representatives; they are only its agents and can conclude nothing definitively" (1762/2008, p. 221). Consequently, for Rousseau the government "is absolutely nothing but a commission, an employment, in which, as simple officers of the sovereign, they exercise in its name the power of which it has made them custodians [*dépositaires*]" (1762/2008, p. 194). In this sense, the sovereign "can limit, modify, and take back when it pleases" (1762/2008, p. 194). Again, the imperative of the word *commision* is sometimes lost in the English translation of Sieyès's work, and it is translated as simply delegation: "It is equally obvious that any delegated government [*gouvernement commis*] must have its constitution" (Sieyès, 1789/2003, p. 135). Although at other times it does recognize the imperative when it states that the extraordinary representatives "are acting by virtue of an extraordinary commission from the people" (Sieyès, 1789/2003, p. 135). These passages bring me back to the concept of mandate.

Sieyès's idea of constituent power in the French Revolution is conceptualized as a mandate (*procuration*) to create a constitution that must mirror the will of the people. Unfortunately, the English translation softens this revolutionary meaning of the term mandate. For Sieyès, the third epoch of the formation of political society is the representative government exercised by mandate (*gouvernement exercé par procuration*), not just only the epoch of government by proxy. The *Encyclopédie*'s definition is helpful in understanding this meaning, for mandate (*procuration*) is the act of a person who, because of indisposition or unwillingness, is unable to perform a thing, and grants to another a power of attorney to do it, as if he were present himself (*comme s'il étoit lui-même présent*) (Diderot et al., 1751-1772c, p. 410). The definition of "mandate" (*procuration*) explicitly refers to a "constituted agent" (*procureur constitué*) that performs a task on behalf of another:

> A mandate [*procuration*] is an act by which a person who, because of absence, indisposition, or some other impediment, is unable to do a transaction himself, gives authority to another to do it for him as if he were present himself. The term *mandataire* or *procureur constitué* refers to a person authorized by another person to transact certain business on his behalf (Diderot et al., 1751-1772c, p. 410).

This is precisely Sieyès's concept of constituent power as a mandate from the people in the French Revolution. His vocabulary is related to how the *Encyclopédie* specifies the meaning of the mandate, for it even distinguishes between *general* and *special mandate* (the term Sieyès uses for the extraordinary representation of the constituent power). When speaking of the mandate, the term *constituant* is used (Diderot et al., 1751-1772c, p. 410).

The mandate is, essentially, a power of attorney. First of all, the acceptance of the mandate begins either with the acceptance by the agent or already when the agent starts to execute the mandate (Diderot et al., 1751-1772c, p. 410). The person named in the power of attorney is free not to accept the mandate, but if accepted, he must conscientiously execute the mandate. The power of attorney may be granted to a person either by a formal mandate or by a simple letter or note, or by a third party who will execute the order, commission or assignment given to the attorney-in-fact. The mandate may be "pure," that is, it may contain an "unlimited power of attorney," or it may be "conditional," that is, it may be granted in writing with "certain restrictions." There are *general* and *special mandates* (Diderot et al., 1751-1772c, p. 411). The general mandate consists in the fact that the agent handles all the affairs of the principal (*constituant*), while the special mandate consists in performing a specific task. The mandate of the agent expires by revocation, by the appointment of another agent, by the death of the agent or by the death of the principal. However, if the agent, unaware of the death of the principal, continues to act under the power of attorney, everything he has done in good faith shall be ratified (Diderot et al., 1751-1772c, p. 411).

I must emphasize here that the definition of mandate in the *Encyclopedia* assumes that the will of the agent (the executor of a *commission*) reflects the will of the principal (*constituant*). There is a legal bond between the two: "The person who has granted a power of attorney is bound to the agent from the moment the agent accepts the mandate or begins to execute it" (1751-1772c, p. 411). Thus, the principal "is bound to approve and confirm everything that the agent has done on the basis of the power of attorney granted to him" (1751-1772c, p. 411). This is so because it is assumed that the agent acts only according to the will of the principal. From my understanding, this means that the will of the authorized agent is only a reflection of the will of the principal. This sense lies in the definition of the term

‘*constituant*’. The *Encyclopédie* defines *constituant* as a legal addition that complements the law. In the first meaning, the *constituant* is a proxy *ad lites* or *ad negotia*, meaning that “the *constituant* is the one who gives power to another to act for him” (1751-1772b, p. 61) hence it is used “in the contracts of *constitution*, to express the one who constitutes (*celui que constitue*) the annuity to the profit of another” (1751-1772b, p. 61). However, a *constituant* also has a second associated meaning in that it can also mean “to establish (*établissent*)” (1751-1772b, p. 61). In this sense, *constituant* refers to procuring something for someone else. In both cases, it captures granting power to act on behalf of another person, so that the *pouvoir constituant* means “to establish” just as the person would do it himself.

The etymological explanation of Sieyès’s political vocabulary leads me to my central point of criticism. The illiberalism of his idea of constituent power as a mandate from the people refers to the fact that the extraordinary representatives are *commissars* and *mirrors* of the will of the people. His concept of representation as a mandate is in complete agreement with Rousseau’s theory of sovereignty and government as a *commission* from the people. In *What is the Third Estate*, Sieyès explains that “those delegated to exercise that will do not do so as a right that is their own, but as a right exercised on others’ behalf. The common will is exercised as a commision [*la volonté commune n’est là qu’en commission*]” (1789/1985, p. 160). He points out, however, that they also have a mandate to act as if they were the people themselves, i.e., to perceive and reflect the constituent will: ‘‘[They] assemble and deliberate as would the nation itself if, consisting of no more than a small number of individuals, it decided to give its government a constitution” (1789/2003, p. 140) This is precisely the idea of the 18th century political vocabulary of mandate (*procuration*) and *constituant*. In my view, these passages mean that the representatives of the constituent assembly have the same absolute, unchecked, and unlimited powers as the sovereign, since there are no limitations that they could impose on themselves. For this reason, Sieyès insists that the extraordinary representatives can act as if they were in the same *state of nature*:

> [The extraordinary representatives] have been put in the place of the Nation itself as if it was it that was settling the constitution. Like it they are independent. It is enough for them to will as an individual would will in the state of nature. Regardless of how they might have been deputed, how they assembled or deliberated, and provided that no one is ignorant that they are acting by virtue of an extraordinary commission from the people (and how could the nation that entrusted them ever be ignorant?), their common will has the same worth as that of the nation itself (Sieyès, 1789/2003, p. 139).

This paragraph brings me to my main argument as to why Sieyès's idea of constituent power is a moderate and illiberal idea of sovereignty in the French Revolution. Rubinelli (2020a, p. 47) is correct in saying that Sieyès's idea of constituent power was intended to moderate and rationalize Rousseau's account of sovereignty. However, this moderation means that the extraordinary representatives act on behalf of the people as if they were the people themselves. For the duration of the delegation, the representatives exercise all unlimited powers conferred upon them. The mandate to exercise constituent power is sovereign and concentrated in a group of representatives who have the imperative to mirror the will of the people. As I explained, this is the 18th century vocabulary for the terms *mandate* and *constituant*: the agent acts as if he were the sovereign himself. This is a big problem from the point of view of constitutional theory. Even if the liberal reading emphasizes that Sieyès (1789/2003, p. 135) says that this sovereign power is delegated only for a limited time, with the task of creating a written constitution and with the nation's commitment to natural law (Fasel, 2022, pp. 9–14), this mandate opens the door to the absolute and unchecked power of the constituent assembly. Besides, the illiberalism of this delegation of sovereignty is consistent with Sieyès's idea that the birth of the constitution does not occur in the "third epoch" (the representative government), but much earlier, with the appearance of the *common will*. The mandate of the extraordinary representatives, then, is not to deliberate 'freely', but merely to reflect the pre-existing general will by exercising unlimited powers.

Interestingly, constituent power as a concept articulating *delegation of sovereignty* has been explained in the tradition of 20th-century French *Droit Public*. Maurice Hauriou (1929, p. 262) and Léon Duguit (1907, pp. 130–131), two leading French jurists of the early 20th century, described it as central to the political theory behind the Constitution of 1791.

In Article 1 of Title III, this constitution states: "Sovereignty is one, indivisible, inalienable, and imprescriptible. It pertains to the nation, therefore no section of the people nor any individual may assume to exercise it on their own" (*Constitution de 1791*, n.d.). Indeed, this article institutionalizes Rousseau's conception of *volonté générale*. However, Article 2 institutionalizes Sieyès's theory of delegation for exercising sovereignty: "The nation, from which alone all powers emanate, may exercise such powers only by delegation" (*Constitution de 1791*, n.d.). It also states that "the French Constitution is representative." Thus, "the legislative power is delegated to a National Assembly," the "executive power is delegated to the King," and the "judicial power is delegated to judges who are elected at stated times by the people" (*Constitution de 1791*, n.d.). For Hauriou, the nation exercises its sovereign will by delegating power because "the nation possesses the power of will or the

power of command; therefore, it can delegate it" (1929, p. 262). However, Hauriou (1916, pp. 680–681) also warns against the illiberalism of Sieyès's idea of constituent power when he refers to Louis Napoleon's plebiscites of 1851 and 1852, which for him are also compatible with Sieyès's idea of delegation of sovereignty as a mandate from the people. Now I will explain the ideas of delegating sovereignty at the beginning of the French Revolution.

b. Two Concepts of the Delegation of Sovereignty

The potentially illiberal character that Hauriou (1916, pp. 680–681) attributes to constituent power is important to analyze. Sieyès's great invention is not only the distinction between *pouvoir constituant* and *pouvoir constitué*, but also his idea that the *pouvoir constituant*, as a "sleeping sovereign" (Tuck, 2016), is potentially active and can therefore be reconvened. In this section, I discuss whether Sieyès's idea of *pouvoir constituant* in the French Revolution was a liberal and moderate idea of constitution-making (Baczko, 1988, p. 122; Pasquino, 2008, p. 20; Rubinelli, 2020a, p. 47). In my view, his illiberalism lies in his concept of extraordinary representation as a *delegation of sovereignty*. In 1789, Sieyès's idea of constituent power was at odds with the *Monarchiens*' liberal reading of the will of the people. Mounier was the true representative of the Moderate Enlightenment in the French Revolution (Israel, 2013, pp. 927–928). For Mounier (1789, p. 62), the beginning of the extraordinary representation ends with the revolutionary activity of the *pouvoir constituant* and neutralizes it in the written constitution. Sieyès (1789/1989a, pp. 22–23) is a staunch opponent of this liberal understanding because he believes that the constituent power can always be recalled because its will is not limited by any procedure or constitutional law. Despite Mounier's staunch rejection of Sieyès's illiberal view, the literature has insisted on presenting the concept of constituent power as a liberal idea in the French Revolution. I will first explain how I understand the terms liberalism, illiberalism, and moderation.

When I speak of liberalism, I am not referring to the vocabulary of the term, which historically emerged only in the 19th century with political thinkers such as Benjamin Constant and François Guizot, but primarily to the idea of political liberalism. Liberalism, as a republican tradition founded in modern political theory by John Locke, is essentially directed against the absolute and arbitrary exercise of power (Faulkner, 2001; R. W. Grant, 2010; Halldenius, 2003; Locke, 2016, Chapter 11; Skinner, 2008). In contrast, when I speak of illiberalism, I say that "the tendency for a democratic government to believe it has absolute sovereignty (that is, power) can result in the centralization of authority" (Zakaria, 1997, p. 30). I follow Wagrandl's suggestion to define illiberalism as a form of illiberal democracy (Wagrandl, 2021, p. 110) The concept is directly related to autocratic forms of government and the use of the majority rule (Landau, 2021, pp. 434–437). The two main characteristics of illiberalism are *unlimited* and *unchecked* power. The unlimited power "refers to the subject matter the state may regulate: everything," while "unchecked refers to the obstacles to surmount in doing so: there are none" (Wagrandl, 2021, p. 110). Illiberalism assumes that

"the will of the people is always just, whatever it touches upon" and "it is always just because it is one will." Thus, the will of the people is *unchecked* because "every hindrance to fully and purely implement the will of the people is to defy it" (Wagrandl, 2021, p. 110).

In this general conception of political liberalism, the concept of constituent power has been conceptualized as a liberal idea in the French Revolution. Rubinelli (2020a, p. 47) points out that Bastid (1939/1970) was one of the first to identify Sieyès's idea of constituent power as a way to temper Rousseau's account of sovereignty. For Rubinelli, Sieyès managed to avoid direct democracy because he could replace Rousseau's abstract concepts such as the *volonté genérale* and the legislator with much more concrete ideas such as the *pouvoir constituant* and the constituent assembly. Moreover, Rubinelli claims that after the constituent foundation, the sovereign *pouvoir constituant* "would retreat and make room for the ordinary exercise of power through the legal and political system, which, having no sovereign will of its own, was necessarily constrained in both scope and nature by the limits established in the constitution" (2020a, p. 47). I will explain why this reading contradicts Sieyès's words (1789/1989a, pp. 22–23), because he says that the *pouvoir constituant* can be reconvened. However, Rubinelli affirms that the idea of constituent power "highlights the liberal concerns behind Sieyès's political project" (2020a, p. 47). My research draws attention to the fact that the reading of Rubinelli conflates the moderate model with a liberal constitutionalism built atop popular sovereignty. In this interpretation, the exercise of constituent power is presented as a liberal and moderate political theory compared to Rousseau's idea of sovereignty and the radical faction in the French Revolution. In contrast to this reading, I analyze constituent power to christen Sieyès as a moderate on different, i.e., illiberal terms.

The concepts of *moderation* and *liberalism* are different and may even be antagonistic. While the liberal tradition opposes absolute and arbitrary power, moderation is a concept associated with the ideas of self-restraint, prudence, and *just milieu*. The important works of Craiutu (2001, 2012, 2018) and Mithen (2022, 2023) have shown that there is no clear concept of moderation, although its existence is recognized in the works of authors such as Aristotle, Montesquieu, Burke, and Tocqueville. Moderation was, in essence, "the binding of moral and political life to one another as a means to establish harmony – both inner and outer, in the self and the state" (Mithen, 2022, p. 34). Mithen points out that Machiavelli "reconceptualises politics as forces moderating one another, and a well-ordered republic as consumed by a two-way conflictual moderation between political manifestations of social forces, the people and the elites" (Mithen, 2022, p. 45). I interpret this explanation proposed by Mithen to mean that moderation is independent of the form of government, because

whether in a republic, a monarchy, or a democracy, what is important is the exercise of power in a way that creates a political order understood as the balance between the parties. Thus, political liberalism is necessarily moderate because it seeks a balance between the powers of the state in order to neutralize absolute or arbitrary power. I understand the difference between moderation and liberalism in the way that autocracies like the absolute monarchy of the Christian prince could correspond to the model of moderation, while political liberalism rejects this kind of autocratic or monarchical moderation because it is against any kind of absolute concentration of power (absolute monarchy, dictatorship, despotism).

Now I can explain why the idea of constituent power is a moderate but illiberal idea of sovereignty. First of all, I am not the first to explain the illiberalism of Sieyès's political ideas in the French Revolution (Lindsay, 2022, pp. 169–170; Sommerer, 2017, pp. 157–161). The problem was treated indirectly in studies comparing the representation theories of Hobbes and Sieyès (Forsyth, 1981; Hont, 1994; Runciman, 2009). However, I propose a novel stance here. When Sieyès's representatives receive the *mandate* from the people to create a new constitution, they become the holders of unlimited powers that must mirror the sovereign will of the people. Although Sieyès in *What is the Third Estate* rejects the English constitutional model being imported into France, he was indeed greatly influenced by writers such as John Locke, Adam Smith and James Harrington (Arato, 2017b, p. 161; Baker, 1990, p. 246; Hammersley, 2010, p. 164). We find traces of English constitutional thought in his understanding of the territorial division of France as well as in his conception of representation as a division of labor. In my view, however, this does not give evidence that his idea of constituent power as a delegation of sovereignty was inspired by the more liberal ideas of the English Revolution of 1689. In this section, I distinguish between two moderate conceptions of delegation of sovereignty. The first is the liberal delegation of sovereignty idea, advocated mainly by Mounier. The second is the illiberal delegation of sovereignty expressed in Sieyès's idea of constituent power as a mandate from the people.

During the French Revolution, Mounier published his famous essay *Considérations sur les gouvernements* (1789). The text summarizes the political position of the *Monarchiens* (Egret, 1950). It is a work that defends the liberal idea of representation and constitutional monarchical government. In addition, it denounces the dangers of the despotism of an absolute monarch as well as the "tyranny of the crowd" as forms of despotism (Mounier, 1789, pp. 3–4). Mounier says that in all his writings on the French Revolution he tried "to express his love of justice and moderation, his extreme attachment to monarchical government" (1789, p. 4). He begins his work by stating that the French nation wants liberty,

but it wants it within the framework of a constitutional order that does not permit the arbitrary exercise of power. Liberty, for Mounier, is synonymous with limited government. Thus, for Mounier (1789, p. 7) arbitrariness is both the concentration of power in a person and the concentration of power in a group. He defines all types of concentration of power as despotic power. But despotism also lies in the arousal of the passions of the crowd, that is, when one tends toward anarchy, toward "popular despotism" (*despotisme populaire*) (Mounier, 1789, p. 9). For Mounier, liberty consists in the security and welfare of the people, but also in the avoidance of the concentration of power both in an absolute monarch and in an agitated crowd: "la anarchie est la license de la multitude" (1789, p. 10)

Mounier was the true champion of a liberal and moderate idea of delegation of sovereignty. Most of Mounier's essay (1789) deals with the monarchical form of government. The most important part for my analysis, however, is in the final section on his concept of the constituent assembly and its relationship to the general will (Mounier, 1789, pp. 58–66). Mounier's core idea (1789, p. 62) is that the renewed invocation of the *pouvoir constituant* is forever invalidated by its potentially arbitrary nature once the constitution is established. His idea of delegation of sovereignty has three features. First, representatives have a delegation to create a constitution, but they do not have a mandate to act as if they were the nation itself, that is, to reflect sovereignty. The representatives of Mounier are 'freer' than the representatives of Sieyès because for him the *volonté générale* ceases when representation begins. Mounier envisaged the constitution as a *contract* between the nation and its representatives (the legislature and the king) (Egret, 1950, p. 34). Once the constituent power has been exercised, the will of the people is 'embalmed' in the constitutional laws. Consequently, it is not possible to appeal or reconvene the *pouvoir constituant*, since each constitutional reform is carried out through a special procedure in parliament. Unlike Sieyès, Mounier admired the English constitutional model and wanted France to imitate it.

The liberal idea of delegation of sovereignty is conceived by Mounier as a *contract* rather than a *mandate*. Drawing on the history of Roman law, Mounier points out that the people exercise their sovereignty by representation, through the delegation of powers. This institutional approach to the Roman law conception of delegation entails the idea of a limitation of powers: "All peoples, then, must entrust or delegate the exercise of powers; but they must also divide them and assign their limits" (Mounier, 1789, p. 14). For Mounier (1789, p. 15) this Roman idea of representation is "the most beautiful" of political institutions. His liberal idea of delegation of sovereignty defends the concept of the constitution as an agreement between the different powers of the state, the royal veto, and the blocking of any

other constituent assembly because of its tendency toward despotic power. He said that "it has never been thought that the *volonté générale* must always be in operation," so "the magistrates have been assigned the exclusive right to propose laws" and "the people cannot make as many laws as they wish" (Mounier, 1789, p. 54). Between late August and early September 1789, there was a polarized debate in the National Assembly about the new French constitution's foundations, the scope of the royal veto, and the separation of the legislative and executive functions (Blackman, 2019, pp. 180–217).

For the liberal idea of delegation of sovereignty, the *pouvoir constituant* is defunct after the extraordinary representation. The will of the people becomes ossified and almost dead. Mounier (1789, p. 62) accepts that constitutions cannot be eternal, but he stresses that the people cannot delegate their sovereignty again under the pretext of creating a new constitution, as this would lead to anarchy and despotic power. He says that the constituent assembly should never be reconvened because parliament can reform the constitution:

> I would therefore defend that there should never be an extraordinary [constituent] assembly, either to uphold the Constitution or to correct it, that its solidity should result from the organization of the powers, that the means to correct its defects should be placed in the same organization, and that the corrections be slow and difficult. To amend a single article of the Constitution would require the consent of the King and both Houses. Once the approval is given, the amendment is announced in the Realm as a simple project to take advantage of all the lights (Mounier, 1789, p. 62).

If Sieyès's idea of the delegation of sovereignty were the same as Mounier's, as explained above, I could agree with Rubinelli's reading (2020a, p. 47) that the concept of constituent power is a liberal idea in the French Revolution. We could then also argue that Sieyès anticipated the political liberalism of Constant and Guizot (Baczko, 1988, p. 122). However, in 1789, Sieyès's position was far from Mounier's. His conception of delegation of sovereignty has an element of political illiberalism. Like Mounier, Sieyès expresses the extraordinary representation as a delegation of sovereignty. Are we dealing here with the liberal idea of moderation because Sieyès claims that the representative will is exercised by delegation? I cannot entirely agree with this liberal reading of Sieyès since the deliberative capacity of the extraordinary representatives is dependent on the *volonté générale*. While for Mounier, the *volonté générale* ceases when representation begins, for Sieyès the representatives are merely commissioners, so they still have the mandate to mirror the will of the people. Sieyès's representatives can thus only act, proceed, and will what the nation wills:

> It is equally obvious that any delegated government must have its constitution and that what is true of government in general is also true of each of its component parts. Thus the body of representatives entrusted with the legislative power, or the exercise of the common will, exists only by way of the mode of being which the nation decided to give it. It is nothing without its constitutive forms; it acts, proceeds, or commands only by way of those forms (Sieyès, 1789/2003, p. 135).

Sieyès's idea of constituent power contradicts each of the three main features of Mounier's liberal idea of delegation of sovereignty. First, Sieyès denies that a constitution is a *contract*. On the contrary, he says, "to assume that there is a contract between a people and its government is a false and dangerous idea. A nation does not make a contract with those it mandates (*mandataires*); the nation entrusted (*commet*) the exercise of its powers" (Sieyès, 1789/2003, p. 120). Second, Sieyès asserts that the will of the people cannot be absorbed or subsumed in the constitutional laws: "It would be ridiculous to suppose that the nation itself was bound by the formalities or the constitution to which it had subjected those it had mandated" (Sieyès, 1789/2003, p. 136). In line with this premise, Sieyès affirms that it is always possible to *appeal* to the constituent power and reconvene a constituent assembly. Sonenscher has said that the ex-*abbé* believed that after the ratification of the constitution, "absolute government would give way to constitutional government" (2015, p. 73). However, Sieyès affirmed in his speech on the royal veto that the constitution might not prevent a crisis and conflict between the powers of the state (the legislature and the king). While Mounier believed that these cases could be solved by constitutional amendments to avoid anarchy and despotic power, for Sieyès the constituent power is always the "sleeping sovereign" (Tuck, 2016), the true supreme power that acts even after the creation of the written constitution:

> I say, then, since it is possible that the public powers, though carefully separated from each other, though independent of each other in their organization and prerogatives, nevertheless seize one over the other, there must be some means in the social constitution to remedy this disorder. That means is quite simple. It is not *insurrection*, it is not the *cessation of taxes*, nor is it the *royal veto*. All these means are worse than evil; the People are always the real victims, and we must prevent the People from becoming victims; the means we seek is to invoke the extraordinary delegation of the Pouvoir Constituant. This Convention is, in fact, the only Court to which this type of complaint can be submitted (Sieyès, 1789/1989a, pp. 22–23).

The illiberal idea of delegation of sovereignty was conceptualized in the 20th-century *Droit Public* as a "representative mandate" (*mandat représentatif*). This was the idiosyncratic theory of representation that prevailed between 1789-1791 (Duguit, 1911/1928, p. 646). Duguit explains that in this theory "the effect of this mandate will be to create a representation

so that the expression of the will emanating from the assembly will be as if it emanated from the nation and will have the same effects" (1911/1928, pp. 644–645). Thus, "the whole assembly constitutes a legal entity with the *mandate* to exercise that sovereignty on behalf of the nation as a whole" (1911/1928, pp. 644–645). Interestingly, Carl Schmitt's illiberal approach recovered this French theory in analyzing Sieyès's idea of constituent power: "The representatives acting on behalf of the *pouvoir constituant* are, then, unconditionally dependent commissars; but, in point of content, their mandate is not to be limited" (1921/2014, p. 125). Schmitt finds "one should assume that the most general and basic drawing-up of the constituting will – that is, the draft of a constitution – represents the genuine content of the mandate" (1921/2014, p. 125). Like Furet, who saw the illiberalism of the French Revolution in the absolute powers of the National Constituent Assembly of 1789 (Woloch, 1990, p. 1457), Schmitt theorized this revolutionary assembly as a dictatorship legitimized by the constituent power (*sovereign dictatorship*). I will explain the organization of the extraordinary representatives in the sovereign constituent assembly.

c. Sovereign Constituent Assembly

The concept of *popular autocracy* that I present does not correspond exactly to the National Constituent Assembly of 1789, but the sources of the concept clearly lie in that revolutionary assembly. The idea of the constituent assembly as an autocracy with the consent of the people did not exist in the context of 1789, but is a terminology of later development. The idea is contained in Schmitt's interpretation of the French Revolution, according to which the revolutionary assembly was a *sovereign dictatorship* legitimized by Sieyès's idea of constituent power (Schmitt, 1921/2014, Chapter 4). De Wilde (2021, pp. 149–152) has pointed out the historical inaccuracy of Schmitt's conception of the constituent assembly as a dictatorship. Beyond Schmitt's reading, however, there is indeed a decades-long historiographical debate about the illiberal and autocratic character of this revolutionary assembly. Furet (1978), inspired by Tocqueville's reading (1856/2011), was one of the main proponents of this reinterpretation when he claimed that the revolutionaries enthroned state power by centralizing all powers in a group of extraordinary representatives (Christofferson, 1999, p. 607; Christofferson et al., 2010, p. 231; Woloch, 1990, pp. 1457–1458). For important French historians like Gueniffey (2000, 2003), there is a connection between this illiberalism of the French Revolution and the Terror. Beyond this discussion, which will probably continue for many decades, it seems important to me to point out the current state of the debate on the National Constituent Assembly of 1789.

The relationship between Sieyès's idea of constituent power and the political foundations of the constituent assembly of 1789 is still debated in the literature. The topic underwent an important development at the beginning of the 20th century through the works of Zweig (1909), Redslob (1912), and Loewenstein (1919/1922). However, Schmitt's reading (1921/2014, Chapter 4) of the constituent assemblies of 1789 and 1793 as *sovereign dictatorships*, based on Sieyès's idea of constituent power, stands out above all. Unlike a century ago, a historical literature has developed in recent years that focuses on explaining the factions and discourses of the first constituent assembly. Blackman's work (2004, 2019) is important for understanding the details of the constitutional debates. Likewise, the historical literature has established a conceptual relationship between contemporary concepts such as populism in the speeches of these factions (Rousselière, 2021). The political theory literature of the last decade, on the other hand, has revisited Schmitt's concept of sovereign dictatorship. For Arato (2017b, p. 292), the concept of "sovereign constituent assembly" comes closest to Schmitt's idea of sovereign dictatorship. Rubinelli (2020a, p. 130), on the

other hand, contends that Sieyès's idea of constituent power was an attempt to convince of the importance of accepting representation as a form of moderation of Rousseau's account of sovereignty. Colón-Ríos (2020, pp. 80–81) also places the concept of constituent power in this context, although he emphasizes that Sieyès shared the political radicalism of the 1789 revolutionaries and adopted a more conservative stance after the Terror.

In the last decade, an important debate has developed on whether a constituent assembly is necessarily sovereign. The debate is very old, but has found its greatest expression in recent decades in the work of Le Pillouer (2003). Pillouer (2017) draws on the distinction between *original constituent power* (=sovereign) and *derivative constituent power* (=non-sovereign) developed by Roger Bonnard (1942) in Vichy France. Since I will discuss this issue in the third section of this manuscript, for now I will just mention that Pillouer's work (2003, 2017) has been one of the most important of the last decade to point out that the concepts of *sovereignty* and *constituent assembly* can be different and even antagonistic. It is precisely this interpretation that anticipates the contemporary readings on the distinction between the concepts of *sovereignty* and *constituent power* (Colón-Ríos, 2020, p. 84; Rubinelli, 2020a, p. 17). For Arato (2017b, pp. 36–37), on the other hand, the concept of constituent assembly is closely related to the theory of popular sovereignty, but especially to Carré de Malberg's idea of an *organ* exercising sovereign powers to create a new constitution. Arato (2017b, p. 37) draws on Schmitt's concept of sovereign dictatorship to show that assemblies with sovereign powers are the predominant form of constitution-making from an empirical perspective and are strongly associated with democratic legitimacy from a political theory perspective. Similarly, Arato (2017a) also relates the constituent assembly of the Russian Revolution to Schmitt's concept of sovereign dictatorship.

The definition of the National Constituent Assembly of 1789 in Schmitt's sense, i.e. as a *sovereign dictatorship*, will always be controversial, since this vocabulary of the early 20th century did not exist in the French Revolution. However, it seems to me indisputable that the sources of an important variant of *popular autocracy* lie in this sovereign constituent assembly. The *unlimited* and *unchecked* powers of the extraordinary representatives is closely related to the discussion revived by Furet (1978) on the illiberal and autocratic character of the Assembly of 1789. Sieyès's idea of constituent power emerged as an illiberal delegation of sovereignty. The central problem of the concept of constituent power is that representatives are dependent commissars of the nation: "Ils sont *seuls* dépositaires de la volonté générale" (1789/1985, p. 178). Their wills are a mirror of the will of the nation itself. To better grasp this problem, Robert Redslob (1912, p. 156), a leading German jurist of the 20th century,

proposed a distinction between the terms representative and spokesperson in the period 1789 to 1791. Since Rousseau finds the representation of sovereignty impossible, the deputies of the National Constituent Assembly would be no more than spokespersons, and certainly not representatives of the nation's constituent power. However, in my view, the idea of the illiberal delegation of sovereignty better describes Sieyès's idea of constituent power.

The French institution of a constituent assembly (*assemblée constituante*) offers a primary illustration of how the nation's constituent power is exercised. The constituent assembly simultaneously presupposed three principles. First, there is a body (an assembly) with a constituent function (drafting a constitution) used at extraordinary or constituent moments. The National Constituent Assembly of 1789-1791 had sovereign powers, while the constituent assemblies of 1793 and 1795 ended with ratification by the people (plebiscite). Second, the French tradition institutes a separation of powers and functions, distinguishing between the ordinary bodies, the *constituted powers* such as parliament, and the constituent assembly. Thus, unlike the tradition of the English parliament, which is a body that exercises ordinary and extraordinary legislative functions under special procedures, the constituent assembly in France is a specially created body that exclusively exercises constituent functions. Finally, the constituent assembly consists of extraordinary delegates who are exclusively mandated to draft a new constitution. In Sieyès's conception of constituent power, the will of these extraordinary representatives is the nation's will itself. I will first explain the nature of these constituent deputies.

Notably, Sieyès distinguishes between *pouvoir constituant*, *pouvoir constitué*, and *pouvoir commettant.* As explained above, the first merges popular sovereignty with constitution-making, while the second refers to the power that arises from exercising the nation's will by delegation. In contrast, *pouvoir commettant* refers to the people's right to elect their representatives: "That is to say, it must limit itself to choose and delegate the persons who will exercise its *real* rights, starting with the right to constitute the public establishment" (1789/1989b, p. 36). But this *pouvoir commettant* is not the *pouvoir constituant*. Constituent power, according to Sieyès, aims to represent the will of the people in drafting a constitution. Exercising this constituent power, which is by definition sovereign, is embodied in an assembly of extraordinary representatives. In his *Préliminaire* of 1789, Sieyès expresses this as follows: "The representatives of the French nation, reunited in the National Assembly, recognize that they have, by their mandates, the special charge of regenerating the Constitution of the state. Consequently, in this title, they will exercise the constituent power" (1789/1989b, p. 17). The mandate the nation issues to this constituent assembly is to create

fundamental or constitutional laws; it is, therefore, a specially created body with a dedicated constituent function, and for a limited time:

> A body of extraordinary representatives is a surrogate for an assembly of that nation. Doubtless it does not need to be entrusted (chargé) with the *plenitude* of the national will. All it needs is a special power and even this only in rare cases. But it is a surrogate for the Nation in its *independence* from all constitutional forms. Here it is not so necessary to take as many precautions against the abuse of power. Representatives of this kind are deputed to deal with a single matter for a limited time (Sieyès, 1789/2003, p. 139).

This brings me to my main criticism of the liberal reading of the concept of constituent power in the French Revolution: the basis for interpreting Sieyès's understanding of sovereignty as liberal lies in the temporal and representative character of exercising constituent power (Rubinelli, 2019b, pp. 47–67). However, although constituent power is exercised by temporary delegation to an assembly of extraordinary representatives, this exercise presents constitutional theory with a significant challenge. From a political theory approach, I am of the opinion that the great challenge Sieyès's idea of constituent power has posed to constitutional theorists for more than 220 years is in the expectation that representatives must act as if they were the nation itself. This means that the delegation, the representative system, does not change Rousseau's idea that sovereignty has an indivisible character and a commissarial exercise (Rousseau, 1762/2008, pp. 171, 194). Sieyès (1789/2003, p. 139) affirms that the representatives must will as the nation wills; they must act as the nation would act. When the constituent deputies exercise power they do so as the sovereign nation itself. Thus, in *What is the Third Estate*, the delegation moderates sovereignty and expresses it in an illiberal and *positive* form: "[The representatives'] common will has the same worth as that of the nation itself [*leur volonté commune vaudra celle de la nation elle-même*]" (Sieyès, 1789/1985, p. 164, 1789/2003, p. 139).

From an institutional perspective on constituent power, the requirement that the extraordinary representatives' will mirrors the nation's will itself is an impossibility. It is impossible because the nation is a pre-state political concept, an entity in a state of nature, a *philosophique* notion of the Enlightenment (Israel, 2001, pp. 714–720). Yet this impossibility, this metaphysical conception of constituent power, is a central element of this theory and a significant challenge to constitutional law. Sieyès distinguishes between ordinary representatives, who make the laws, and extraordinary representatives, who must "assemble and deliberate as would the nation itself if, consisting of no more than a small number of individuals, it decided to give its government a constitution" (1789/2003, p. 140). Similarly,

the nation convenes "to depute a set of extraordinary representatives to the capital with a special mandate to draft the constitution of an ordinary National Assembly" (1789/2003, p. 143). Finally, the extraordinary representation's goal must be entirely consistent with the goal the nation would set for itself in the same place: "The object or goal of the representative assembly cannot be different from the one that the nation would have proposed to itself if it were able to gather and confer in a single place" (1789/2003, p. 153). The delegation in an assembly of extraordinary representatives is thus an expression of the indivisible character of the *volonté générale* and of the commissarial character that its nature requires.

The illiberal character of constituent power allows intellectual parallelism between Sieyès and Schmitt. Schmitt (1921/2015, p. 137) defines Sieyès's idea of delegation of sovereignty in the constituent assembly as *sovereign dictatorship*. The mandate of the extraordinary representatives to perceive and mirror the nation's will has given rise to a discussion on the arbitrariness of constituent power. Schmitt affirmed that "unlike ordinary representatives, the extraordinary ones – those who execute the *pouvoir constituant* – can have some arbitrary authority [*beliebige Vollmacht*]" (1928/2008, p. 125, 1921/2015, p. 141). Therefore, constituent power may "will arbitrarily [*sie kann beliebig wollen*]" (1921/2015, p. 139). This has led to Rubinelli's interpretation (2020a, pp. 116–117) of Schmitt as having read Sieyès's idea of constituent power to be sovereign, omnipotent and arbitrary power. It seems, however, that in this discussion, the root of the problem lies in the English translation of the term "arbitrary authority" (*beliebige Vollmacht*). Recall the political vocabulary of the 18th century, in which the terms *mandate* and *constituant* resemble the power of attorney, which in German corresponds to the term *Vollmacht*. Schmitt characterizes constituent power as "arbitrary," but not in the sense of "arbitrary rule" (Nyquist, 2013), but in the sense of sovereign power of attorney. For him constituent power is arbitrary in the juridical sense of the delegation of sovereignty that can take decisions as it wills. In my view, this means that constituent power is expressed in this way, even in the case of extraordinary representatives. However, this does not mean that Sieyès and Schmitt see them as tyrants with no proper authorization, for the legitimacy of their commission rests on the nation's will.

It is important to point out that Schmitt's concept of sovereign dictatorship is one of the most important variants of the concept of popular autocracy. Here, we are dealing with an autocracy that is legitimized by the consent of the people. For Schmitt, this idea originated in the French Revolution and finds its basis of legitimacy in Sieyès's idea of constituent power. The point of agreement between Sieyès and Schmitt lies in the conception of constituent power as a *mandate* or *commission* from the people to create a new constitutional order.

Schmitt insists on this conception of constituent power as a mandate in the texts of Rousseau and Sieyès, but he also relies on Boutmy's reading (1885) of constituent power as an "imperative act," that is, as an act of sovereignty. The idea of the concentration of all state powers in the hands of extraordinary representatives under the legitimacy of a mandate from the constituent power is defined by Schmitt as *sovereign dictatorship*. Similarly, Schmitt extends the idea contained in Hauriou's critique (1916, pp. 680–681) that Sieyès's idea of constituent power is compatible with Louis Napoleon's plebiscites of 1851 and 1852. The explicit expression of the popular mandate is found here in the majority approval of the questions that gave Louis Napoleon constituent powers and later enthroned him as "Emperor of the French." Schmitt then presents two variants of the concept of popular autocracy: a dictatorship of revolutionary assembly and a Caesarist or Bonapartist dictatorship.

Constituent power is exercised in a sovereign constituent assembly. Although the literature has noted a similarity between the French National Assembly of 1789-1791 and the American Constitutional Convention of 1787 (Arato, 2017b, pp. 116–122; Bofill, 2021, pp. 115–119) it has rightly been pointed out that the American tradition of constituent power is profoundly institutional. The first to highlight these differences in France were Laboulaye (1871) and Hauriou (1929). For Laboulaye (1871), the concept of constituent power had found its democratic and liberal tradition in the United States, so it was necessary to emulate that tradition in France. Similarly, Hauriou (1929) had also emphasized that the concept of constituent power in America is a non-sovereign power to reform the constitution, not a concentration of power in the deputies. In contemporary literature, Partlet (2018) has emphasized these differences. For Partlet "the Philadelphia Convention had no inherent powers to reshape the existing American constitutional order. It could not — as the French National Assembly did — claim the authority to unilaterally disband existing institutions such as the Continental Congress or itself call into existence the ratifying conventions" (2018, p. 965). Thus, "the Convention was called into being by the state legislatures and these legislatures closely controlled their representatives or 'Commissioners'" (Partlett, 2018, p. 966). In contrast to the American tradition, Sieyès's notion of the extraordinary representatives can create the new state powers *ex-nihilo*, just as the nation would.

3. Conclusions

In the preceding pages, I have focused on the concept of constituent power in the developmental context and vocabulary of 1789, drawing on texts and manuscripts by Sieyès. I have not addressed the important discussion of whether Sieyès changed his mind after the Terror, as this would require a new study of the revolutionary and post-revolutionary development of the concept. I have focused exclusively on his idea of constituent power in the French Revolution and have reached five main conclusions. First, Sieyès's concept of the nation relates to the concept of the people as a constituent power. His great invention is the distinction between the *pouvoir constituant* and the *pouvoir constitué*. The nation is an entity that precedes government and the constitution borrows heavily from Rousseau's theory of sovereignty and government. Second, Sieyès's concept of the constitution does not appear in the period of extraordinary representation, but much earlier, with the general will. This point is important because it shows that the constitution is nothing but a reflection of the general will of the people. Even though Sieyès uses the term constitution in various meanings in his work, such as in his references to the "English Constitution," it is important to emphasize that his concept of constitution arises with the general will because, in Rousseau's sense, it is an act of sovereignty, an act of will of the people.

Since the constitution is an act of sovereignty, constituent power is essentially a mandate from the people to create a new constitutional order. This is the third conclusion of my study, because Sieyès gave this meaning to his term *pouvoir constituant* in the early stages of the French Revolution. In his speeches, Sieyès presents the authority of the deputies of the National Assembly as "emissaries" of the general will of the nation. He uses various terms to define representation: delegation, custody, commission, and mandate. In all these cases, it is "government exercised by mandate," not "government by proxy." The mandate is at the heart of Sieyès's notion of representation. His idea of constituent power as mandate runs through his essay *What is the Third Estate*. The concept of the mandate or commission is inspired by Rousseau's theory of sovereignty and government. According to this theory, the government is nothing more than a commission, a task entrusted to representatives by the sovereign, who can withdraw it from them at will. Sieyès rejects the concept of *imperative mandate* because it establishes the will of a part of the nation. However, he does not completely reject Rousseau's concept of sovereignty and mandate when he conceives of the constituent power as the mandate of the nation (*Mandat spécial*). As I have already argued, this idea of a mandate from

the people is at the heart of Sieyès's vocabulary and his conception of the exercise of constituent power in the National Assembly of 1789.

However, since the creation of the constitution is a mandate from the people to their representatives, the exercise of the constituent power necessarily constitutes a delegation of sovereignty. This fourth conclusion points to the illiberalism of his idea when compared to the models of delegation of sovereignty used by other liberal revolutionaries of 1789. Illiberalism always refers to *uncontrolled* and *unchecked* power because it concentrates power. Sieyès's concept of the constituent assembly envisions representatives acting on behalf of the people. The concept of mandate here comes from the concept and vocabulary of the term in the *Encyclopédie*. Thus, it is assumed that there is a correspondence between the will of the principal and the will of the agent. The constituent assembly becomes only a reflection of sovereignty. In my view, this turns Sieyès's idea of the constituent assembly into an unlimited authority with sovereign powers for the duration of the delegation. The illiberalism of this revolutionary assembly has been widely discussed among historians of the French Revolution, but its development in constitutional and political theory has found its idea in Schmitt's concept of sovereign dictatorship. Strictly speaking, Schmitt's interpretation of the constituent assemblies of 1789 and 1793 is the source of the concept of *popular autocracy*, that is, an autocracy with the consent of the people.

Finally, the illiberalism of Sieyès's idea of constituent power in the French Revolution has necessitated a comparison between two models of delegation. For this reason, the comparison between Mounier and Sieyès is fundamental. For Mounier, the delegation of sovereignty means that the will of the people is ossified and effectively died with the advent of extraordinary representation. This is consistent with Mounier's idea that the constitution is a *contract* between the people and their rulers (king and parliament). For him, it was important that neither the constituent power nor a constituent assembly ever be used again to draft a new constitution, since arbitrary and despotic power (understood as the concentration of power in one group or person) must be avoided. In contrast, Sieyès rejects Mounier's reading and affirms that the constitution is not a *contract* but a *mandate* from the people. Thus, it is not an agreement between the ruling powers, but a mandate from the people to the rulers. In this way, the constituent power always remains latent, since it can be reconvened if necessary. The will of the people cannot be limited or restricted by the constitution or by the will of the deputies. For Sieyès, the sovereign *pouvoir constituant* can be reconvened.

It is precisely this idea that the constituent power can be reconvened that leads me to the next chapter on Sieyès's idea of the king. In his speech on the royal veto, Sieyès claims

that the *pouvoir constituan*t and the constituent assembly can be recalled in case of conflict between the powers of the state. The question is who has the right to reactivate the "sleeping sovereign." This is precisely where Sieyès's theory of the exercise of constituent power ties in with autocracy when he points out that the king, as the unelected representative of the nation, can convene the constituent power and a new constituent assembly. For Sieyès, the king also fulfills a mandate, albeit a constitutional one. The king's mandate is not to create a new constitution, but to protect it. He sees the king as the guardian of the nation's will as expressed in the constitution. Although Sieyès denies the king the right of veto, he recognizes him as the "first citizen," the head of the nation. When the king raises his voice, he does so with the voice of the people. Sieyès's king is a protector of the constituent power, thus introducing a new variant of the concept of *popular autocracy*. It is the notion of the head of state as the protector of the will of the people, an idea that was later carried forward in the 20th century in Schmitt's Reichspräsident as the "guardian of the constitution."

Chapter 2: The King as Protector of the Will of the People in the French Revolution

> "The question between us then depends upon simple theory. Mr. Paine defends his Republic, such as he understands it; I defend Monarchy, such as I have conceived it" (Sieyès, 2003, p. 137)

> "We want a prince to save us from the danger/misfortune of having a master" (Sieyès, 1999b, p. 421).

Introduction

Sieyès was a monarchist political thinker during the French Revolution. In his famous 1791 correspondence with Thomas Paine, Sieyès (2003, p. 137) explicitly states that he defends monarchy as he understands it. He believes that Paine overlaps the concepts of representative government and republic, whereas, for the ex-*abbé*, monarchy is also a form of "Representative Constitution" (2003, p. 142). Sieyès's king is not an absolute monarch, that is, not a head of state legitimized from a traditional religious understanding. His 'republican king' is the head of the executive branch; he is the representative of the people as a constitutional authority. His conception of the separation of powers expresses how the Constitution of 1791 would later conceive of the executive and legislative branches as the two legitimate representatives of the will of the people. Sieyès's king is thus neither an autocrat nor a dictator, but a protector of the will of the people. However, when I argue that the origins of the autocratic conception of constituent power are to be found in Sieyès's king, I mean that in his idea appears a legitimation of the head of state that Schmitt will later defend in two variants of popular autocracy: the "Bonapartist dictatorship" (1928/2008, p. 309) and the "guardian of the constitution" (1931/2016). Sieyès lays the first stone to conceptualize the head of state as the representative and protector of the constituent power.

Autocracy and constituent power are different but not antagonistic concepts. Sieyès's idea of *pouvoir constituant* (constituent power), which today is considered the central category of the democratic state, has been tainted with an autocratic character from the beginning. Since the French Revolution, the exercise of constituent power has been understood as the democratic convening of a constituent assembly, composed of extraordinary

representatives, with the task of drafting a new constitution. Its autocratic face, however, arises from the question of who has the right to reconvene the constituent power. Unfortunately, this question, which is of central importance, has been overlooked in current literature. In September 1789, the National Assembly debated the royal veto of Louis XVI, who was considered the holder of executive power and the unelected representative of the nation. The debate centered on the question of whether he should exercise a veto power over the legislature in order to check the despotism of the parliamentary majority. On September 7, 1789, Sieyès held that in the event of a conflict between the two powers of the state, i.e., the king and parliament, only the constituent power of the people is the supreme judge. Thus, the party affected by the usurpation (including, theoretically, the unelected king) has the right to appeal directly to constituent power and to convene a new constituent assembly:

> I have just proved that the executive power and the royal prerogative as determined in the Constitution have nothing to fear from the decrees of the legislative power. If the different powers begin to infringe upon the terrain of the other, the true remedy for such public disorder is not the royal veto, but a real appeal to the constituent power (*un véritable appel au pouvoir constituant*). The injured party then has the right to approach the convocation or the national delegation to intervene. Allow me to add, in passing, that this extraordinary convocation can only be peaceful in a country where all the parties are organized by a system of general representation, where the order of deputations is well regulated, and legislative deputations meet frequently (Sieyès, 1789/1989a, p. 23).

Based on Sieyès's assertion that the unelected king can directly reconvene a constituent assembly in cases of conflict between the powers of the state, a study of the autocratic face of constituent power is developed. Although I focus on the beginning of the French Revolution, my work fits into contemporary debates examining the political and constitutional foundations of populist autocratic regimes (Bermeo, 2016; Keane, 2020; Prieto, 2021; Schäfer & Zürn, 2021) and the relationship between constituent power and populism (Corrias, 2016; Doyle, 2019; J. Grant, 2020). In this paper, I show that the autocratic face of constituent power is in Sieyès's idea of the unelected king as custodian/representative of the nation. My research departs from contemporary literature, as the intellectual history of constituent power has previously been associated only with democratic political theory (Arato, 2017b; Colón-Ríos et al., 2021; Kalyvas, 2018; Patberg, 2020; Rubinelli, 2020a). The only relevant reference to an autocratic face of constituent power in Sieyès was Schmitt's constitutional theory (1921/2015, 1928/2017). His idea of a dictatorship legitimized by constituent power has been linked to his justification of Hitler's seizure of power. Thus, it has been emphasized that Schmitt's concept of *sovereign dictatorship* misunderstood and

instrumentalized Sieyès's democratic intentions (Rubinelli, 2020a, p. 114; Thiele, 2003, p. 241). In contrast to these approaches, I analyze Sieyès's writings on the king to show their consistency with an autocratic conception of constituent power.

From the perspective of political theory, Sieyès's idea of the king with the right to invoke the constituent power of the people is the origin of an entire autocratic tradition in Europe, ranging from Bonapartism to fascism to the populist autocracies of today. The central idea of this illiberal tradition is that the head of the state is not a magistrate or prime minister appointed by parliament, but a direct representative and protector of the will of the people with the right to reconvene constituent power. The topic is still relevant, as contemporary literature discusses the democratic backsliding in established democracies due to populism and "executive aggrandizement" (Khaitan, 2019; Petrov, 2020). In his classic comparative study of the American, English, and French government systems, Maurice Duverger (1961) was one of the first European political scientists to emphasize the tendency of the French political system to personalize power. He affirms that "the democratic executive has not entirely been able to forget its monarchical origins" because "this phenomenon is typical of Europe: The United States has not known it" (1961, p. 16). Parliamentary democracy was conceived as a rejection of the autocratic tendency of French presidents. Nevertheless, Duverger (1961, p. 34) claims that in France, power remains more or less personalized, so that the phrase "*Le roi est mort, vive le roi!*" persists in French republican politics.

The idea of the head of state as the true representative of the will of the people has led to heated political debates, especially in France. Karl Marx's (2007) political analysis of this problem in his work on the coup d'état of Louis Bonaparte is well known. Brunet (2004) has addressed this topic in his important work on the French theory of representation. He affirms that the history of the king as representative of the nation is "a hidden question" (2004, p. 178). Brunet wonders if the figure of the king would show that there are "two theories" of representation in France, a democratic one that affirms the election of representatives in the National Assembly and another, more undemocratic theory of representation that points to the representation of the nation by the unelected king. Brunet says that to affirm this "would be truly excessive" (2004, p. 178). However, in examining the historical origins of the constitutional theory of the President of the French Republic, Brunet (2004, pp. 318–319) notes that it has its roots in the discussion of the royal veto in the French Revolution. The author supports the historical work of Lucien Jaume (1990), which points out that the origin of the Gaullist conception of the French President as representative of the unity of the nation lies in Mirabeau's idea of the king in his speech on the royal veto on September 1, 1789.

Brunet then quotes a passage of the *Essai sur la révolution française* (1858) by Pierre Lanfrey (1828-1877), which makes the connection between the idea of the king as representative of the nation and the origin of the Caesarist idea of representation in France:

> [Mirabeau's] idea of making the king the tribune of the people, in the perpetual representative of the nation, vis-a-vis the Assembly, his temporary representative, under the illusory pretext of preventing by this rivalry the possible formation of an aristocracy within the legislature [*Corps législatif*], is nothing but the pure and simple theory of Caesarism (Brunet, 2004, p. 319).

Nevertheless, the idea of the king of Sieyès, not that of Mirabeau, is the source of the whole autocratic tradition of constituent power. An autocracy is a form of government in which all power is concentrated in one entity (person or group). Thus, the essential element of the Caesarist or Bonapartist conception of constituent power is based on the idea of an autocracy (monarchy, dictatorship) legitimized by popular sovereignty (Antonini, 2021, p. 32; Bluche, 1980, p. 46; Prutsch, 2021, p. 48; M. Richter, 2005, p. 239). This conception has gone beyond France and found important receptions, as in Schmitt's constitutional theory in Germany (Kelly, 2016, pp. 232–236; Rubinelli, 2020a, pp. 129–135). Sieyès's idea of the king enabled the development of two variants of the concept of popular autocracy in Schmitt's work. First, as I will explain in the third chapter, Schmitt's notion of Louis Napoleon's as a sovereign dictator is based on the idea that the constituent power gives the head of state a plebiscitary mandate to create a new constitutional order. Second, Sieyès's idea also allows for the further development of Schmitt's Reichspräsident as the guardian of the will of the people contained in the constitution. In both cases, the head of state is linked to the activation and protection of the constituent power. The Schmittian idea of the head of state as the guardian of the will of the people is consistent with Sieyès's idea of the king who has the right to protect and reconvene the *pouvoir constituant* in exceptional situations.

This section is divided into three parts. In the first part, I analyze the conception of the king as the representative of the people in two important politicians of the early phase of the French Revolution. In the second part, I analyze the king in Sieyès as representative and protector of the constituent power and its right to reconvene the constituent assembly. Finally, I analyze the reception of Sieyès's idea in the 19th century autocratic tradition of constituent power, which consists in concentrating all state power in the executive with the consent of the people, i.e. the source of the variant of popular autocracy in the form of Bonapartism.

1. The King as Representative and Protector of the Will of the People

The fundamental change brought about by the French Revolution was that the king of France became the king of the French nation, thus consolidating the doctrine of popular sovereignty. On July 9, the National Constituent Assembly was established, and on July 14, the Storming of the Bastille took place. In this context, Sieyès, who had set forth his idea of constituent power in his famous pamphlet *What is the Third Estate?* published in January 1789, resolutely opposed the royal veto (Blackman, 2004, p. 125; Halévi, 1993, p. 191; Rubinelli, 2020a, p. 63; Tuck, 2016, p. 170). In early September 1789, the National Assembly began a heated discussion about the *veto* or *royal sanction*. As Colón-Ríos (2020, p. 91) explains, the debate began after the king attempted to veto the Declaration of Rights adopted by the National Assembly. This led to a polarization between the republican and royalist factions. The royalists wanted to defend the royal veto "on the basis of their instructions and because it was one of the basic elements in the traditional monarchy" (Colón-Ríos, 2020, p. 91). In contrast, radical republicans like Robespierre were against the royal veto because it was "clothed with constituent power" (Colón-Ríos, 2020, p. 43). Rubinelli has summarized Sieyès's position by saying that the royal sanction giving an "unelected citizen the power to block the representative Assembly, bypassing the authority of the nation" was "in Sieyès's terms, a '*lettre de cachet* sent against the will of the nation'" (2020a, pp. 63, 64).

Nevertheless, a serious error in contemporary literature is to believe that because Sieyès opposed the royal veto, he rejected the figure of the unelected king as custodian/representative of the people. To understand Sieyès's idea of the king, we must compare it with that of the two major ideologues who thought about the relationship between the king and popular sovereignty during the early stage of the French Revolution. The first idea is that of Jean-Joseph Mounier (1758-1806), an admirer of the English model, who accepts popular sovereignty but stresses that the constitution must limit it. The king, he argues, is a guarantor of freedom against a possible "democratic tyranny" of the parliament. The second idea is that of the Count of Mirabeau (1749-1791), who states that the king, as protector of the will of the people, can call new elections to the legislature. The third idea is that of Sieyès: the king is a *constituted power*, but he is also a protector of the constituent power. Thus, the ex-*Abbé* attributes the right to reconvene constituent power to the king. At the heart of the three positions is the idea that the people need a protector, a guarantor of their freedom vis-à-vis parliament, and that is none other than the head of the French state.

a. The Monarchiens' Liberal Idea of the King

The Monarchiens defended the king's veto power since he represented the nation's will. Extensive literature has explained the republican and monarchist positions on the royal veto between September 1 and 7, 1789 (Baker, 1990, pp. 281–285; Blackman, 2019, pp. 189–191; Egret, 1950, pp. 147–148). The Monarchiens had already accepted that the only sovereign was the nation, so the task in 1789 was to determine the king's role in the constitutional design of the separation of powers (Blackman, 2004, p. 130). They were led by Mounier, an expert on British institutions (Baker, 1990, p. 273). His central idea was that the origin of the king's political legitimacy as a representative comes from the people and is limited by the constitution. The classic work of Egret (1950) points out that the Monarchiens represented the *révolution des notables*. Indeed, Mounier was also a prominent intellectual of the Moderate Enlightenment and played a leading role in the first constitutional committee formed on July 14, 1789. In light of Sieyès's drafting of the *Déclaration des droits de l'homme et du citoyen de 1789*, Mounier considered it "too metaphysical and too obscure" (Egret, 1950, p. 114). To understand the historical origins of the concept of the king as the representative of the people, it is necessary to briefly describe the political position of the royalists in the National Assembly in September 1789.

The liberal idea of a constitutionally limited veto power of the king was the spearhead of the Monarchiens in the French Revolution. At the session of August 28, 1789, Mounier presented his governmental proposal to the National Assembly, which defined the king's constitutional powers. The first article of his proposal read: "The French government is a monarchical government, there is no higher authority than the law; the king rules only by the law" (Laurent et al., 1875, p. 504). This sparked a disorderly discussion in the Assembly, but it clarified the monarchist position early on. In the same session, Pierre-Victor Malouet (1740-1814), another important royalist, said: "It is the will of the nation that its government is monarchical" (Laurent et al., 1875, p. 507). For Mounier, the first chapter of the new constitution was to refer to the *Déclaration des droits*, so the task now was to define the nature of monarchical government (Laurent et al., 1875, p. 509). For him, however, this question was directly related to royal veto since this builds up the relationship between the king and the legislative power. Against the Monarchiens, in the session of 29 August, Pétion pointed out that the National Assembly exercised the constituent power of the nation and that it was therefore up to it alone to define the meaning of the royal sanction (Laurent et al., 1875,

p. 510). After this troubled session, Mounier demanded that the National Assembly clarify what a royal veto is (Laurent et al., 1875, p. 510).

The Monarchiens defended a liberal reading of the relationship between the king and the idea of popular sovereignty. On 31 August, the session of the Assembly began with the intervention of Gérard de Lally-Tollendal (1751-1830), another member of the Monarchiens, who sought to define the royal sanction. In Rousseaunian fashion, he points out that the law is "the expression of the general will" and that the government is nothing more than an "instrument," an "organ" of the nation (Laurent et al., 1875, p. 521). For this reason, and only because of the general will of the nation, he points out that the king must have a veto power, which is not unlimited, but only suspensive, to ensure control over the legislative power (Laurent et al., 1875, p. 522). Mounier then took the floor to present the Constitutional Committee's proposal for the design of monarchical government. The most crucial aspect of Mounier's intervention is that he states that the royal sanction is designed *by* the Constitution and not *for* a Constitution (Laurent et al., 1875, p. 523). That means the king's veto power, as Lally-Tollendal said, is not unlimited. It is not intended to veto a constitution but is intended to control the legislature. In Mounier's words:

> The King would not have the right to oppose the establishment of the Constitution, that is, the liberty of his people; but he must sign and ratify it for himself and his successors. If he were interested in the provisions contained in it, he might demand amendments; but if they were contrary to the liberty of the people, the National Assembly would not only have the power of refusing the tax (*impôt*) but of appealing to their *commettants*; for the nation certainly has the right to use all necessary means to become free (Laurent et al., 1875, p. 523).

This liberal idea of the royal veto met with criticism and negative reactions in the National Assembly, as Blackman (2004, Chapter 5) has beautifully described. The heated debate over the royal sanction began at the session of September 1, 1789. Jean-Baptiste Salle (1759-1794), a deputy that will later join the Girondin faction, took the floor, invoking Rousseau: "The general will cannot err, said the greatest publicist of the century" (Laurent et al., 1875, p. 531). Therefore, says Salle, it is absurd to believe that the nation can make evil laws that harm itself (Laurent et al., 1875, p. 531). Salle then states that if Mounier claimed that an absolute veto is not necessary for laws under the Constitution, he must also accept that a royal veto is unnecessary for any legislation. From this, he concludes that only "the Constitution is the basis for everything" (Laurent et al., 1875, p. 532). The Monarchiens' response was not long in coming. Malouet took the floor and replied that the sanction belongs to the nation and has been delegated to the king (Laurent et al., 1875, p. 535). Malouet's

position sums up the Monarchiens' view of the origin of the royal veto. For him, the king has veto power because the sovereign nation holds that power and has delegated that very power:

> It is, therefore, true that wherever the people want to be free, they are or will be free by the sole act of their sovereign will. It is, therefore, true that all sovereignty resides in the nation, and this is the principle that you have consecrated. Now, according to this principle, gentlemen, what can the royal sanction be? It is an act of sovereignty, by which the law is pronounced; it is a power communicated by the nation, which possesses them all (Laurent et al., 1875, p. 535).

But the Monarchiens saw the king not only as the representative of the people, but also as the guarantor of the people's freedom against a possible tyranny of the legislature. Thus, they assign the monarch a leading role in the legislature. In his *Considerations sur les gouvernements* (1789), Mounier points out that delegating all legislation to an assembly can lead to "democratic tyranny" (1789, p. 44). On 5 September 1789, Mounier pointed out that if the king did not participate in the legislative power, he would only be a magistrate subject to the legislature. There would be no monarchical constitutional government but a republic (Laurent et al., 1875, p. 585). For Mounier, the sovereign nation has some of its power vested in the monarch. Therefore, the king remains as representative and head of the nation and has the right to participate in the legislature (Laurent et al., 1875, p. 585). In Mounier's words: "The will of the French nation is formed by the will of its king and its representatives" (Laurent et al., 1875, p. 586). Mounier's speech shows how, in France, since the first months of the Revolution, two legal entities simultaneously represent the will of the nation: an assembly and an individual (the king). The royalist position understood the general will as the source of the king's veto power, which is also the real guarantee of the people's freedom.

In summary, the Monarchiens understood the royal veto as emanating from the nation's sovereign will and as bound by the constitution. For them, there was no doubt that the king of France had now become the king of the French nation. The problem now was to delimit the scope of his powers vis-à-vis the legislative power constitutionally. The Monarchiens see the king as the nation's executive with legislative powers, while Mirabeau sees the king as the protector of the people who can even dissolve the legislature.

b. Mirabeau's Idea of the King as Protector of the People

The Monarchiens see the king as a guarantor of the people's freedom, while Mirabeau sees the king as a protector of the will of the people. He was an advocate of constitutional monarchy based on popular sovereignty and his views on the king have been considered in the literature as the origin of the Bonapartist (Brunet, 2004, p. 319) and Gaullist idea of representation in France: "Le roi de Mirabeau devait être - comme chez De Gaulle - l'interlocuteur de la nation" (Jaume, 2001, p. 44). Mirabeau was one of the main politicians at the beginning of the French Revolution as a deputy to the Estates-General for the provinces of Aix and Marseilles. He was an excellent orator, and his defense of the *Déclaration des droits* and his views on the royal veto played a decisive role. Mirabeau was president of the Jacobin Club founded by Robespierre in 1790 and president of the Constituent National Assembly in 1791. However, his revolutionary reputation was tarnished when *L'armoire de fer* (Iron Chest) was discovered in the Tuileries Palace in November 1792. In it, documents were discovered proving secret dealings between Mirabeau and Louis XVI and that the monarch even paid the revolutionary orator. In what follows, I will focus only on his view of the king as protector of the people in his speech on the royal veto.

On September 1, 1789, Mirabeau delivered his speech on the royal veto. The central idea he puts forward is that the king is the supreme head (*chef suprême*) of the nation in a constitutional monarchy. And this monarchy is based on popular sovereignty (*Gouvernement Monarchique, institué sur la base de la Souveraineté du Peuple*). The king should be seen as the protector of the people (*le protecteur des Peuples*) and not as the enemy of their welfare. Like the Monarchiens, Mirabeau envisages two types of representatives of the people. The first is the representative to will (*vouloir*), and the second is the representative to act (*d'agir*). Legislative power consists of the will of the people's representatives to create laws. However, Mirabeau points out that another type of popular representation has the power to execute the laws: the executive. Both powers are necessary to maintain the balance between the powers of the state. The king's representative power, as head of the executive branch, is to check the actions of the legislature on behalf of the people. The king thus becomes the protector of the will of the people against the danger of the legislative power becoming a new aristocracy:

> Hence this natural and necessary alliance between the Prince and the People against any kind of Aristocracy, an alliance founded on the fact that having the same interests, the same fears, they must have the same goal and consequently the same will. If, on the one hand, the greatness of the Prince depends on the prosperity of the People, the

> happiness of the People rests mainly on the tutelary power of the Prince [*la puissance tutélaire du Prince*] (Mirabeau, 1789, p. 7).

Mirabeau's notion of the origin of the royal veto is consistent with the idea espoused by the Monarchiens: "[The king's veto power] is a right of the people, specifically entrusted to the prince because the prince, like the people, is interested in preventing the reestablishment of aristocracy" (1789, p. 10). He agrees that the king cannot veto the constitution because the royal veto can only be a power exercised within the framework of the constitutional laws. The discussion centers on whether the royal veto should be understood as an integral part of the legislation. He accepts the criticism of the deputies, who point out that it is illogical that the will of one man (the king) should be sufficient to veto the will of an assembly of representatives elected by the people. However, Mirabeau emphasizes that the king is a "perpetual representative of the people" (*representant perpétuelle du peuple*), a power that has a horizontal relationship with the representatives of the legislature. Mirabeau's defense of the royal veto is based on a deep distrust of the high probability of corruption in parliament. Therefore, the king remains as the protector of the general will vis-à-vis the legislature:

> Firstly, if the Prince does not have the veto, who will prevent the representatives of the people from prolonging, and soon afterwards eternalizing, their deputation? (It is in this way, and not as you have been told, by the suppression of the House of Peers, that the long Parliament overthrew the political liberty of Great Britain). Who will prevent them from appropriating that part of the executive power, which disposes of the offices and pardons? Will they lack pretexts to justify this usurpation? The jobs are so scandalously filled! The graces so indignantly prostituted! (1789, p. 11).

Although he shares the Monarchiens' distrust of legislative power, Mirabeau rejects the Mounier's idea of royal veto and endows the king only with a kind of 'populist' suspensive veto. If the king recognizes a law that is contrary to the welfare and interests of the people, he can dissolve parliament and call new parliamentary elections in the name of the people. Mirabeau states that if the new legislature approves the law the king has rejected, he has no other way to approve it. This is the characteristic element of Mirabeau's political thought on the relationship between the king and the concept of the will of the people. It is the germ of an autocratic conception of the representation of the people. In France, this is known as the king's *appel au peuple*, a term associated with the history of Bonapartism and Gaullism. In Germany, it is associated with Schmitt's defense of the right of the Reichspräsident to dissolve parliament. In contrast to the liberal conception of the king by the

Monarchiens, Mirabeau raises for the first time in French revolutionary constitutional thought the idea that the head of the executive can appeal directly to the people to confront the legislature. The king of Mirabeau does not reconvene a constituent assembly; rather, he protects the will of the people by reconvening a new legislature:

> When the king refuses to sanction the law that the National Assembly proposes to him, it is to be supposed that he judges this law to be contrary to the interests of the people, or that it usurps the executive power which resides in him, and which he must defend: In this case, he appeals to the Nation [*il en appelle à la Nation*], [and the nation] appoints a new legislature, it entrusts its wish to its new representatives; consequently it pronounces: it is necessary that the king submits, or that he denies the authority of the supreme court [*tribunal suprême* = the people], to which he himself has appealed (Mirabeau, 1789, p. 19).

Mirabeau introduces in this passage the autocratic tradition of the head of the state as the true representative and protector of the will of the people. He even claims that if the king and the people agree on a law that the legislature does not want, this can only mean that the latter is corrupt, so the king's call for new elections is a good thing. As Brunet (2004, p. 230) has explained, the idea of an *appel au peuple* by the monarch, reminiscent of the Bonapartist tradition of plebiscites in the 19th century, does not refer here to a popular consultation for a new constitution. But it is also true that Mirabeau's position is underpinned by the idea of the king as the guarantor of the nation's will, their true representative autocrat, their Caesar. Like Mirabeau, Sieyès participated in this debate on September 7, 1789. In his critique of the royal veto, the ex-*Abbé* argues for the constituent power of the people and rejects the ideas of the Monarchiens' royal veto and also Mirabeau's *appel au peuple* to call a new legislature. Even though Sieyès rejects the royal sanction, this does not mean that he does not see the king as indirectly involved in the exercise of the constituent power. Sieyès assumes that the monarch is the "first citizen" of the French nation and the true representative and protector of the will of the people. Therefore, the king has the right to appeal to the *pouvoir constituant* to reconvene a constituent assembly.

2. Sieyès's Idea of the King as Protector of the Constituent Power

To understand Sieyès's idea of the king, we must first compare his conception of executive power with that of Rousseau. There is extensive literature on how Rousseau's concept of the general will (*volonté générale*) influenced Sieyès's idea of constituent power in the context of the proclamation of the National Constituent Assembly of 1789 (Baczko, 1988; Colón-Ríos, 2020, Chapter 3; Schmitt, 1921/2014, Chapter 3). A little explored topic, however, is that Sieyès, like the Monarchiens and Mirabeau, had to think of the will of the people in terms of the place that the king was to occupy in the new French constitution.

As I explained in the first chapter, Rousseau and Sieyès agree on the idea of the people as sovereign. However, in their conceptions of the political legitimacy of the executive they are in absolute opposition. In his *Contrat Social* (B. III, ch. 6) and in his writings on the constitution of Poland (ch. 8), Rousseau (2005, 1762/2008) presents the monarchy as a form of government that bases its legitimacy on tradition rather than the will of the people.

The Geneva philosopher binds the concepts of sovereignty and legislation: "The sovereign, having no other force than the legislative power, acts only through the laws" (1762/2008, p. 218). The executive power neither has nor represents the will of the people. He states that the legislative power is a genuine *will*, while the executive power is only a *force* (1762/2008, p. 193). Therefore, "the executive power cannot belong to the people generally as legislative or sovereign" (1762/2008, p. 193). Rousseau (1762/2008, p. 218) establishes a hierarchy of the legislation over the executive in his analogy on the death of the body politic. He says that the executive is like the brain, while the legislative is the heart. As soon as the heart ceases to perform its functions, the body is dead, which shows that it is not the executive but the legislature that keeps the state alive. Following Rousseau, Baker's influential work refers to Sieyès's concept of representation as the deputies elected in the legislature. The king was a representative only of his majesty: "But in his capacity as head of the nation, Sieyès contended, the monarch was inseparable from the body whose majesty he represented" (1990, p. 295). Then, says Baker, Sieyès rejected the royal veto because "the people or the nation can have but one voice, that of the national legislature" (1990, p. 299).

Nevertheless, Rousseau's view that the executive is subordinate to the legislature because it does not represent the people does not apply to Sieyès. Rather, Sieyès's conception of representation is closer to Immanuel Kant's moderate idea of the *trias politica* (*potestas legislatoria, rectoria et iudiciaria*): both the legislative and executive branches are representatives of popular sovereignty (Kant, 1797/2009, p. 125). Sieyès's first critical

reflections on the monarch's role in revolutionary France are found in his pamphlet *What is the Third Estate*. At the end of Chapter 4, Sieyès states that the French should by no means imitate the English constitution. He acknowledges that English constitutionalism, which created a parliament representing the nation's will, is admired. Yet Sieyès questions whether the English model is the best for a country like France. In his words, "it would be wrong to decide in favor of the British Constitution simply because it has lasted for a hundred years and looks as if it should last for centuries more" (1789/2003, p. 132). In a footnote to these passages, the ex-*abbé* criticizes the fact that in the English constitutional tradition, the king is not a representative of the nation but only a spectator of a partisan fight:

> In England, the government is a subject of a perpetual combat between the ministry and the aristocracy in opposition. The Nation and the King seem to be mere spectators. The King's policy consists of always adopting the strongest party. The Nation suspects both the stronger and the weaker party. For its safety, the combat has to continue. This is why it supports the weaker party to prevent it from being completely crushed. But if, instead of leaving the management of its affairs as a prize in this gladiatorial combat, the people decided to take them in hand by way of genuine representatives, can it, in all good faith, not be believed that all the importance presently attached to the balance of powers would not fall away, along with the order of arrangements that alone was what made it necessary? (Sieyès, 1789/2003, p. 131).

This rejection of the English constitutional model leads Sieyès to propose his own idea of the role of the king in revolutionary France. On September 7, 1789, he delivered his speech on the royal veto (Sieyès, 1789/1989a). Here the ex-*Abbé* clearly states his defense of the constituent power of the people, his view of the king's constitutional powers, and the separation of the executive and legislative powers. I will now describe his conception of the king as a representative and protector of the will of the people.

a. The King's Right to Appeal to the Pouvoir Constituant

For Sieyès, each custodian (*dépositaire*) of the common will represents the people. Therefore, he rejects the royal veto, but recognizes the unelected king as the people's representative. In his speech on September 7, 1789, he first praised the wisdom of the National Assembly in opening the debate on the royal veto (1789/1989a, p. 3). Sieyès (1789/1989a, p. 8) refuses the veto proposed by Mounier and Mirabeau because, for him, there is no difference between the right to prevent (*droit d'empêcher*) something and the right to make laws (*droit de faire*). He says that the Assembly "seems to have abandoned the idea of attributing to the royal power an integral part in making the law" because doing so would "denaturalize even the essence of the law" (1789/1989a, pp. 3–4). Sieyès echoes Rousseau by saying that "the only reasonable definition that can be given to the law is to call it the expression of the will of the governed" (1789/1989a, p. 4). Thus, "the governors cannot seize it in whole or in part, without approaching more or less despotism" (1789/1989a, p. 4). However, Sieyès (1789/1989a, p. 4), like the Monarchiens and Mirabeau, refers to the king as the "first citizen" (*premier citoyen*) and "head of the nation" (*chef de la nation*). In contrast to Rousseau's idea of the executive power, Sieyès points out that the king is not a representative of his own majesty but a *constituted power* representing the will/wish (*vœu*) of the people:

> If you consider the person of the King [*la personne du Roi*] in the capacity which suits him best, namely, as Head of the Nation [*Chef de la Nation*], as First Citizen [*Premier Citoyen*], you will remember the beautiful words spoken by His Majesty before the assembly of the orders in your midst: *I*, said he, *who am but one with the Nation* [*moi, a-t-elle dit, qui ne suis qu'un avec la Nation*]. Indeed, the Prince, the Head of the Nation, can only be one with the nation. If you separate him from the nation for but a single moment, if you give him a different interest, an interest apart, you degrade from that moment the Royal Majesty; for it is too evident that another interest than the national interest can never be compared to it; that, in a Nation, everything bends and must bend before it.
> Thus, the King can never be separated, even in idea, from the Nation whose entire Majesty he represents [*Ainsi le Roi ne peut jamais être séparé, même en idée, de la Nation dont il représente toute la Majesté*]. When the Nation pronounces its wish (*vœu*), the King pronounces the nation's wish with him. In every way, he is the Head; in every way, he presides, but all these acts presuppose that he is present in your midst (Sieyès, 1789/1989a, p. 4).

In the footnote to this passage, Sieyès (1789/1989a, p. 4) explains why the king is the custodian/representative of the will of the people. The ex-*abbé* agrees with the Monarchiens and Mirabeau that the origin of the king's executive power lies in a delegation of the people:

> The king is a citizen of all municipalities; he alone is the First Citizen; all others are equal. In the very order of the powers *commissioned* [*commis*], the executive is not first: nor is he superior to all others as the custodian [*dépositaire*] of that [executive] power. I look upon the First Citizen as the natural *overseer* (*surveillant*) of the executive power for the nation. I identify the king with the nation; together, they make common cause against the errors and enterprises of the ministry (Sieyès, 1789/1989a, p. 4).

Nevertheless, although it is clear that the king is the representative/custodian (*dépositaire*) of the people within the executive, the ex-*abbé* does not reach the same conclusions as the Monarchiens about the royal veto. For Sieyès, "if we are led to recognize that the king cannot participate in the formation of the law, outside of the National Assembly, it is still undecided for everyone what is the proportional share of influence he can have in this" (1789/1989a, p. 5). As Rubinelli (2020a, p. 63) has explained, the ex-*abbé* sees the interpretation of the Monarchiens as an attempt to give the king *two* votes. In Sieyès's words: "Everywhere he has the right to vote, everywhere he can preside, everywhere he is legally the first, for there can be no first except by law; but nowhere can his vote be worth *two*" (Sieyès, 1789/1989a, p. 7). For this reason, Sieyès notes a contradiction in the interpretation of the Monarchiens, since the king, who already represents the nation in the executive, would usurp the wish of the nation if he participated in the legislative. This would lead to despotism:

> Then the law could be the expression of a single will; then the king could claim to be the *sole* Representative of the Nation [*Représentant de la Nation*]. We observed a moment ago that the inequality of political rights would lead us back to aristocracy: it is clear that this odious system would be no less likely to plunge us into the most absurd despotism (Sieyès, 1789/1989a, p. 6).

To avoid despotism, legislative and executive powers must be separated. For Sieyès, there are two powers commissioned (*commis*) by the people, two custodians/representatives (*dépositaires*) of the general will: the legislative power and the king. The king's executive power includes only executive functions. Thus, when the king uses his status as a representative to usurp legislative functions, he simultaneously usurps the general will. Sieyès's separatist conception of executive and legislative functions is evident in this passage:

> At present, gentlemen, if you want to consider the king as the custodian [*dépositaire*] of all the branches of the executive power, it is obvious that there is nothing in his authority, however extensive, however immense it may be, that can enter, as an *integral part*, into the formation of the law. To do so would be to forget that individual wills alone can enter, as elements, into the general will [*volonté générale*]. The execution of the law takes place only after it has been formed; the executive power and

> all that belongs to it are not supposed to exist until the law has been fully formed (Sieyès, 1789/1989a, pp. 7–8).

But just as the executive cannot interfere with the legislative functions, the reverse is also true. The primacy of the constituent power of the people over the constituted powers (the king and the legislature) is accurate; however, there is insufficient evidence in Sieyès's writings for Rousseau's idea of the primacy of the legislative power over the executive power of the king, as argued in contemporary literature (Colón-Ríos, 2020, p. 92; Goldoni, 2009, p. 144; Rubinelli, 2020a, p. 66). The supremacy of the legislative power was, of course, the reading of Rousseau's theory of government and the radical faction of the Assembly, but it is not the position of Sieyès. If we make this claim, we would destroy Sieyès's notion of representation of the constituent will by reducing it only to legislature elections, as traditional literature does (Blackman, 2019, p. 207; Brunet, 2012, p. 632; Riklin, 2001, p. 31). In my understanding of Sieyès, however, his head of the state is not subordinate to the legislature because they are two representatives of the same *volonté générale*, as in Kant's idea of *trias politica*. For this reason, Sieyès claims that his new French constitutional model of separation of powers is not comparable to the model of the English constitutional tradition:

> In England, no distinction has been made between the constituent power and the legislative power; so that the British Parliament, unlimited in its operations, could attack the royal prerogative, if the latter were not endowed with the *veto* and the right to dissolve Parliament. This danger is impossible in France. We will have as a fundamental and constitutional principle, that the ordinary Legislature will not have the exercise of the Constituent Power, nor that of the Executive Power. This separation of powers is of the most absolute necessity (Sieyès, 1789/1989a, pp. 20–21).

This discussion by Sieyès of the separation of powers brings us to the question of who is the true representative of the people who has the right to reconvene the constituent power. As I explained in the first chapter, Sieyès's great invention is not only the distinction between *pouvoir constituant* and *pouvoir constitué*, but also his idea that the constituent power can be reconvened (Sieyès, 1789/1989a, pp. 22–23). The legislative and executive branches are representatives (*dépositaires*) of the people. Both powers are separated by constitutionally defined functions. The function of the executive is to enforce the laws, and the function of the legislature is to make laws. However, in one of the most important passages of his speech on the royal veto, which has been completely forgotten in the literature on constituent power, Sieyès raises the question of the hypothetical situation that the Monarchiens and Mirabeau were talking about: the corruption of the state power. Sieyès's solution is neither revolt, nor the royal veto (Mounier), nor the demand for new parliamentary elections (Mirabeau). Sieyès

says that the "supreme judge" (a term Sieyès (1789/1985, p. 163) uses to define the sovereign people) in these exceptional circumstances is the constituent power itself:

> I say, then, that since it is possible that the public powers, though carefully separated, though independent of each other in their organization and prerogative, nevertheless undertake one upon the other, there must be found in the social Constitution a means of remedying this disorder. This means is quite simple. It is not insurrection, it is not the cessation of taxes, nor is it the royal veto. All these remedies are worse than evil; the people are always the real victims, and we must prevent the people from becoming victims; the means we seek is to demand the extraordinary delegation of the constituent power [*à réclamer la délégation extraordinaire du Pouvoir Constituant*] (Sieyès, 1789/1989a, pp. 22–23).

Sieyès then points out that the solution to the extraordinary and critical situation is that the power of the state affected by the usurpation (including, theoretically, the unelected king) has the right to appeal directly to constituent power to reconvene a constituent national assembly: "The true remedy for this public disorder is not the royal veto, but a real appeal to the constituent power [*un véritable appel au pouvoir constituant*], whose injured party has the right, then, to request the convocation or the national delegation" (1789/1989a, p. 23). The only reason Sieyès believes that the king has the right to reconvene the constituent power is because of his status as the custodian/representative (*dépositaire*) of the people. Because, unlike Rousseau, Sieyès does not see the executive as a power subordinate to the legislature; that is, the king is not a prime minister. Thus, the only idea that comes close to Sieyès's is Kant's idea of the executive and the legislature as two different representatives of the same general will. Now that we have shown that Sieyès understands the king as having the right to reconvene the constituent power, we must explain why he conceives the unelected king as the protector of the will of the people. The answer is found in his unpublished manuscripts.

b. Sieyès's Hobbesian Manuscripts on the King (1789-1791)

The mandate of the unelected king is to protect the will of the *pouvoir constituant*, which could be corrupted by the political authorities. For this protection, he has the right to reconvene a constituent assembly (Sieyès, 1789/1989a, p. 23). Sieyès's king, while having constitutionally limited functions, also has the political mandate to protect the constitutional order created by the will of the people. In the literature, a connection has been made between Hobbes's and Sieyès's theories of representation (Forsyth, 1981; Hont, 1994; Runciman, 2009). However, it has been overlooked that Sieyès's justification of the king as representative of the people is also based on his Hobbesian distrust of the passions and interests of men. His reflections on the king are found mainly in manuscripts 284 AP 4-5 (Sieyès, 1999b) and 284 AP 4-7 (Sieyès, 1999c) of his *Fragments politiques*. These texts have no exact date, but were probably written between 1789-1791. They consist of folios and personal notes. Like the *Monarchiens* and Mirabeau, Sieyès uses certain terms from Rousseau's work to build his idea of the king. Although we do not find significant references to the *Contrat Social* in his annotated bibliography, one of the quotations from Rousseau that he uses refers to a passage about the monarch. In his *Second Discourse* (1755/2008), Rousseau makes an indirect reference to Hobbes's theory of sovereignty. In this paragraph, he points out the difference between a monarch (*prince*) and a master (*maître*):

> It would be equally unreasonable to imagine that men at first threw themselves into the arms of an absolute master, without any conditions or consideration on his side; and that the first means contrived by jealous and unconquered men for their common safety was to run headlong into slavery [See: (Hobbes, 1651/2003, Chapter XVIII)]. (...) It is therefore past dispute, and indeed a fundamental maxim of all political law, that people gave themselves chiefs to defend their liberty [*les peuples se sont donné des chefs pour défendre leur liberté*] and not to be enslaved by them. *If we have a Prince* [*nous avons un prince*], said Pliny to Trajan, *it is in order that he may keep us from having a master* [*maître*] (Rousseau, 1755/2008, pp. 127–128).

Sieyès interprets this Hobbesian passage of Rousseau's work as the will (*nous voulons*) and necessity (*nous avons*) of the people to have a monarch in France. He quotes this passage in his two manuscripts on the king, and paraphrases it as follows:

> We want a prince to save us from the danger/misfortune of having a master [*Nous voulons un prince pour nous éviter le danger/malheur d'avoir un maître*] (Sieyès, 1999b, p. 421).

> We have a prince so that he saves us from the peril of having a master [*Avons un prince pour qu'il nous sauve du péril d'avoir un maître*] (Sieyès, 1999c, p. 427).

Sieyès's manuscripts show that, like the Monarchiens and Mirabeau, he distrusts the passions and intentions of the executive authorities, which leads him to propose the necessity of the king as the true protector of the will of the people. In this paragraph, in a Hobbesian tone, he echoes Rousseau's idea of the difference between a prince and a master:

> Men are subject to the passion for prevailing as well as to steal. It is necessary to have a legal and moral brake for the first one. We need to be warned; it would be too late to repress it. Thus, in the sense that we want to give it, the monarchy is established to preserve equality that cannot be obtained in republics; it is the real brake on inequality; it says, at whatever height you rise, you will always find the social interest above you. There is only one legal inequality [*Il n'y a qu'une inégalité légale*], it is that of all on one person [*c'est celle de tous sur chacun*]; this one is represented by the person of the prince. It is not the superiority of the magistrate, it is a real personal inequality, but it is the only one (*mais c'est le seule*). "We want a prince to save us from the danger/misfortune of having a master" (Sieyès, 1999b, p. 421).

This passage from Sieyès about the king is consistent with the central idea Hobbes points out as the cause for establishing sovereign, autocratic authority. Hobbes (1651/2003, Chapter XVII) states that only the fear of punishment of the sovereign (the monarch) can restrain men's natural passions. Sieyès is not an advocate of absolute monarchy like Hobbes, but believes that the king is the only one who can protect the will of the people by restraining the passions that lead men to corruption. His Hobbesian approach shows that a monarch in the executive branch must be the protector of the people. Like Mounier and Mirabeau, he believes that this mandate of the king is a consequence of the constituent will. Sieyès explains that constituent power creates all the powers of the state: the legislative power with elected representatives, the king's executive power, the administrative power, and the judicial power. The ex-*abbé* says that the king "must appoint for the exercise of all his royal functions as many heads of departments" (1999b, p. 422). The king exercises this power not as a magistrate of the legislature but as a result of the nation's constituent will:

> It is time to notice that the *pouvoir constituant* must not limit itself to organizing the legislative representation and the different administrative or judicial bodies; the whole executive machine is subject to its power. We need a new ministerial constitution; it is not arbitrary that the functions attributed to the royalty can be separated, correspond, and bind to social unity... (Sieyès, 1999b, p. 422).

This passage shows that Sieyès's idea of the king as protector emerged from the mandate of the *pouvoir constituant* itself. The people mandated the king as their protector and

delegated to him the executive power to represent their will. As in the *Monarchiens* and in Mirabeau, in Sieyès the will of the people becomes effective in the person of the unelected king. The people also elect their other representatives, who draft laws in parliament. However, the unelected king represents the people by choosing the ministers and officials of the executive branch of the monarchical government of France. For Sieyès, then, the king is not a magistrate; parliament cannot depose him because he is the representative and protector of the will of the people. For the ex-*abbé*, the king's executive power is thus bound not only to the constitution but also to the constituent will of the people (*volonté constituant*):

> The king is commissioned [*est chargé*] by the nation's will to select the ministers of execution, just as the people are, at their other extremity, to elect the lawmakers [*formateurs de la loi*]. The people are the governed; the constituent will [*volonté constituant*] is the whole nation before any distinction of government, or of government before any constitution. It is not the persons who make their current laws [=the deputies in parliament] who have entrusted the king with the election of the public officials of the administration. It is the nation; it is the constituent will [*volonté constituant*], which, besides the law made [*la loi faite*], has committed a citizen with the duty of being the custodian [*dépositaire*] of the law made, and the selector or maker [*formateur*] of an active administration, etc. (Sieyès, 1999b, pp. 418–419).

This statement by Sieyès makes it clear that not only positive or constitutional law (*la loi faite*), but also the mandate from the *pouvoir constituant*, the will of the people, directly binds the king. It is important to emphasize the terms "citizen" and "commission" for Sieyès's definition of the king, because this shows his completely republican view of the monarch. It would be wrong to think that Sieyès's idea of constituent power has nothing to do with the authority of the king in the French Revolution. He is not a magistrate of the legislative power, not a minister appointed by the political factions of the Parliament. On the contrary, the king selects the other executive magistrates on behalf of the people:

> This citizen we wanted to elevate above all others. Other considerations have made him named the first citizen, the prince, and the head of the nation. He is superior to all by constitutional law, and finally not attainable by penal law, for he is not indeed susceptible to prevarication, at least in the exercise of a power which he must entrust to the ministers, the true chiefs, the true monarchs since they are the first in charge. Therefore, it is not as an active head of the execution that the king is the custodian [*dépositaire*] of the law. The king must be considered in his true capacity; he is the representative of the people/nation who appoints the agents of the administration; he stands between the people and the ministry [*il est placé entre peuple et le ministère*]. The constitution has made him the first citizen; that is his character; he is united in interest with the people [*c'est avec le peuple qu'il est uni d'intérêt*]. He watches over the agents of the administration for the people; that is his proper designation. The king

> is an arbitrary selector of the ministers of execution and overseer [*surveillant*] over them for the interests of the people and the law (Sieyès, 1999b, p. 419).

In this passage, Sieyès has used two important terms to define the king as the representative and head of the nation: *dépositaire* and *surveillant*. I have translated the first term as "custodian" and the second as "overseer" to obtain an authentic translation. Nevertheless, the true meaning of these terms from the lexicon of political theory is, in my view, *guardian*. For the ex-*abbé*, in his executive functions, the king acts as the guardian of the people's will and interests vis-à-vis other magistrates such as the officers of the armed forces and the ministers of state. It is fair to say that Sieyès conceptualizes the unelected king as the guardian of the general will of the nation against ministerial despotism:

> All the king's duties, all his prerogatives, arise from his being the first citizen. We shall say soon why he must be the first citizen. As such, he is the leader of us all; he makes common cause with us against ministerial despotism. For us, he dismisses ministers and appoints those who are better suited to the interests of the law (Sieyès, 1999b, p. 419).

This depiction of the king as a leader is related to his idea of the king as the guardian of constitutional order. Sieyès (1999b, p. 421) places the title "representative" (*représentant*) and then defines the king as "guardian of primacy and equality" (*le gardien de la primatie et de l'égalité*) (1999b, p. 421, 1999c, p. 435). By primacy, Sieyès refers to the material content of the French state, i.e., the will of the people as the basis of the constitutional order. Since the king is the guardian of this material content for Sieyès, the authority of the head of state as guardian is emphasized, and then he defines his account of the primacy of the representative government (*primatie représentée*) as a delegation of the people. This monarchical view of guardianship is also consistent with his speech on the royal veto: "When the nation expresses its will (*vœu*), the king expresses it with the nation. In every respect he is the Head, in every respect he presides, but all these acts presuppose that he is present in your midst" (1789/1989a, p. 4). Sieyès's idea of the king as the representative and protector of the people is based on his Hobbesian legitimation for the head of state as the authority that curbs the passions of men that lead to the corruption of the government. Sieyès concludes that the king stands as the guardian of the will of the people and as "notre vrai chef" (1999c, p. 439):

> The primacy [*primatie*] of all over one is brought to representation in a custody [*dépôt*] and not in a workshop [*atelier*]. The throne represents it; the custodian [*dépositaire*] is its first officer, the one who sits on it and merges with it. This represented primate [*primatie représentée*] is given into custody and entrusted to the

> care of the monarch, so that he may personally defend it against individual usurpations. A more active, sensitive self-interest has been created so that the guardian [*gardien*] may be better so that the citizens can respond to the aristocrat or the demagogue. You deceive us, our primatial representative; our true leader is the monarch [*Vous nous trompez, notre représentant primatial, notre vrai chef est le monarque*]. This is against the representative system [*c'est contre le système représentatif*] (Sieyès, 1999c, p. 439).

These passages from Sieyès lay the foundation for two variants of popular autocracy: the Bonapartist dictatorship (Schmitt, 1928/2008, p. 309) and the "guardian of the constitution" (Schmitt, 1931/2016). Echoing Rousseau's indirect quotation of Hobbes, the ex-*abbé* says that a king is necessary in France to "silence (*étouffer*) the excessive ambition of demagogues" (1999b, p. 421). Moreover, the king was necessary to "protect public order/public liberty from the despotic arbitrariness of the political organs, especially the army commander" (1999b, p. 421). In his important study of the French theory of representation, Brunet (2002, p. 41) recognized that the conception of the king as the representative of the people in the executive branch posed a significant dilemma for French constitutional theory because the people did not elect him by vote. I have explained that for Sieyès the concept of representation is essentially a mandate from the people. For this reason, his king as representative and protector of the people is the result of a mandate from the *pouvoir constituant* to protect the monarchical government. Accordingly, Sieyès's king has the right and constitutional authority to reconvene a constituent assembly on behalf of the people when he sees a corruption of the constitutional order created by the people. The most important consequence of this legitimization of the king's authority is the potentially autocratic activation of the *pouvoir constituant*. This idea is behind the legitimation for the Bonapartist conception of representation as a mandate from the people to create a new constitutional order. Not surprisingly, Sieyès's ideas found wide appeal in 19th-century Bonapartism.

c. The Bonapartist Reception in the 19th Century

Sieyès's idea of the king's right, as representative and protector of the people, to reconvene the constituent power is related to the concept of Bonapartism. I have already mentioned that in this section I will not focus on the biography of Sieyès in the Bonapartist period, which has already been extensively covered in the historical literature. However, it is important to point out that Sieyès here utters his famous Bonapartist phrase, which was later quoted by Schmitt (1932/2004, p. 90): "Authority comes from the top and confidence from the bottom" (1985, p. 236). In the history of Bonapartism the head of state usually prefigures the invocation of constituent power (Penadés & Velasco, 2022). The typical result is that he accumulates all the powers of the state and legitimizes himself through the consent of the people by becoming a Caesarian dictator. The first political principle of this plebiscitary idea of constituent power, the idea of an autocracy legitimized by popular sovereignty (Antonini, 2021, p. 32; Prutsch, 2021, p. 48), is present in a germinal form in Sieyès's idea of the king. The literature has rejected this connection between his theory of constituent power and Bonapartism (Rubinelli, 2020a, p. 50), attributing this intellectual relationship only to Schmitt's constitutional theory (Arato, 2016, p. 30; Thiele, 2003, p. 417). The Bonapartist conception of representation is one of the important variants of popular autocracy.

From a political theory perspective, Sieyès's idea of the king's right to appeal to constituent power is the germ of Bonapartism. Although Bonapartism emerged almost two centuries ago, it has revived in recent publications on the intellectual history of despotism and dictatorship (Keane, 2020; Kivotidis, 2021; Prieto, 2021). Moisés Prieto (2021, p. 5) points out that the history of dictatorship has resurfaced in our context of crisis due to the Covid 19 pandemic. The use of crisis containment measures has strengthened autocratic regimes, but it has also produced the phenomenon of "democratic backsliding" (Bermeo, 2016; Schäfer & Zürn, 2021). The cases of Turkey and Hungary had already attracted the interest of comparative political scientists because civil liberties have been seriously affected in these countries (Bozóki & Hegedűs, 2018; Göztepe, 2021). But the recent measures taken to combat the pandemic have also led to study of the "executive aggrandizement" (Khaitan, 2019; Petrov, 2020). In this context of political crisis, it is essential to analyze concepts such as dictatorship and Bonapartism. However, I do not focus on the biography of Sieyès and his political role as a conspirator in the rise of Napoleon Bonaparte in 1799, which has been extensively studied by historians (Lentz, 2014, pp. 48–59). Rather, I examine the relationship between Sieyès's idea of constituent power and the Bonapartist conception of representation.

In contemporary literature, Colón-Ríos (2020, p. 75) has said that it is ironic that Napoleon, as French emperor, in his speech of May 15, 1804, attributed to himself Sieyès's idea of constituent power. In Napoleon's words:

> It is not as a general that I rule, but because the nation believes I have the civilian qualifications for governing. My system is quite simple. It has seen to me that under the circumstances the thing to do was to centralize power and increase the authority of the Government, so as to constitute the Nation. I am the constituent power (Colón-Ríos, 2020, p. 75).

Nevertheless, the historical connection between Sieyès and Bonapartism goes beyond this speech. The tradition of Bonapartism was consolidated with the coup d'état of Louis Napoleon in 1851, which then established the Second Empire in France through plebiscites. It is often neglected that Louis Napoleon viewed Sieyès's political ideas and his role as a French politician favorably. Before becoming the second French emperor, he attempted in his *Idées Napoléoniennes* (1839) to legitimize the electoral system by which his uncle Napoleon Bonaparte came to power. This prompted Louis Napoleon to praise Sieyès:

> It is essential to recall here the mode of election introduced by Napoleon. In the Constitution of the Year VIII, Sieyès had invented a system of notabilities which removed from the people all participation in the elections. Although Sieyès, a former member of the Constituent Assembly, the Convention and the Directory, was a friend of liberty, he had been obliged by circumstances and for the maintenance of the Republic to act in this way; because, before the 18 Fructidor, the elections brought royalists to the legislative body: this day drove them out (Bonaparte, 1848, pp. 269–270).

The intellectual influence of Sieyès's political ideas on Louis Bonaparte had existed since the early 1830s. In 1832 Prince Bonaparte wrote his *Rêveries Politiques*, in which he sets forth his political ideas for introducing popular sovereignty into the French constitutional system. The second part of this writing is followed by a proposal for a new constitution for France. Louis Bonaparte advocates the political foundations of the Constitution of 1791, but in particular, Sieyès's idea of the king. Bonaparte replaces the idea of the king being the nation's representative with the idea of the emperor representing the nation. As Frédéric Bluche (1980, pp. 229–232) has shown in his classic study of Bonapartism, Louis Bonaparte merely set down in 1832 what he would implement between 1848-1851. His project aimed to legitimize a popular autocracy. For this reason, Bonaparte's fledgling constitutional project of 1832 draws on Sieyès's idea of the king as representative of the people:

> The nation, from which alone all powers emanate, may exercise such powers only by delegation. The French Constitution is representative; the representatives are the legislative body and the Emperor. The legislative power is delegated to a National Assembly (...). The government is monarchical; the executive power is delegated to the Emperor (Bonaparte, 1848, pp. 86–87).

This passage leads us to one of the most famous German readings on the relationship between Sieyès's idea of the king and Bonapartism: *The Eighteenth Brumaire of Louis Napoleon* (1852/1898). It has been widely expounded how Marx analyzes Napoleon's rise to power with his 1851 coup d'état through his theory of class struggle. Francesca Antonini (2021, p. 49) has pointed out that Marx had a deep knowledge of French history and politics. This is evident in *Class Struggles in France, 1848 to 1850*, his articles as a correspondent for the *New York Tribune*, and his book *The Civil War in France*. However, the literature has paid little attention to Marx's analysis of the constitutional laws of the Second French Republic. Marx did not make the intellectual connection between Sieyès and Bonapartism directly. Rather, he makes it by explaining that the Constitution of 1848 had an Achilles' heel, which was to be found in the design of the executive and legislative powers:

> This Constitution, so ingeniously made invulnerable, was, however, like Achilles, vulnerable at one point: not in its heel, but in its head, or rather in the two heads into which it ran out — the Legislative Assembly, on the one hand, and the President on the other. Run through the Constitution and it will be found that only those paragraphs wherein the relation of the President to the Legislative Assembly is defined, are absolute, positive, uncontradictory, undistortable (Marx, 1852/1898, p. 14).

Although not a constitutional theorist, Marx (1852/1898, pp. 15–16) recognizes with great understanding that the notion that the head of state (king or president) represents and protects the people has been a fundamental problem since the French Revolution. Marx points out that the assembly could constitutionally revoke the president, but the president could only unconstitutionally overrule the assembly. The central problem is that two juridical persons claim the true nation's representation for themselves. One is an individual (president), and the other is a group (parliament). Thus, Marx perceives the key problem of Sieyès's idea of constituent power since 1789: an individual (the king) can also represent the unity of the will of the people. We must remember that Sieyès pointed out that sovereignty is exercised by delegation; besides, the custodians/representatives are the legislative power and the king. In my view, Marx's *Eighteenth Brumaire* has indirectly criticized Sieyès's idea of the king and its application in counter-revolutionary France. In Marx's words:

> The elected National Assembly stands in a metaphysical, but the elected President in a personal relation to the nation (*Die erwählte Nationalversammlung steht in einem metaphysischen, aber der erwählte Präsident in einem persönlichen Verhältnis zur Nation*). True enough, the National Assembly presents in its several representatives the various sides of the national spirit, but, in the President, this spirit is incarnated. As against the Assembly, the President possesses a sort of divine right, he is by the grace of the people (*Volkesgnaden*) (Marx, 1852/1898, p. 16).

Marx's explanation of Bonapartism is consistent with the ideas later espoused by the Bonapartist intellectuals of the 19th century. President Napoleon, who later became the second French emperor by plebiscite, advocated a new form of autocratic constituent power, understood as a mandate from the people to a dictator to create a new constitution. The literature has continued to be interested in this intellectual history, particularly Bonapartism and its party organization in parliamentary democracy (Berthet, 2013; Gandouly, 2018; Pairault, 2019). Two Bonapartist intellectuals from the Third French Republic have attracted attention: Paul de Cassagnac (1842-1904) and Gustave Cunéo d'Ornano (1845-1906).

Cassagnac is known due to historical works that analyze his radicalism and polemical struggle against French parliamentary democracy. Gandouly (2018) calls him *l'enfant terrible* of Bonapartism. In the Dreyfus affair, he sided with anti-Semitism. Cassagnac was a polemicist, self-proclaimed "democratic autocrat," and a champion of the French Revolution. Offen (1991) considered him the representative of the authoritarian French right of the 19th century. Cassagnac defended the Revolution not on revolutionary grounds but because it showed that the ultimate foundation was the people, the nation, and not divine right. Cassagnac affirmed that "the Revolution has produced a new monarchy, the Empire, a new system of authority based on the principle of the sovereignty of the nation" (Offen, 1991, p. 55). Thus, "Caesar is the modern authority" (Offen, 1991, p. 55). For him, "imperialism is the sovereignty of the nation, which delegates its power directly, by way of plebiscite, to a chief with the mandate to impose respect of the law of the majority..." (Offen, 1991, p. 55). For Cassagnac, Bonapartism is a middle ground between monarchy and republic:

> I am authoritarian; that is, I want government by one, of course, with the delegation of the people. Caesarism is my system of government because I regard it as a truly modern form, the middle form between the concept of the divine right of the Bourbons and the new right of suffrage of the Republic since it borrows from the first the idea of inheritance, and plebiscitary confirmation from the second. I sincerely believe that in a country with the problems of revolutions like ours, an authoritarian government is the only one that can save us (Gandouly, 2018, p. 72).

Like Cassagnac, Cunéo d'Ornano was a politician and propagandist of the Second Empire in the Third French Republic. He wrote apologetic works such as *Le Peuple et L'Empereur* (1878). In this pamphlet, he affirms that the French established their political principles in 1789. And the essential principle is that the will of the people is the basis of government. Thus, "the people and the emperor form the definitive synthesis of our immortal revolution of 1789" (1878, p. 1). He defends the plebiscites of Napoleon Bonaparte and then says that Louis Napoleon continued this political tradition. For him, "the nation is the master of confirming or rejecting the titles conferred if that is its will" (1878, p. 13). He asks himself: "Is this not always the true democratic doctrine?" (1878, p. 13). But Cunéo d'Ornano was also a historian of Bonapartism. He wrote *La République de Napoléon* (1894), a book of more than 630 pages describing the constitutional history of France from a Bonapartist point of view. His central thesis is that the French Parliament usurped constituent power with constitutional laws such as Article 45 of the 1848 Constitution, prohibiting the president's reelection. Cunéo d'Ornano thus uses Sieyès's idea of constituent power to argue for the president of the republic and against parliamentary democracy:

> Is it indeed the nation that holds the *pouvoir constituant*? Or is it the assembly? If the nation bears the *pouvoir constituant* only within the limits within which the assembly, heir in this case to Louis XVIII, which grants it, then the assembly can forbid the nation to elect or reelect this or that citizen; then, the nation must obey and submit to the assembly since the assembly is the sovereign, as in England (...). But if the nation is sovereign, if it alone holds the *pouvoir constituant*, if the deputies are only agents, agents who cannot validly sign and legitimize, to the detriment of their principal, their sovereign, an unforeseen decay, a diminution of the head, an arbitrary binding; thus, that Article 15 —by which disloyal and usurping mandataries obliged the nation not to reelect its elected representative [Louis Bonaparte] on December 10 [1848]— had no value and even constituted an abusive violation of national sovereignty (Cunéo d'Ornano, 1894, pp. 334–335).

This Bonapartist conception of representation anticipates Schmitt's concept of the Bonapartist dictatorship (1928/2008, p. 309), which is one of the variants of popular autocracy. In the early 20th century, Hauriou (1916, pp. 680–681) warned of this connection between constituent power and Bonapartism. Thus, it is not surprising that Schmitt imported the same autocratic reading for the Weimar Republic from France. Schmitt (1928/2008, pp. 134, 141) describes the Bonapartist dictatorship as a *plebiscitary mandate* from the people to create a new constitutional order. For Schmitt (1928/2008, p. 77), Louis Napoleon's plebiscites represent the *explicit* mandate of the *pouvoir constituant* in the form of *acclamation*. However, this conception of the Bonapartist dictatorship is not to be confused

with his idea of the Reichspräsident as the "guardian of the constitution" (1931/2016). Schmitt's president has no mandate from the people to create a new constitutional order, but a mandate to protect the constitution. Thus, he is a *commisarial dictator* with plebiscitary legitimacy who uses constitutional powers (Article 48) to protect the will of the constituent power. These two variants of popular autocracy (the Bonapartist dictatorship and the "guardian of the constitution") derive from a single source: Sieyès's idea of the king as the representative and protector of the will of the people in the French Revolution.

3. Conclusions

Sieyès was a monarchist political thinker in the French Revolution. His idea of the king is the source for two important variants of the concept of popular autocracy: the Bonapartist dictatorship (Schmitt, 1928/2008, p. 309) and the "guardian of the constitution" (Schmitt, 1931/2016). The central idea behind these autocracies is that the head of state is the true representative and protector of the *pouvoir constituant*. I have explained how this idea of the head of state emerged in the constitutional debates over the royal veto in September 1789.

In the French Revolution, the head of state and the parliament were understood as two representatives emanating from the people. The position of the *Monarchiens* is summarized in Mounier's work. For him, the king is a representative who guarantees the freedom of the people, therefore he has the right to veto the legislative power in order to avoid a "democratic tyranny." For Mounier, it was the constituent power that delegated the king this right of veto. His conception of the king is fundamentally defensive because it assumes a distrust of the elected representatives of parliament. On the other hand, Mounier's conception of the king is also taken up by Mirabeau, one of the leaders of the Jacobins. For the latter, the nation has two delegates. The delegate of its *will* is the legislature, and the delegate of its *force* is the executive. Unlike Mounier, Mirabeau sees the king as the "perpetual protector of the will of the people." He rejects the royal veto advocated by the *Monarchiens* and therefore proposes another way to contain a possible "aristocracy." For Mirabeau, if the king sees the danger of corruption of the general will of the people, he can appeal to the people (*appel au peuple*) and dissolve parliament. With this power of dissolution, Mirabeau introduces for the first time in political and constitutional theory the autocratic notion of the head of state as the true protector and representative of the will of the people. Sieyès's position, however, is much more closely related to the autocratic conception of constituent power than Mirabeau's.

The Bonapartist dictatorship is based on the idea that the head of state indirectly exercises constituent power. Sieyès's king is a representative and protector of the will of the people, so that in exceptional situations he can activate the *pouvoir constituant*. In his discourse on the royal veto, Sieyès does not think of the king in traditional and religious categories, but in a republican conception. His king is the "first citizen" and the "head of the nation." The head of state represents the unity of the nation. Sieyès develops the argument that not only is the distinction between *pouvoir constituant* and *pouvoir constitué* important, but also the idea that constituent power can be reconvened. The question is who can call in the *pouvoir constituant*. Sieyès points out that theoretically, in a situation of usurpation, the

parliament or the king can call upon the constituent power and reconvene a constituent assembly. The reason for this is that the constituent power is conceived as the "supreme judge" in a situation of conflict between the powers of the state. With this solution, Sieyès's king is indirectly involved in the exercise of the constituent power, since he becomes one of the representatives that has the right to exercise the constituent power. While Mirabeau and Mounier think of the protection of the people from the procedures within the constitution, Sieyès thinks of the protection of the people both within and outside the constitution by invoking the *pouvoir constituant* (a power that is by definition outside the constitution).

The concept of the "guardian of the constitution" goes back to the idea of the head of state as the "*gardien*" of the constitutional order created by the constituent power. Sieyès, in his Hobbesian manuscripts, sees the king as the protector of the people. The king's mandate emanated from the will of the people. Sieyès's support for monarchical government and the fact that the king represents for him a check on the passions and interests of men that corrupt representative government is evident in his manuscripts. Echoing a passage from Rousseau that indirectly quotes Hobbes's theory of sovereignty, Sieyès sees the head of state as a protector who prevents despotic government. For this reason, Sieyès uses the terms "custodian," "delegate," and "overseer" to define the authority of the head of state. However, when he thinks of the king, he also thinks of him as the "true leader" of the people. As leader, Sieyès defines him as the "guardian of primacy." By the primacy of government, he means the material content of the order created by the *pouvoir constituant*. Thus, the king has the mandate to select ministers and to limit the private interests of other important authorities, such as the commander-in-chief of the armed forces. Sieyès's king and the people are thus bound by a bond of protection and obedience, just as in Hobbes's political philosophy.

The connection Sieyès makes between the head of state and the constituent power was well received in 19th-century Bonapartism. Apart from Sieyès's biography in his Bonapartist period and his thesis that "authority comes from the top and confidence from the bottom," it is important to examine the concept of Bonapartism as a continuity of his political thought. Bonapartism is based on the idea that the head of state represents the will of the people. It is a dictatorship legitimized by the mandate of constituent power. Napoleon I considered himself "the bearer of constituent power," and Louis Napoleon considered the authority of the emperor as a delegation of the people. In the context of Louis Napoleon's coup d'état, Marx described this problem by recognizing that two powers (president and legislature) created the dispute over who was the true representative of the people. The head of state had a relative advantage here because he presented himself as *one* single will (an individual) representing

the unity of the nation. Among the Bonapartist intellectuals of the Third Republic, this idea of delegating the constituent power to the head of state is present. For Cassagnac, Caesarism or Bonapartism do not represent a rupture but a continuity with the project of the will of the people introduced in the French Revolution. For Cunéo d'Ornano, Sieyès's idea of constituent power found expression in Napoleon's plebiscites. In all these cases, the link between the dictator and the *pouvoir constituant* plays a fundamental role in Bonapartism.

This discussion of the relationship between Sieyès's idea of constituent power and Bonapartism leads us to the work of Schmitt, the theorist of popular autocracy. One question Sieyès does not address in 1789 is whether the concepts of sovereignty and constituent power are synonymous. An important discussion has developed in contemporary literature on the distinction between these concepts. The works of Colón-Ríos (2020) and Rubinelli (2020a) have advanced this debate by pointing out that in Sieyès this distinction exists. Rubinelli, however, has pointed out that Schmitt does not distinguish between the concepts of sovereignty and constituent power, thus losing the original meaning and liberal intentions of Sieyès. In the next chapter, I develop a new reading of this problem. In my view, Schmitt distinguishes between *sovereignty* and *sovereign dictatorship*, with the essential criterion for the distinction being Sieyès's idea of constituent power as the *mandate* or *commission* from the people to create a new constitution. Thus, Schmitt presents three variants of popular autocracy: the sovereign dictatorship of the constituent assembly, the sovereign dictatorship of Bonapartism, and the Reichspräsident, who is neither a sovereign nor a constituent dictator but represents a popular autocracy in the form of a guardian of the will of the people.

Second Section: The Conceptualization

Chapter 3: Carl Schmitt's Theory of Constituent Power and the Differentiation between *Sovereignty* and *Sovereign Dictatorship*

> "[Sovereign dictatorship] is sovereign in a completely different sense from that in which the absolute monarch or a sovereign aristocracy can be said to be 'sovereign'. The commissary dictator is the unconditional commissar of action of a *pouvoir constitué*, and sovereign dictatorship is the unconditional commission of action of a *pouvoir constituant*" (Schmitt, 1921/2014, p. 127)

> "The king receives the authority of his father, and the father of the dictator is the people" (Donoso Cortés, 1851/2019, p. 101)

Introduction

Sovereign dictatorship is one of the variants of the concept of *popular autocracy*. The distinction between the concepts of *sovereignty* and *sovereign dictatorship* is fundamental to understanding the reception of Sieyès's idea of constituent power in Schmitt's work. In terms of outcomes, there is no difference between these two concepts, since both involve the concentration of the powers of the state in a single entity (individual or group). However, my study emphasizes that the difference lies in the foundations of political legitimacy, especially with regard to the concept of constituent power. The distinction between sovereignty and sovereign dictatorship has gone unnoticed in the literature for nearly a century, leading to overlap the concepts of sovereignty, constituent power, and sovereign dictatorship. Schmitt first developed his reading of constituent power in the fourth chapter of his book *Die Diktatur* (1921/2015) and then expanded it in his works *Politische Theologie* (1922/2015), *Volksentscheid und Volksbegehren* (1927/2014) and, most importantly, in *Verfassungslehre* (1928/2017). The distinction between constituent power and the dictatorial powers of the Reichspräsident, based on Art. 48 of the Weimar Constitution, also plays a central role in his works *Der Hüter der Verfassung* (1931/2016) and *Legalität und Legitimität* (1932/2005). I will briefly explain how the international literature has confused the concepts of sovereignty, constituent power, and sovereign dictatorship in Schmitt's work.

In the last two decades, an intellectual history literature has emerged that argues that Schmitt's ideas of constituent power, dictatorship, and sovereign dictatorship would have been inspired by Theodor Mommsen's work on Roman public law (1874/1952, pp. 702–742).

The central idea is that Mommsen was the first to present a historical study of how the Roman dictatorship was not merely a commissarial institution, but also an institution with *constituent powers*, that is, with the power to create the fundamental laws of the state. In this legal approach, constituent power is equivalent to any supreme power (whether triumvirate, dictator, or emperor) that creates the fundamental laws. One of the first to develop this reading was Egon Zweig (1909), who states in his work that the precursors of Sieyès's idea of constituent power can already be found in the writings of Plato and Aristotle on the term Πολιτεία (*politeia*) as the political order of the state. I have ascertained that Mommsen's influence on Schmitt can be found in his personal archive on Zweig's work in four sheets with annotations (Schmitt, n.d.-b). However, Nippel (2011, pp. 129–137) was the first to revive Zweig's reading of the prehistory of the idea of constituent power, claiming that Schmitt's idea of sovereign dictatorship was already contained in Mommsen's work on Caesarist dictatorship. Nippel's interpretation has been consolidated at the international scholarship in the works of Kelly (2016, pp. 224–226), Rubinelli (2020a, pp. 107–108, 115), and especially Pasquino (2021). The reading that Schmitt's ideas of constituent power and sovereign dictatorship derives from Mommsen's work on Roman law can be summarized as follows:

> But what is the "sovereign dictatorship"? The Schmittian concept probably derives from another text found in Mommsen's *summa* on Roman public law, in particular the last part of the volume the great Romanist devoted to Roman magistracies entitled *the extraordinary constituent powers* (*Die ausserordentlichen constituierenden Gewalten*). Mommsen does not use the expression "sovereign dictatorship" but interprets Sulla's dictatorship of 82 BC *rei republicae constituendae* (*et legibus scribundis*) *causa* as the equivalent of a constituent power, which Schmitt, with a terminological contradiction, defines as a "sovereign dictatorship". Here there is undoubtedly a *contradictio in adiecto* —a question to which I will return— because the dictatorship is a conservative magistracy and not "*mit der Befugniss die Verfassung der Gemeinde (...) umzugestalten*", as Mommsen writes, i.e. a magistracy that would have the power to change the constitutional order, i.e. the form of government of the political community. In his 1921 book, Schmitt, like Mommsen, distinguishes between a magistracy that has the power to modify the constitution and a magistracy that must defend it, calling the former the same name of dictatorship, while the latter must guarantee the maintenance and stability of the threatened political-constitutional order (Pasquino, 2021, p. 269).

This legal-historical discussion of the origins of Schmitt's concepts of sovereignty, dictatorship and constituent power found its greatest theoretical development in the important works of Rubinelli (2020a) and Colón-Ríos (2020). Their books were published almost simultaneously and reached completely opposite conclusions about the relationship between the concepts of sovereignty, constituent power, and sovereign dictatorship.

Rubinelli's work is particularly influenced by the reading introduced by Nippel (2011), which later inspired Kelly (2016) and Pasquino (2021), thus confirming that Schmitt established the relationship between constituent power and dictatorship through his reading of Mommsen's work (Rubinelli, 2020a, pp. 108–107, 115). The thesis that runs through Rubinelli's book is that Schmitt overlapped the concepts of sovereignty and constituent power, whereas Sieyès would have made a clear distinction between his moderate exercise of constituent power in constituent moments and Rousseau's radical account of sovereignty. This has important consequences for her analysis of Schmitt's work. According to Rubinelli (2020a, pp. 134–135), for example, Schmitt's Reichspräsident is the new embodiment of the constituent power (=bearer of sovereignty). This interpretation was first developed by Cristi (1998a, p. 70), in which it is argued that Schmitt's president is the bearer of constituent power, being a plebiscitary leader with 'sovereign powers' over the other powers of the state. Although Schmitt nowhere explicitly states that the Reichspräsident is the new bearer of constituent power, the Mommsenian reading assumes that his president is a quasi-sovereign through his emergency powers, i.e., a *sovereign dictator*. Rubinelli (2020a, pp. 138–140) concludes that Schmitt overlaps the concepts of sovereignty and constituent power, which is far from the more liberal and moderate intentions of Sieyès in the French Revolution.

In contrast to Rubinelli's interpretation, Colón-Ríos (2020, pp. 239–248) has developed a reading that emphasizes the importance of the *mandate* or *commission* in Sieyès's idea of constituent power. He points out that Schmitt developed his concept of sovereignty primarily in *Politische Theologie*. Colón-Ríos (2020, p. 246) notes that Schmitt's theory is about how someone makes himself sovereign by deciding and restoring political and constitutional order in the face of a state of exception. Schmitt's sovereign can do anything to achieve this goal, from suspending the constitution to failing to honor its commitments. The sovereign is a personal, absolute, and unlimited power in the face of extreme danger to the existence of the state. Colón-Ríos (2020, p. 247) clarifies that Schmitt's sovereign is not subject to any *mandate*, but can destroy and establish a constitutional order at will. However, Colón-Ríos points out that both Sieyès's original idea of constituent power and Schmitt's reading presuppose that the delegation of sovereignty to create a new constitution necessarily constitutes a *mandate* or *commission* from the constituent power. Colón-Ríos concludes that, paradoxical as it may seem, this necessarily makes *sovereign dictatorship* a de jure power because it bases its legitimacy on a delegation of sovereignty, whereas the sovereign in a state of exception can simply be a de facto power:

> [For Donoso Cortés], it was a dictator that would have all powers, even the constituent one: if the saving of society required the creation of a new constitution, then the sovereign has the power —and the duty— to create it. (...) Whoever exercised that power was a true sovereign entity acting free from any commission, an entity that could do anything. Schmitt, in *Political Theology*, simply called this power sovereignty; his sovereign dictator, in contrast, was all about the creation of new constitutional orders. Schmitt's distinction between sovereignty and constituent power is thus best understood as leading to the conclusion that a constituent assembly authorized to adopt a new constitution is not the sovereign, but a sovereign dictator commissioned to exercise constituent power on behalf of the true sovereign. Sovereignty can in this sense be a de facto power; constituent authority is a de jure one to the extent that it rests on some form of mandate (Colón-Ríos, 2020, p. 247).

In the first chapter I showed that the notions of *mandate* and *commission* are essential components of the concept of constituent power. Therefore, Colón-Ríos is right to see that the *sovereign dictatorship* is not only about the creation of fundamental laws, but above all about the foundations of political legitimacy. It is not only the sovereign dictator who proclaims that he acts on behalf of the constituent power, but the constituent power that gives him the mandate to create a constitution. In the late 18th century, this mandate was understood as a political concept in which an agent received authorization from a principal. I have argued that Sieyès's concept of mandate (*procuration*) has been present in France at least since Diderot's *Encyclopedie,* and that the vocabulary of constituent power presupposes authorization by a principal who, because of impossibility or unwillingness, commissions another to act on his behalf. For Sieyès, this means that *extraordinary representatives* have a mandate to create a constitution and mirror the will of the people as if they were the people themselves. This revolutionary idea of the mandate of the constituent power, which Schmitt takes from Sieyès, is completely absent from Mommsen's conception of constituent power in Roman law. The idea of *delegation of sovereignty* is key to the exercise of the *constituent will*. It is clear, then, that not every *sovereign* is a *sovereign dictator*, that is, a dictator who has a *mandate* from the constituent power to establish a new constitutional order.

The distinction between *sovereignty* and *sovereign dictatorship* has enormous theoretical and empirical consequences for the study of Schmitt's reading of constituent power. In contrast to Rubinelli's reading, Schmitt's sovereign as described in *Politische Theologie* is, for Colón-Ríos, much more than a sovereign dictatorship exercising constituent power. Schmitt's sovereign has no *mandate* or *commission*. The legitimacy of the sovereign lies essentially in his decision to restore order and save the existence of the state. The sovereign could be an absolute monarch, as in the sovereignty theories of Bodin and Hobbes, a dictator like Julius Caesar or Sulla, as described by Nippel (2011) and Pasquino (2021). It

could also be a counterrevolutionary dictator, as depicted by Donoso Cortés (1849/2000), and even a military junta staging a coup d'état and instituting a new constitutional order, as Cristi (1999, p. 1748) describes the Pinochet dictatorship in Chile. Schmitt's idea of the plebiscitary Reichspräsident is also a variant of the concept of *popular autocracy* and not a *sovereign dictator*, that is, a bearer or embodiment of constituent power (Rubinelli, 2020a, pp. 134–135). The distinction between the concepts of sovereignty, constituent power, and sovereign dictatorship opens new possibilities for research, as it allows to distinguish dictatorships with 'sovereign powers' (without commission) from sovereign dictatorships that have the commission from the constituent power to create a new constitutional order.

The distinction between sovereignty and sovereign dictatorship is also important to understand how Schmitt's reading of Sieyès provides the basis for the distinction between a *guardian* of the will of the people and a *sovereign dictator*. A guardian is not a bearer of constituent power. However, a guardian could establish a *popular autocracy*. In *Verfassungslehre* (1928/2008, pp. 243–244), Schmitt introduces his concept of political representation as an *existential* concept. Here he points out that in the 18th century and in the French Revolution, representation is understood as the representation of the will of the people. This form of representation is introduced by Schmitt, especially in his theory of the Reichspräsident as guardian of the constitution (1931/2016). However, as I will show in my chapter on Schmitt's idea of the Reichspräsident, I disagree with the Mommsenian reading, which assumes that Schmitt's president is the new embodiment or bearer of constituent power, i.e., a *sovereign dictator* (Rubinelli, 2020a, pp. 134–135). This interpretation conflates the concepts of sovereignty, dictatorship, and constituent power. On the contrary, based on the distinction between sovereignty and sovereign dictatorship, I show that Schmitt's idea of the dictatorship of the Reichspräsident is a *popular autocracy* without any mandate to create a new constitution. Schmitt's president is a strong, plebiscitary executive that protects the will of the people through the emergency powers of Art. 48 of the Weimar Constitution.

The aim of this chapter is to deepen in the distinction between the concepts of sovereign and sovereign dictatorship through a detailed study that confronts the decisionist idea of sovereignty in *Politische Theologie* (1922/2015) with the idea of sovereign dictatorship in *Die Diktatur* (1921/2015). My study shows that the case of Cromwell's dictatorship, which Schmitt analyzes in the fourth chapter of *Die Diktatur*, is the most illuminating example of how not every dictatorship with 'sovereign powers' is a sovereign dictatorship, i.e., a dictatorship legitimized by the mandate of the constituent power. This also shows that it is the historical literature inspired by Mommsen rather than Schmitt's approach

that has overlaid the concepts of sovereignty, constituent power, and sovereign dictatorship. My study ends with an analysis of Schmitt's concept of the constitution and acclamation as the clearest expression of the idea of *popular autocracy*. In this last section, I emphasize that for Schmitt, the mandate of the constituent power must always be *explicitly* expressed. Its natural expression is *acclamation*. The mandate by acclamation is expressed primarily in revolutions. I emphasize, however, that for Schmitt plebiscites are also a form of expression of the mandate of the constituent power. Here we have another variant of the concept of popular autocracy: Louis Napoleon's plebiscites of 1851 and 1852 are understood by Schmitt as the establishment of a *sovereign dictatorship* because there is a mandate from the people to create a new constitution and establish an 'empire of the people'.

1. The Decisionist Idea of Sovereignty

Plettenberg-born Carl Schmitt (1888-1985) was one of the most important German jurists of his generation. Mehring (2021, pp. 23–41) has shown how the young Schmitt began his career as a criminal lawyer in an intellectual environment influenced by neo-Kantianism. His dissertation was entitled *Über Schuld und Schuldarten* (1910), the subtitle of which (*eine terminologische Untersuchung*) foreshadows his methodological approach, which focuses on the analysis of legal concepts and their different conceptions in different disciplines and historical periods. Schmitt made his career at various universities, including Strasbourg, Munich, and Berlin. During World War I, he served for a short time as a soldier in Munich, which greatly inspired his theory of dictatorship and the state of exception. During the Weimar Republic, Schmitt published his most important works, which brought him international fame. During this period, he radicalized his political stance and became a harsh critic of parliamentarism and democracy. In 1932-1933, Schmitt defended the dictatorship of the Reichspräsident with the application of the emergency powers based on Article 48 of the Weimar Constitution and shortly thereafter became one of the ideologists of the National Socialist theory of the state. His openly anti-Semitic and authoritarian stance sparked a decades-long controversy about how to evaluate his legacy and influence. It is therefore still relevant to discuss the continuity or discontinuity of his political ideas between his youthful writings, his writings in Weimar, and his writings during the National Socialist period.

The central idea I argue in this section is that Schmitt's decisionist idea of sovereignty is fundamentally concerned with the restoration of conditions of normality and *homogeneity* in the face of a state of exception. My remarks are divided into two parts.

In the first part, I explain the concepts of decisionism, state of exception, and political theology. I begin with an extension of the reading proposed by Vinx and Zeitlin (2021), distinguishing between the *legal decisionism* in Schmitt's young writings and the *political decisionism* in his writings of the Weimar Republic. I show that the main idea of legal decisionism lies in the notion of the conditions of normality and *homogeneity*, understood as the establishment of a social or political order that enables legal determinacy and the "realization of the law" (*Rechtsverkirklichung*). In the Weimar Republic, Schmitt takes up this idea and conceptualizes it as acts of sovereignty to restore these conditions of normality in the face of the state of exception: "Sovereign is he who decides on the state of exception." Drawing primarily on an examination of the first and third chapters of *Politische Theologie* (1922/2015), I argue that Schmitt's decisionist idea of sovereignty is not bound by a *mandate*

or *commission*, as the sovereign can theoretically do whatever it wants to achieve the restoration of political and constitutional order. The absence of any constraint shows that the sovereign is the only holder of absolute and unlimited powers. Thanks to his reading of Donoso Cortés, Schmitt found that this idea of sovereignty as a decision can be understood with the analogies between the concepts of modern state theory and Christian theology.

In the second part, I show that Schmitt's reading of Donoso Cortés inspired his evolution from a legal decisionism to a political decisionism that advocated a counterrevolutionary dictatorship. I focus on Schmitt's essays on parliamentarism (1923/2017) and the concept of the political (1927 1932/2018). Donoso Cortés shaped his arguments against liberalism as a government of discussion that avoids decisions in the face of the state of exception. Parliamentary government defends openness, separation of powers and a weak executive. Moreover, I explain that Schmitt followed Donoso Cortés's idea that the epoch of monarchy has come to an end, so that a theory of the state is possible only on the basis of democratic legitimacy. Thus, Schmitt developed his defense of the concept of democracy as *homogeneity* and *acclamation*, in which dictatorship with popular support, like Bolshevik and fascist dictatorship, expresses for him an illiberal but not an anti-democratic theory of the state. Here I find Schmitt's idea of *popular autocracy*. Since his notion of democratic homogeneity presupposes the exclusion of certain groups and the elimination of heterogeneity, I argue that his political concept of homogeneity is best understood in terms of the friend-enemy distinction. I conclude this section by emphasizing that Schmitt's concepts of dictatorship and constituent power, in contrast to his decisionist idea of sovereignty, always presuppose a *mandate* or *commission* from the sovereign. This leads me to Schmitt's distinction between *sovereignty* and *sovereign dictatorship*, which I will develop later.

a. Decisionism, State of Exception, Political Theology

Schmitt was a decisionist thinker from his youth. It is known that his decisionist idea of sovereignty is developed mainly in *Politische Theologie* (1922/2005). However, thanks to the translation and introductory study of Schmitt's early legal writings by Vinx and Zeitlin (2021), we can get a clearer picture of how he anticipates his decisionism in his books *Gesetz und Urteil* (1912) and *Der Wert des Staates* (1914). Schmitt's youth legal-theoretical writings have been commented on in the literature (Hofmann, 2010, pp. 55–62; Mehring, 2021, pp. 23–37; Neumann, 2015, pp. 21–29). Extending the reading proposed by Vinx and Zeitling (2021), I introduce Schmitt by distinguishing between two phases of his decisionism. In my view, his young decisionism is fundamentally a *legal decisionism*, whereas the decisionism he developed in the Weimar Republic is a *political decisionism*. The difference is not in the content, but in the application of decisionism. In his young writings, Schmitt examines the decisionism of judges and the statutory rules, as well as the state and the meta-positive concept of law. The central theme running through the young Schmitt's legal decisionism is the problem of the "realization of the law" (*Rechtsverwirklichung*) (Schmitt, 2021b, p. 197). In the early years of the Weimar Republic, Schmitt expanded this decisionist approach to include an anti-parliamentary stance and a defense of counterrevolutionary dictatorship. The influence of Donoso Cortés on Schmitt is crucial to his evolution toward a decisionist conception of sovereignty. I begin with a brief explanation of Schmitt's legal decisionism.

To explain Schmitt's legal decisionism at the beginning of the 20th century, we need to explain how he entered into a debate about "legal determinacy" in his work *Gesetz und Urteil* (1912, Chapter 3). The predominant position Schmitt opposes is held by positivist jurists who assume the perfect determinacy of statutory law. In the jurisprudential approach of Wilhelmine Germany, it was assumed that "all law is the product of the sovereign will of the state, typically expressed in the form of statutory enactments" (Vinx & Zeitlin, 2021, p. 4). Against this trend, a group of jurists formed, calling themselves the "free law movement" (*Freirechtsbewegung*). Schmitt discusses in his book the ideas of one of the movement's important representatives: Hermann Ulrich Kantorowicz. According to Vinx and Zeitlin, Kantorowicz criticized the positivist approach's assumption that there were techniques to predict judges' decisions: "The belief that decisions are always determined by statutory norms, Kantorowicz concludes, amounts to a kind of false consciousness among legal decision-takers" (2021, p. 5). The statutory positivists assumed that "all legal questions that might arise in a concrete case have a correct answer and that this answer is fully contained in

statutory law, assuming the latter is correctly interpreted" (2021, p. 6). Thus, "what a judge does, in deciding a specific case, is to apply a general decision already taken by the legislator to the concrete situation at hand" (2021, p. 6). The solution that the young Schmitt (1912, Chapter 3) found in the face of this legal debate was to emphasize the legal practice of judges, assuming that their decisions were guided by a "postulate of legal determinacy."

Schmitt's emphasis on legal practice leads him to the idea of "homogeneity" of judicial decisions and legal determinacy. The concept of homogeneity runs from Schmitt's young writings through his major works in Weimar. In the second chapter of *Gesetz und Urteil* (1912), Schmitt lays out his idea of the criterion of the correctness of judicial decisions: "A judicial decision is correct, today, if it is to be assumed that another judge would have decided in the same way" (Schmitt, 2021b, pp. 79–80). His term "another judge" refers to the empirically trained jurist. The goal of legal determinacy, then, is for judges to arrive at a coherent set of conventions from legal practice itself: "The judge is not to become *legibus solutus* ['unbound from the laws'], but a criterion of correctness that is specific to legal practice can be identified only by way of an investigation of legal practice itself" (Schmitt, 2021b, p. 81). However, Schmitt (1912, p. 95, 2021b, p. 123) says that this cannot be achieved by the "judge's subjective sense of justice" alone, but that there must be an intuition for the right decision based on a pre-existing "sense of justice" (*Rechtsgefühl*). In cases of legal indeterminacy, judges have a sense that the decisions they make are appropriate even in difficult cases. This means that, although juristic constructions are heterogeneous, judges form a homogeneous group in their decisions in order to achieve legal determinacy:

> The 'sense of justice' gains a decisive influence on that evaluation only once the notions that are summarized by this phrase are of such general effectiveness amongst judges that they come to ground legal determinacy. The true reason for the decision may then be concealed underneath 'juristic' argumentations, perhaps it will also be mentioned in passing, at the end of the presentation of the 'reasons of decision', that the result that has 'thus been found' also conforms to the 'sense of justice', so that this 'sense of justice' [*Rechtsgefühl*] is sometimes given the function to decide on the correctness and choice of a juristic construction, although juristic constructions are wholly heterogeneous to it, an altogether alien language. In such cases, the 'sense of justice' [*Rechtsgefühl*] is indeed what grounds the correctness of the decision [*Richtigkeit der Entscheidung*] (1912, pp. 95–96, 2021b, p. 123).

This idea of the homogeneity of judicial decisions brings us to the main argument of the book *Der Wert des Staates* (1914). In this work, Schmitt focuses on the concept of "realization of the law" (*Rechtsvervirklichung*): "The state is accordingly the legal construct, whose sense consists exclusively in the task of realizing law" (Schmitt, 2021b, p. 197). The

term *Recht* is to be understood as 'the law' in the objective sense of that which is *right*, as opposed to the term 'a law' (Vinx & Zeitlin, 2021, p. 14). In contrast to *Gesetz und Urteil* (1912), which focuses on *Gesetz* (the "positive statutory rules"), Schmitt rejects the identification of *law* with *statute* in *Der Wert des Staates* (1914). In this book, the focus is not on legal practice but on the decisions that confer legitimacy and authority. In the second chapter, Schmitt analyzes the relationship between the concepts of 'the law' and the state. The legitimacy of the state is understood as the implementation of the meta-positive idea of law (*Recht*). Schmitt sees a connection here to his discussion of the practice of judicial decisions in concrete situations developed earlier in *Gesetz und Urteil* (1912, pp. 95–96). Schmitt's core idea is that the "value of the state" lies in the realization of *Recht*, hence his concept of sovereignty appears here, understood as an "act of sovereign decision:"

> Just as the judicial decision always makes reference to a statute and brings the concrete case under general principles that necessarily go beyond the interest of the concrete case, while the execution, by contrast, is always something concrete and itself again makes reference to a concrete decision, so as to hang together only mediately with the domain of the more general statute, so the abstract legal thought takes form in a positive state statute. (...) The legal thought, which is to serve as a yardstick for the transformation of reality, must become positive, that is, its content is set by an act of sovereign decision [*Akt souveräner Entscheidung*], it becomes a statute and is articulated in a concrete version. Therewith the abstractness of the legal thought does not signify something attained out of concrete legal propositions via omission – such a method could not yield anything noteworthy – but rather the detachedness from every empirical appearance (1914, p. 78, 2021b, p. 213).

Schmitt's legal decisionism lies in the idea of the conditions of normality or *homogeneity*, understood as the establishment of a social or political order that enables legal determinacy and the realization of the law. Schmitt developed his legal decisionism in a context of peace, whereas in the early 1920s the context was one of political and social crisis.

In the Weimar Republic, Schmitt continued to defend this concept of "acts of sovereign decisions" that create conditions of homogeneity for the realization of the law (*Recht*). Here lies the theoretical connection with the political decisionism of *Die Diktatur* and *Politische Theologie*. In his *political decisionism*, Schmitt states that positive law is not possible in chaos and anarchy, but only under conditions of normality, i.e., in a "homogeneous medium" (1922/2005, p. 13). Thus, Schmitt's political decisionism means that the sovereign suspends positive law in order to restore the situation of normality. The sovereign decides what is 'normal' or 'abnormal' on the basis of a prior decision for a conception of the social and political order. Interestingly, Vinx and Zeitlin (2021, p. 26)

extend this argument to Schmit's idea of constituent power, since the sovereign's decision for a particular social or political order must be supported by the people. The authors explain that Schmitt claims that "it is the sovereign's task to reconstitute the social conditions of legal determinacy, of the predictable and calculable applicability of positive legal norms" (Vinx & Zeitlin, 2021, p. 25). For this reason, "a successful exercise of constituent power homogenizes society and thus creates the conditions for the determinate (and therefore legitimate) applicability of positive law" (Vinx & Zeitlin, 2021, p. 27). After this brief introduction to Schmitt's legal decisionism, we can now move on to his political decisionism.

Political decisionism is found mainly in *Politische Theologie*, which deals with the concept of sovereignty and only secondarily with Sieyès's idea of constituent power (Schmitt, 1922/2005, p. 51). Two sentences summarize the central argument of the book: "Sovereign is he who decides on the state of exception" (1922/2005, p. 5) and "all significant concepts of the modern theory of the state are secularized theological concepts" (1922/2005, p. 36).

These ideas are developed in four chapters: the concept of sovereignty and the state of exception, the critique of legal positivism (especially Hans Kelsen), the concept of political theology, and the political philosophy of counterrevolution (especially Donoso Cortés). The translation, dissemination, and influence of this work have spanned decades, opening up an entire field of research devoted to the study of political theology (Dean et al., 2023). The book has been variously interpreted in recent decades, with works oriented toward a critical approach to the 'existentialist' reading initiated by Krockow (1958) (Orsi, 2022; Rech, 2015; Wolin, 1990), philosophical interpretations from the perspective of the so-called "theologico-political problem" (Meier, 1992, 2016; Vatter, 2020), and legal and political-historical critiques of the illiberal character of Schmitt's political decisionism (Hofmann, 2010; Scheuerman, 2020; Vinx, 2015a). Despite all the differences and criticisms, there is a general consensus that this book contains the political decisionism that Schmitt's other works published during the Weimar Republic takes up. Since an exhaustive historiography of *Politische Theologie* (1922/2005) is not possible here, I will focus on Schmitt's idea of sovereignty as a decision in the first and third chapters of the book.

The first chapter of *Politische Theologie* deals with the question of how someone becomes sovereign during a state of exception to protect the political and constitutional order. Schmitt argues that sovereignty is a "borderline concept" (*Grenzbegriff*), so that from the point of view of state theory it can only be understood via the state of exception (*Ausnahmezustand*) (Schmitt, 1922/2005, p. 5, 1922/2015, p. 11). The state of exception is not synonymous with an emergency decree (*Notverordnung*) or the state of siege

(*Belagerungszustand*). The decision on the exception is a decision in the true sense of the word, since it contradicts the concept of the general norm (*generelle Norm*), because this idea, "as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm" (1922/2005, p. 6). Schmitt says that the exception cannot be derived from a norm or equated with a decree, but refers to an extreme situation, a political situation that acutely threatens the existence of the state: "What is argued about is the concrete application, and that means who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, *le salut public*, and so on" (1922/2005, p. 6).

The state of exception cannot be defined in terms of the norm, but as a political situation of "extreme peril" or "danger to the existence of the state," so that "it cannot be circumscribed factually and made to conform to a preformed law" (1922/2005, p. 6). In short, the state of exception as an extreme situation is linked to the concept of sovereignty, which is understood as a decision on an extreme danger to the existence of the state:

> It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty. The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited (Schmitt, 1922/2005, pp. 6–7).

Schmitt thus links the concepts of sovereignty and decision. In a state of exception, the sovereign is free from any *mandate* or *commision* when he makes a decision to restore political and constitutional order. Colón-Ríos (2020, p. 247) is correct in saying that Schmitt understands the absence of a *commission* and the possibility of doing 'anything' as sovereignty. In *Politische Theologie*, the sovereign is not controlled by checks and balances or bound by a constitution because "he decides whether there is an extreme emergency as well as what must be done to eliminate it" (1922/2005, p. 7). Moreover, the sovereign stands beyond *positive law*, but belongs to the *Recht*: "He stands outside the normally valid legal system (*Rechtsordnung*), he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety" (1922/2005, p. 7, 1922/2015, p. 14). Schmitt argues that this notion of sovereignty as a decision was implicit in Bodin's conception of sovereignty, found primarily in chapter 10 of the first book of the *Six livres de la République* (1576). For Schmitt, Bodin's sovereign is responsible to the estates and bound

by the laws because the commitments are binding to natural law; however, "in emergencies (*Notfall*) the tie to general natural principles ceases" (1922/2005, p. 8).

Bodin's notion of *urgente necessité* is used by Schmitt to affirm that "the prince is duty bound toward the estates or the people only to the extent of fulfilling his promise in the interest of the people," but "he is not bound under conditions of urgent necessity" (1922/2005, p. 8). The German jurist concludes that what matters most is that the decision is incorporated into Bodin's concept of sovereignty:

> This is what is truly impressive in [Bodin's] definition of sovereignty; by considering sovereignty to be indivisible, he finally settled the question of power in the state. His scholarly accomplishment and the basis for his success thus reside in his having incorporated the decision into the concept of sovereignty [*daß er die Dezision in den Souveränitätsbegriff hineingetragen hat*]. Today there is hardly any mention of the concept of sovereignty that does not contain the usual quotation from Bodin. But nowhere does one find cited the core quote from that chapter of the Republic (Schmitt, 1922/2005, p. 8, 1921/2015, p. 15).

This reading of Bodin's idea of sovereignty as a decision aims at the question of who is the sovereign (*Subjekt der Souveränität*). Schmitt is dissatisfied with the classical definition of sovereignty as "the highest, legally independent, underived power" (1922/2005, p. 17). He believes that "such a definition can be applied to the most different political-sociological configurations and can be enlisted to serve the most varied political interests" (1922/2005, p. 17). Schmitt tends to view this classical concept of sovereignty as an abstract definition that blurs the concrete question of who the sovereign is. In his presentation of the ideas of sovereignty of Hobbes and Pufendorf, he asserts that "everyone agrees that whenever antagonisms appear within a state, every party wants the general good -therein resides after all the *bellum omnium contra omnes*" (1922/2005, p. 9). However, he says, "sovereignty (and thus the state itself) resides in deciding this controversy, that is, in determining definitively what constitutes public order and security, in determining when they are disturbed, and so on" (1922/2005, p. 9). This appropriation of the ideas of early modern authors such as Bodin, Hobbes, and Grotius has been critically commented on in the literature (Schröder, 2012). Beyond this discussion, it is important to point out that Schmitt focuses on the question of who is the sovereign in the modern theory of the state:

> Whether God alone is sovereign, that is, the one who acts as his acknowledged representative on earth, or the emperor, or prince, or the people, meaning those who identify themselves directly with the people, the question is always aimed at the subject of sovereignty [*Subjekt der Souveränität*], at the application of the concept to a

> concrete situation. Ever since the sixteenth century, jurists who discuss the question of sovereignty have derived their ideas from a catalogue of determining, decisive features of sovereignty that can in essence be traced to the points made by Bodin. To possess those powers meant to be sovereign (Schmitt, 1922/2005, p. 10).

The discussion of who is the sovereign brings us to Schmitt's idea of the "monarchical principle" (*das monarchische Prinzip*) and his brief explanation of Art. 48 of the Weimar Constitution in *Politische Theologie*. It is important to note that Schmitt refers here to the concept of sovereignty and not to Sieyès's idea of constituent power, as has been suggested in the literature (Cristi, 1998a, pp. 69–70; Kelly, 2003, pp. 181–182; Rubinelli, 2020a, p. 133). What he does is to use the idea of the state of exception to clarify who the sovereign is: "In a more familiar vein it was asked, Who is supposed to have unlimited power? Hence the discussion about the exception, the *extremus necessitatis casus*" (1922/2005, p. 10). For Schmitt, this discussion has the same "legal-logical structure in the discussions on the so-called monarchical principle" (1922/2005, pp. 10–11). The concept of the monarchical principle was developed at the beginning of the 19th century in connection with the Bourbon Restoration in France (Jaeger, 2008, pp. 696–697; Kordeva, 2020). The idea was that the *holder of state power*, i.e. the subject of sovereignty, is the monarch, not the people. The monarchical principle rejects popular sovereignty and asserts that only the king is the true sovereign. Schmitt points out that this idea is expressed in Art. 14 of the French Charter of 1815, which "made the monarch the sovereign" (1922/2005, p. 11).

In contrast to the monarch as sovereign, Schmitt notes in *Politische Theologie* that if Art. 48 grants emergency powers to the Reichspräsident, he is nevertheless subject to control by the other powers of the state. He warns, however, that without these controlling powers, Art. 48 would provide unlimited powers, making the Reichspräsident 'sovereign' like the French king in 1815. He thus distinguishes between the emergency powers granted by Art. 48 of the Weimar Constitution and the unlimited powers of the sovereign in a state of exception:

> … Not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority [*unbegrenzte Befugnis*], which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind [*Rechtsordnung*]. The existence of the state is undoubted proof of its superiority over the validity of the legal norm. The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation [*Selbsterhaltungsrecht*], as one would say (Schmitt, 1922/2005, p. 12, 1922/2015, pp. 18–19).

This explanation of the decision as the restoration of the political and legal order (*Rechtsordnung*) is linked to Schmitt's idea of *homogeneity*. As I have argued above, Vinx and Zeitlin (2021) rightly point out that in Schmitt's early legal-theoretical writings, especially in *Der Wert des Staates* (1914), one can observe that the value and authority of the state "derive exclusively from this function of the realization of *Recht*" (Vinx & Zeitlin, 2021, p. 15). Indeed, in the introduction to *Die Diktatur*, Schmitt (1921/2014, p. xlv) mentions that his study of the concept of dictatorship is embedded in this discussion of the realization of *Recht* (*Rechtsverwirklichung*), which he had already begun in his early legal writings. For Vinx and Zeitlin, Schmitt defended in Weimar the "acts of sovereignty that restore a condition of normality and thus secure the legitimate applicability of statutory norms" (2021, p. 29). In *Politische Theologie*, Schmitt takes up this discussion again when he points out that "the norm requires a homogeneous medium. This effective normal situation is not a mere 'superficial presupposition' that a jurist can ignore" (1922/2005, p. 13). Here, Schmitt refers to the state of exception as a situation that impedes the proper enforcement of positive laws: "Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subject to its regulations" (1922/2005, p. 13).

In *Politische Theologie*, the concept of homogeneity means the conditions of normality guaranteed by the sovereign, who suspends *positive law* so that the political order remains first and then allows the realization of *Recht*:

> There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist [*Die Ordnung muß hergestellt sein, damit die Rechtsordnung einen Sinn hat*], and he is sovereign who definitely decides whether this normal situation actually exists. All law is "situational law." The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide [*Entscheidungsmonopol*]. The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm [*Rechtsnorm*], and (to formulate it paradoxically) authority proves that to produce law it need not be based on law [*Recht*] (Schmitt, 1922/2005, p. 13, 1921/2015, p. 19).

Schmitt concludes the first chapter on the concept of sovereignty by establishing an antagonism between exception (*Ausnahme*) and order (*Ordnung*), between the *general* (the norm) and the *concrete* (the decision). He points out that in the constitutional theory of John Locke and 18th century rationalism, the exception is seen as incommensurable. The rationalist tendency, Schmitt argues, tends to overlook the exception because law tends to 'suspend

itself' in a concrete situation of extreme danger to the existence of the state. This is where his critique of liberalism comes in: "The tendency of liberal constitutionalism to regulate the exception as precisely as possible means, after all, the attempt to spell out in detail the case in which law suspends itself" (1922/2005, p. 14). Then Schmitt polemically affirms that "the exception confounds the unity and order of the rationalist scheme" (1922/2005, p. 14), so "precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree" (1922/2005, p. 15). The literature has found an 'existentialist' inspiration that Schmitt might have had when he quotes the philosopher Søren Kierkegaard at the end of the first chapter (Conrad, 2008; Gould, 2013; Löschenkohl, 2019). Apart from these parallels to existentialist philosophy, what is important for my argument is that Schmitt finds the exception more interesting than the rule (*die Regel*):

> The exception can be more important to it than the rule, not because of a romantic irony for the paradox, but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition (Schmitt, 1922/2005, p. 15).

This passage at the end of the first chapter relates to Schmitt's reading of Thomas Hobbes as a classical decisionist thinker. Here Schmitt notes the antagonism between the concepts of law (*Gesetz*) and command (*Befehl*). I will not focus here on Schmitt's critique of the legal positivism of his generation and, in particular, the work of Hans Kelsen in chapter two. It is important for my remarks that Schmitt comes back to this antagonism between *norm* and *decision* towards the end of this chapter, but now presents it as an antagonism between the *norm*, which 'depersonalizes' the concept of sovereignty, and the *command*, which is exercised by the subject of sovereignty: "The law gives authority, said Locke, and he consciously used the word law antithetically to *commissio*, which means the personal command of the monarch. But he did not recognize that the law does not designate to whom it gives authority" (1922/2005, p. 32). Schmitt criticizes that the norms only indicate how to decide, but not who has to decide. In contrast, he presents Hobbes's notion of authority as one personified in the sovereign. As in his reading of Bodin, Schmitt highlights how the concept of decision was incorporated into Hobbes's concept of sovereignty: "It is striking that one of the most consequential representatives of this abstract scientific orientation of the seventeenth century became so personalistic" (1922/2005, p. 34). Schmitt thus presents his recurring reading that separates the concepts of *autoritas* and *veritas* in Hobbes's political philosophy:

> The classical representative of the decisionist type (if I may be permitted to coin this word) is Thomas Hobbes. The peculiar nature of this type explains why it, and not the other type, discovered the classic formulation of the antithesis: *autoritas, non veritas facit legem*. The contrast of *autoritas* and *veritas* is more radical and precise than is Friedrich Julius Stahl's contrast: authority, not majority. Hobbes also advanced a decisive argument that connected this type of decisionism with personalism and rejected all attempts to substitute an abstractly valid order for a concrete sovereignty of the state (Schmitt, 1922/2005, p. 33).

Schmitt's passage on the political philosophy of Thomas Hobbes leads us to the third chapter of *Politische Theologie*. In the first and second chapters of this book, he explains the concept of sovereignty through the antagonism between *exception* and *order*, between *decision* and *norm*, between the *abstract*/*general* and the *concrete*. In his manuscripts on Donoso Cortés (Schmitt, 1920?), I found how Schmitt synthesizes his political decisionism through these conceptual oppositions, which justifies his idea of the polemical meaning of all political concepts (Schmitt, 1932/2007, p. 30). The main idea of the third chapter is that the modern concept of sovereignty is analogous to some concepts of the Christian theology. Schmitt's famous statement that "all the significant concepts of modern state theory are secularized theological concepts" (1922/2005, p. 36) has opened up an entire field of research that continues to generate debate among scholars (Dean et al., 2023; Meier, 1992; Vatter, 2020). I will not discuss here the immense literature inspired by the third chapter of *Politische Theologie*, for that would merit a historiography focusing exclusively on that chapter. I will continue to focus on Schmitt's decisionist concept of sovereignty.

In the third chapter of *Politische Theologie*, Schmitt draws analogies between the concepts of Christian theology and modern state theory. As Baume (2022) has rightly noted, Schmitt had already used the analogy between the state and the Catholic Church in his early legal writings and in his books *Politische Romantik* and *Die Diktatur*. Schmitt says that the concepts of modern state theory "were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver" (1922/2005, p. 36). On the subject of the exception, Schmitt states, "the exception in jurisprudence is analogous to the miracle in theology" (1922/2005, p. 36). It is problematic that Schmitt does not explain the meaning of the term miracle in *Politische Theologie* or in any of his later works. However, his critique is that the application of these theological analogies to understand the nature of the state of exception was denied by the rationalist philosophy of the Enlightenment. On the contrary, Schmitt points out that "conservative authors of the counterrevolution who were theists could thus attempt to support the personal sovereignty of

the monarch ideologically, with the aid of analogies from a theistic theology" (1922/2005, p. 36). Although he does not explain the meaning of the exception as an analogy to the miracle in theology, Schmitt makes clear that these theological analogies can be found in the writings of Catholic political theorists who defended sovereignty as a *decision* against revolution:

> The most interesting political application of such analogies is found in the Catholic philosophers of the counterrevolution, in Bonald, de Maistre, and Donoso Cortés. What we immediately recognize in them is a conceptually clear and systematic analogy, and not merely that kind of playing with ideas, whether mystical, natural-philosophical, or even romantic, which, as with everything else, so also with state and society, yields colorful symbols and pictures (Schmitt, 1922/2005, p. 37).

In explaining these theological analogies in the concepts of modern state theory, Schmitt focuses particularly on the concept of sovereignty and the idea of the legislator in Rousseau's political philosophy. Schmitt points out that political theology is based on the method of the "sociology of concepts" (*Soziologie von Begriffen*). This theoretical approach was developed by Adolf Menzel, who shows that sociology "has assumed functions that were exercised in the seventeenth and eighteenth centuries by natural law, namely, to utter demands for justice and to enunciate philosophical-historical constructions or ideals" (1922/2005, p. 38). The sociology of the concept of sovereignty, Schmitt argues, does not mean, for example, that 17th century monarchy mirrors the Cartesian concept of God. More precisely, the sociology of the concept of sovereignty shows that monarchy corresponded "to the general state of consciousness that was characteristic of western Europeans at that time, and when the juristic construction of the historical-political reality can find a concept whose structure is in accord with the structure of metaphysical concepts" (1922/2005, pp. 45–46). Thus monarchy "becomes as self-evident in the consciousness of that period as democracy does in a later epoch" (1922/2005, p. 46). Following this political-theological approach, Schmitt asserts that the omnipotence of the modem legislator "is not only linguistically derived from theology," but "many reminiscences of theology also appear in the details of the argumentation, most of course with polemical intent" (1922/2005, p. 38). Schmitt presents Rousseau's idea of sovereignty as a political-theological concept:

> "Imitate the immutable decrees of the divinity." This was the ideal of the legal life of the state that was immediately evident to the rationalism of the eighteenth century. This utterance is found in Rousseau's essay *Political Economy*. The politicization of theological concepts, especially with respect to the concept of sovereignty, is so striking that it has not escaped any true expert on his writings. Said Émile Boutmy,

> "Rousseau applies to the sovereign the idea that the philosophes hold of God: He may do anything that he wills but he may not will evil" (Schmitt, 1922/2005, p. 38).

Here I come to an important point in my study, for in these passages of *Politische Theologie* Schmitt distinguishes his decisionist idea of sovereignty from Sieyès's idea of constituent power. The German jurist explains that the conception of God in the 17th and 18th centuries has an idea of God's transcendence vis-à-vis the world, "just as to that period's philosophy of state belongs the notion of the transcendence of the sovereign vis-à-vis the state" (1922/2005, p. 49). This sovereign is defined as "the architect and master builder of the world" who is "simultaneously the creator and the legislator, which means the legitimizing authority" (1922/2005, p. 48). In the French Revolution this "architect of world and state was called the legislator" (1922/2005, p. 48). Schmitt notes that behind this view is a metaphysical idea shared by the philosophies of Leibniz and Malebranche, where it is said that "God enunciates only general and not particular declarations of will" (1922/2005, p. 48). Thus, the German jurist says that "the general will of Rousseau became identical with the will of the sovereign; but simultaneously the concept of the general also contained a quantitative determination with regard to its subject, which means that the people became the sovereign" (1922/2005, p. 48). Schmitt sees the decline of the personalist and decisionist concept of sovereignty, which he saw in the state theories of Bodin and Hobbes, with the emergence of Rousseau's concept of *volonté générale* and Sieyès's idea of constituent power:

> The decisionistic and personalistic element in the concept of sovereignty was thus lost. The will of the people is always good: "The people are always virtuous." Said Emmanuel Sieyès, "In whatever manner a nation expresses its wishes, it is enough that it wishes; all forms are good but its will is always the supreme law." But the necessity by which the people always will what is right is not identical with the rightness that emanated from the commands of the personal sovereign. In the struggle of opposing interests and coalitions, absolute monarchy made the decision and thereby created the unity of the state. The unity that a people represents does not possess this decisionist character; it is an organic unity, and with national consciousness the ideas of the state originated as an organic whole (Schmitt, 1922/2005, pp. 48–49).

According to this passage, the concepts of *sovereignty as a personal decision* and *constituent power* are different and could even be antagonistic. The legitimacy of Schmitt's sovereign in *Politische Theologie* does not derive from a mandate of the people, but from restoring order and saving the existence of the state in the face of a state of exception. This statement leads us to how Schmitt's narrative of the restoration of political order and homogeneity continues in his theory of "concrete-order thinking" in the mid-1930s.

In his essay on the three types of juristic thought (1934/2004), Schmitt refers to the *Recht* as *normativism*, *concrete order*, and *decisionism*. The theory of concrete order emphasizes that *Recht* is above all *nomos*. But *nomos* is not synonymous with law, statute or norm (1934/2004, p. 50). *Nomos* is above all a *Recht*-order. Institutions such as the monarch, the governors, or the judge are concrete orders, so that norms presuppose the existence of this order. Schmitt locates the work of institutionalist jurists like Santi Romano (1918/2018) and Maurice Hauriou (1925/1990) in this way of juristic thought. Because of this emphasis on concrete order and institutions, there is an important debate today, especially developed by Croce and Salvatore (2021b, 2023a), about whether Schmitt abandoned the decisionism he espoused in Weimar and embraced the concept of concrete order in 1934. The reading of Vinx and Zeitlin (2021), on the other hand, sees a continuity between the idea of *homogeneity* and the restoration of order in Schmitt's youthful writings on legal theory and his theory of concrete order. It is not my intention to go into this important debate, but only to point out that Schmitt in 1934 systematizes his decisionist idea of sovereignty in *Politische Theologie*.

Schmitt points out that decisionist thought refers to an "act of will" as a synonym for a decision that establishes an order (*Recht*) (1934/2004, p. 59). For decisionist thought, it is the sovereign's decision that expresses a command. Here Schmitt takes up his reading of Hobbes as a decisionist thinker of sovereignty. He says that for Hobbes all laws, statutes, and interpretations of laws go back to the decision of the sovereign. Here he takes up Hobbes' phrase *auctoritas non veritas facit legem* to emphasize that the meaning of *auctoritas* is simultaneously *summa auctoritas* and *summas potestas*. For Schmitt, the sovereign establishes the conditions of order and *homogeneity*: "Whoever establishes peace, security, and order is sovereign and has all authority" (1934/2004, p. 61). This establishment of an order and homogeneity does not derive from a mandate or a commission from the people: "As genuine and pure decision, this establishment of order can neither be derived from contents of a preceding norm nor from a previously preceding order" (1934/2004, p. 61). The decision establishes order because the enforcement of norms is not possible in chaos. Schmitt concludes his decisionist idea of sovereignty by pointing out that the decision in the state of exception is not preceded by any mandate from the people: "The sovereign decision springs from the normative nothing and a concrete disorder" (1934/2004, p. 62).

The decisionist idea of sovereignty is different from the idea of *sovereign dictatorship*. Schmitt's sovereign in *Politische Theologie* is not subject to any *mandate*, since he could theoretically do 'anything' to restore order and homogeneity. The distinction between Rousseau's and Sieyès's idea of the general will and Schmitt's decisionist reading of the

concept of sovereignty in Bodin and Hobbes leads us to his critique of parliamentarism and his defense of counterrevolutionary dictatorship. So far, I have explained how Schmitt presents his idea of sovereignty as a decision in the face of a state of exception, a situation of extreme danger to the existence of the state. He develops his political decisionism through antagonisms: exception vs. order, norm vs. decision, abstract/general vs. concrete, law vs. command, *ratio* vs. *voluntas*. His political-theological approach looks for the analogies of these concepts in Christian theology. What is important for my study, which aims to show the difference between the concepts of *sovereignty* and *sovereign dictatorship*, is that Schmitt acknowledges that the legitimacy of the decisionist idea of sovereignty began to falter after the European revolutions of the 18th and 19th centuries. Nevertheless, he makes a nostalgic attempt to revive the personalist element of sovereignty by glorifying the political thought of the Catholic theorists of the counter-revolution, especially the ideas of Donoso Cortés.

b. Anti-Parliamentarism, Democratic Homogeneity, Political Enmity

Schmitt's decisionist idea of sovereignty is related to his notion of the restoration of the conditions of normality in the face of a state of exception, i.e., the restoration of political order and *homogeneity*. Decisionist thought was already in Schmitt's early legal writings (2021b), in particular in *The Value of the State* (1914) as the guarantor of the realization of law (Vinx & Zeitlin, 2021, pp. 24–25). In the Weimar Republic, however, his *legal decisionism* evolved into *political decisionism* through his Donoso Cortés-inspired anti-parliamentarism and his defense of counterrevolutionary dictatorship in *Politische Theologie* (1922/2015). There are two important books besides *Politische Theologie* from which his political decisionism can be understood as a restoration of *homogeneity*: *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1923/2017) (*The Crisis of Parliamentary Democracy*) and *Der Begriff des Politischen* (1932/1979) (*The Concept of the Political*, originally published in 1927). In what follows, I will explain Schmitt's political decisionism in these texts by highlighting three ideas. First, his critique of parliamentarism inspired by Donoso Cortés. Second, his conception of democratic homogeneity as the idea of a *popular autocracy*. Third, Schmitt's political conception of homogeneity as the distinction between friend and enemy (*die Freund-Feind-Unterscheidung*). I end this section by returning to Schmitt's defense of his decisionist idea of sovereignty inspired by Donoso Cortés's defense of counterrevolutionary dictatorship.

The decisionist idea of sovereignty expresses a political stance against parliamentary government and a defense of counterrevolutionary dictatorship. I have argued that *Politische Theologie* is primarily concerned with the concept of sovereignty and only secondarily with Sieyès's idea of constituent power. Toward the end of the third chapter, Schmitt points out that the theory of public law has become 'positive' since the revolutions of 1848, and that "the theory has propounded in different paraphrases the idea that all power resides in the *pouvoir constituant* of the people, which means that the democratic notion of legitimacy has replaced the monarchical" (1922/2005, p. 51). Here Schmitt draws his inspiration from the political works of Donoso Cortés, whom he describes as "one of the foremost representatives of decisionist thinking and a Catholic philosopher of the state" (1922/2005, p. 51). According to Schmitt, Donoso Cortés, referring to the revolution of 1848, concluded that "the epoch of royalism was at an end" and therefore "legitimacy no longer exists in the traditional sense" (1922/2005, p. 51). Schmitt notes that Donoso Cortés expresses the defense of the decisionist conception of sovereignty advocated by Hobbes: "For him there was thus only one solution:

dictatorship. It is the solution that Hobbes also reached by the same kind of decisionist thinking, though mixed with mathematical relativism. *Autoritas, non veritas facit legem*" (1922/2005, p. 52). In contrast to his early legal decisionism, Schmitt evolved to *political decionism* through this reading of Donoso Cortés's critique of parliamentarism.

In the fourth chapter of *Politische Theologie*, Schmitt develops a description of Catholic counterrevolutionary thought, focusing primarily on the case of Donoso Cortés and secondarily on Joseph de Maistre and Louis de Bonald. Schmitt says that the political radicalism of the proletarian revolutions of 1848 was more profound than the revolution of 1789, so that "the intensity of the decision was also heightened in the political philosophy of the counterrevolution" (1922/2005, p. 56). He describes how Donoso Cortés uses theological analogies to criticize Proudhon's anarchism as atheistic. Schmitt portrays the Spanish politician as a political-theological thinker who takes a pessimistic view of human nature and portrays the struggle against revolution as "the bloody decisive battle that has flared up today between Catholicism and atheist socialism" (1922/2005, p. 59). The literature has extensively addressed the inaccuracies of Schmitt's interpretation of Donoso Cortés's political writings (Fox, 2013, pp. 182–185; Spektorowski, 2002, pp. 298–302). For Mehring (2020), Schmitt used Donoso Cortés as a "mask" for his political purposes in his early advocacy of counterrevolution in Weimar. Fundamental to my remarks, however, is that even if Schmitt misinterpreted Donoso Cortés, he takes his critique of parliamentary government. The German jurist is fascinated by Donoso Cortés's description of the bourgeoisie as a "*clase discutidora*" (1851/2019) incapable of making a decision in the face of a state of exception:

> According to Donoso Cortés, it was characteristic of bourgeois liberalism not to decide in this battle but instead to begin a discussion. He straightforwardly defined the bourgeoisie as a "discussing class," *una clase discutidora*. It has thus been sentenced. This definition contains the class characteristic of wanting to evade the decision. A class that shifts all political activity onto the plane of conversation in the press and in parliament is no match for social conflict (Schmitt, 1922/2005, p. 59).

The enthusiasm for Donoso Cortés's critique of parliamentary government is directly related to the central argument of his book *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1923/2017). In the fourth chapter of *Politische Theologie* (1922/2015), Schmitt anticipates the central argument of his book on parliamentarism through the ideas of Donoso Cortés. According to Schmitt, the way Donoso Cortés views parliamentarism as the rule of the bourgeoisie as a "*clase discutidora*" is not "the last word on Continental liberalism in its entirety, but it is certainly a most striking observation" (1922/2005, pp. 62–63). He

affirms that Donoso Cortés portrays liberalism as inconsequential because of its inability to make a decision that implies radical negations. For Schmitt, this is not a coincidence, but the consequence that follows from liberal metaphysics, since the bourgeoisie is "the class committed to freedom of speech and freedom of the press" (1922/2005, p. 62). In contrast, Donoso Cortés "considered continuous discussion a method of circumventing responsibility" because "just as liberalism discusses and negotiates every political detail, so it also wants to dissolve metaphysical truth in a discussion" (1922/2005, p. 63). Schmitt concludes that Donoso Cortés clearly portrays the anti-decisionism of liberalism and parliamentary government: "The essence of liberalism is negotiation, a cautious half measure" in the hope that the decisive bloody battle "can be transformed into a parliamentary debate and permit the decision to be suspended forever in an everlasting discussion" (1922/2005, p. 63).

From my understanding, Schmitt's essay on parliamentarism (1923/2017) merely deepens the ideas he had already found in Donoso Cortés. The second chapter of this essay, in particular, is concerned with the foundations of parliamentary democracy. He points out that a study of the relationship between democracy and parliamentarism must start from a political-theological approach, because in this way one can understand that "democracy can exist without what one today calls parliamentarism and parliamentarism without democracy" (1923/1988, p. 32). The essence of parliament is "public deliberation of argument and counterargument, public debate and public discussion, parley, and all this without taking democracy into account" (1923/1988, pp. 34–35). For Schmitt, the 19th century French liberal politician Guizot expressed the political principles of parliamentary democracy:

> The absolutely typical chain of thought is to be found in the absolutely typical representative of parliamentarism, in Guizot. Starting from right (as the opposite to might), he lists the essential characteristics of a system that guarantees the rule of law: (1) that "the powers" are always forced to discuss and thereby to seek the truth together; (2) that the openness of the whole of political life places "the powers" under the citizens' control; and (3) that press freedom prompts citizens to seek the truth for themselves and to make it known to "the powers." (Schmitt, 1923/1988, p. 35).

According to Schmitt, the foundations of parliamentarism are essentially based on *openness* and the *division of power* to ensure limited government. Schmitt believes that liberalism is a metaphysical system that strives for truth: "The truth can be found through an unrestrained clash of opinion and that competition will produce harmony" (1923/1988, p. 35). And that this truth is found through a free competition of ideas: "The intellectual core of this thought resides finally in its specific relationship to truth, which becomes a mere function of the eternal competition of opinions" (1923/1988, p. 35). Here Schmitt takes up a criticism he

had already voiced in his book *Politische Romantik* (1919/1998, p. 32), where he portrays the German Romantic thinkers of the 19th century as lovers of "unending conversation" (*ewiges Gespräch*) (1923/1988, p. 36). The exchange of ideas presupposes the openness of ideas to debate. This political principle of liberalism contrasts with the doctrine of reason of state and *arcana* of 16th and 17th century political thinkers such as Machiavelli and Clapmarius (Schmitt, 1921/2014, Chapter 1). The principle of openness is complemented by the doctrine of division of powers, which aims at the deconcentration of power. The disentanglement of politics from secrecy gives rise to the concept of *public opinion* in the Enlightenment: "The power of a despot can be all the greater as Enlightenment increases, for Enlightened public opinion makes the abuse of power impossible in itself" (1923/1988, p. 38).

Parliamentary democracy is also portrayed by Schmitt as a system designed to weaken executive power. This topic will be of paramount importance in his later defense of the *Reichspräsident* as the guardian of the constitution (1931/2016). The principles of *openness* and *division of powers* are complemented by the idea of law as *veritas* as opposed to mere *auctoritas*. Schmitt says that this idea of law "has always been conceived as something intellectual, unlike the executive, which is essentially active. Legislation is *deliberare*, executive *agere*" (1923/1988, p. 45). Schmitt notes that the tendency to subordinate the executive to the legislative began in the French Enlightenment, where there is a "potent formula for the executive in the constitution of 5 Fructidor III (Title IX, 275). "No armed force can deliberate" (1923/1988, p. 45). The same is found in *The Federalist* (1788), where executive power must be in the hands of a single person because "his energy and activity depend upon it" (1923/1988, p. 45). Thus, "legislation is deliberation and therefore must be made by a larger assembly, while decision making and protection of state secrets belong to the executive, things which 'decline in the same measure as the numbers increase'" (1923/1988, p. 45). Schmitt concludes that the principle of discussion and exchange of ideas applies only to the legislative branch, but not to the executive: "Different opinions are useful and necessary in the legislative; but not in the executive, where especially in times of war and disturbance action must be energetic; to this belongs a unity of decision" (1923/1988, p. 45).

In the introduction to the second edition (1926) of his book on parliamentarism, Schmitt radicalizes his Donoso Cortés-inspired anti-parliamentary reading by pointing out that "the situation of parliamentarism is critical today because the development of modern mass democracy has made argumentative public discussion an empty formality" (1923/1988, p. 6). By Schmitt's time, other writers such as Robert Michels (1910/1970) had already developed a critique of parliamentary government in the context of mass democracy and the

bureaucratic tendency of political parties. It is known that Schmitt's critique of parliamentarism was also influenced by the political ideas of Max Weber (1919/1988, 1918/1988), who criticized the rule of shifting political party coalitions in his political writings. As we will see in the next chapter, Weber (1919/1994a) advocated the idea of a strong executive (*Reichspräsident*) to avoid the crisis of parliamentary government. Here, Schmitt echoes the idea of the "sociology of concepts" in his *Politische Theologie* when he refers to the context of parliamentarism. The German jurist says that "the masses are won over through a propaganda apparatus whose maximum effect relies on an appeal to immediate interests and passions" (1923/1988, p. 6). Thus, Schmitt radicalizes Weber's critique by highlighting the corruption of the foundations of parliamentary government explained by Donoso Cortés: "Argument in the real sense that is characteristic for genuine discussion ceases. In its place there appears a conscious reckoning of interests and chances for power in the parties' negotiations" (1923/1988, p. 6).

Here Schmitt introduces his idiosyncratic idea of the concept of democracy as *homogeneity*. Before Schmitt, Weber had affirmed that "parliamentarism and democracy are precisely far from being identical" (1919/1988, p. 130). However, Schmitt radicalized Weber's idea by saying that parliamentarism and democracy are not only different but antagonistic. Just as Schmitt says that Donoso Cortés accepts that the age of monarchy has ended to make way for the democratic legitimacy of the *pouvoir constituant*, he seems to portray his era as the end of the age of parliamentary government: "The arguments of Burke, Bentham, Guizot, and John Stuart Mill are thus antiquated today" because all the "definitions in which parliamentarism appears as essentially 'government by discussion', must accordingly also count as moldy" (1923/1988, p. 7). For Schmitt, the historical context of the 1920s speaks not for parliamentary government but for democracy as *homogeneity*:

> The belief in parliamentarism, in *government by discussion*, belongs to the intellectual world of liberalism. It does not belong to democracy. Both, liberalism and democracy, have to be distinguished from one another so that the patchwork picture that makes up modern mass democracy can be recognized. Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity [*Homogenität*] and second —if the need arises— elimination or eradication of heterogeneity. (...) A democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign [*Fremde*] and unequal that threatens its homogeneity. The question of equality is precisely not one of abstract, logical-arithmetical games. It is about the substance of equality [*Substanz der Gleichheit*] (Schmitt, 1923/1988, pp. 8–9).

Just as Schmitt states in *Politische Theologie* that the positive law requires a "homogeneous medium" (ie., political order and not chaos) for its enforcement (1922/2005, p. 13), he points out that democracy also requires *homogeneity*. Schmitt (1923/1988, p. 9) gives several examples to explain what he means by this. He says that homogeneity in ancient democracy was based on civic virtue (*areté*). In the 17th century, the homogeneity of the English state was based on a consensus on religious convictions. In the 19th century, democratic homogeneity was understood as 'national homogeneity' in the sense of nation-states. Importantly for Schmitt, in all his historical examples homogeneity grounds equality as the substance of democracy: "Equality is only interesting and valuable politically so long as it has substance, and for that reason at least the possibility and the risk of inequality" (1923/1988, p. 9). This leads Schmitt to the polemical statement that democracy presupposes the exclusion of certain groups, i.e., the elimination of heterogeneity:

> One has to say that a democracy —because inequality always belongs to equality— can exclude one part of those governed without ceasing to be a democracy, that until now people who in some way were completely or partially without rights and who were restricted from the exercise of political power, let them be called barbarians, uncivilized, atheists, aristocrats, counterrevolutionaries, or even slaves, have belonged to a democracy. Neither in the Athenian city democracy nor in the British Empire are all inhabitants of the state territory politically equal. Of the more than four hundred million inhabitants of the British Empire more than three hundred million are not British citizens. If English democracy, universal suffrage, or universal equality is spoken of, then these hundreds of millions in English democracy are just as unquestionably ignored as were slaves in Athenian democracy (Schmitt, 1923/1988, pp. 9–10).

This paragraph brings us to an essential point of my study. In this section, Schmitt develops an idea that I have defined as *popular autocracy*. I have explained that his concept of homogeneity implies the elimination of the heterogeneous, but then Schmitt points out that this homogeneity finds its political foundations in the work of Rousseau: "The general will as sequential democracy as Rousseau constructs it is in truth homogeneity" (1923/1988, p. 14). Schmitt's use and misuse of Rousseau's work has been discussed extensively in the literature (Bates, 2017; Mehring, 2021, pp. 227–240; Salzborn, 2017). Beyond this discussion, it is important for my remarks that Schmitt says that the state in the *Contrat Social* (1762) is not based on the contract, but essentially on homogeneity, so that the "democratic identity of governed and governing arises from that" (1923/1988, p. 14). Schmitt even says that the definition of the term slave in Rousseau refers to the 'alien', the one who is not part of the people, the heterogeneous element that does not belong to the *volonté générale*. Schmitt

claims that this shows that Rousseau's idea of *volonté générale* is a democratic identity relation that expresses the idea of homogeneity: "One can say today, faced with the expansion of democratic thought, that an identity with the will of the people has become so common a premise that it has ceased to be politically interesting" (1923/1988, p. 29).

Similar to Jacob Talmon's idea of "totalitarian democracy" (1952), Schmitt uses the term democracy to define an autocracy based on Rousseau's idea of the will of the people, i.e., an autocracy in which popular consent is by *acclamation*. For Schmitt, Caesarism ceases to be autocratic and instead becomes the best expression of the meaning of democracy as homogeneity. The German jurist deforms the meaning of the term democracy by defining as 'democratic' what are in fact dictatorships. For this reason, it is absolutely coherent for Schmitt that Bolshevism and fascism are illiberal, but not anti-democratic:

> Bolshevism and Fascism by contrast are, like all dictatorships, certainly antiliberal but not necessarily antidemocratic. In the history of democracy there have been numerous dictatorships, Caesarisms, and other more striking forms that have tried to create homogeneity and to shape the will of the people with methods uncommon in the liberal tradition of the past century. (...) The will of the people can be expressed just as well and perhaps better through acclamation, through something taken for granted, an obvious and unchallenged presence, than through the statistical apparatus that has been constructed with such meticulousness in the last fifty years. The stronger the power of democratic feeling, the more certain is the awareness that democracy is something other than a registration system for secret ballots. Compared to a democracy that is direct, not only in the technical sense but also in a vital sense, parliament appears an artificial machinery, produced by liberal reasoning, while dictatorial and Caesaristic methods not only can produce the acclamation of the people but can also be a direct expression of democratic substance and power (Schmitt, 1923/1988, pp. 16–17).

This passage shows that *popular autocracy*, expressed in democracy as homogeneity and acclamation, plays a fundamental role in Schmitt's political thought. In the first chapter of his essay on parliamentarism, the German jurist takes up a passage from *Politische Theologie* on Donoso Cortés's idea of the transition from monarchical to democratic legitimacy: "Neither the theory nor the practice of constitutional and international law could get along without a concept of legitimacy and for that reason it is important that the dominant concept of legitimacy today is in fact democratic" (1923/1988, p. 30).

Thus, Schmitt notes that even the Bolsheviks installed a dictatorship that invoked the principle of democratic legitimacy: "When the theorists of Bolshevism suspend democracy in the name of true democracy and the enemies of democracy hope to deceive it, then the one still assumes that democratic principles are theoretically correct" (1923/1988, p. 30). Ypi (2020) also insists on the same argument of a 'democratic dictatorship' in Marx's idea of the

dictatorship of the proletariat, without quoting Schmitt's works. The German jurist polemically asserts that, much like the dictatorship of the Jacobins in the French Revolution, "communism would be the first true democracy" (1923/1988, p. 29). He says that the revolutionary dictatorship is 'democratic': "In opposition to parliamentary constitutionalism, not to democracy, the idea of a dictatorship that would sweep away parliamentarism regained its topicality. The critical year 1848 was a year of democracy and of dictatorship at the same time" (1923/1988, p. 51). In the 1920s, this idea had great appeal to Marxist theorists such as Max Adler (1922/2019, Chapter 13), who defended Schmitt's idea as compatible with Marxist state theory. It is therefore no surprise that Schmitt's reading has had an important reception in communist China for decades (Libin & Patapan, 2020; Mitchell, 2020). Schmitt concludes that democratic homogeneity remains as a principle of exclusion even in communist dictatorship because there is an enemy that must be eliminated: the bourgeoisie.

The notion of acclamation plays a key role in the idea of *popular autocracy*. Schmitt's idea of democracy as an acclamation is found in his essay on parliamentarism (1923/1988, pp. 16–17) and also in his famous work *Verfassungslehre* (1928/2017). Especially in the latter book the argument that Sieyès's idea of constituent power expresses its will through acclamation is developed (1928/2008, pp. 131–132). Yet, the complex relationship between acclamation and constituent power was most clearly explained in his work *Volksentscheid und Volksbegehren* (1927/2014). The first two chapters of this book deal with the laws of referendum and plebiscite in the Weimar Constitution. The third chapter, however, is the most important for my argumentation, because here Schmitt develops his conception of democracy. He anticipates his different conceptions of the term people, which he will elaborate later in *Verfassungslehre* (1928/2008, Chapter 18). As a political concept, the people is a pre-constitutional entity and thus synonymous with Sieyès's idea of constituent power. In contrast, Schmitt (1927/2014, pp. 50–51) distinguishes this political conception from the constitutional conception of the people as an 'organ of the state': the totality or majority of the electorate. Importantly, the people do not exercise a state function, i.e., they are not an authority (*magistratus*). In both conceptions, Schmitt points out that the people make their will known by acclamation, which is the purest form of democratic homogeneity:

> For the most actual activity, ability and function of the people, the core of every popular expression, the democratic archetypal phenomenon [*das demokratische Urphänomen*], that which also Rousseau had in mind as the actual democracy, is the acclamation [*Akklamation*], the approving or disapproving acclamation of the assembled crowd. The people acclaim a leader [*Führer*], the army (here identical with the people) the commander or emperor, the "circumstance" ["*Umstand*"] of the

> people's comrades or the cantonal assembly [*Landsgemeinde*] a proposal (whereby the question remains open whether actually the leader or the proposal in the matter is acclaimed); it calls up or down, cheers or murmurs, strikes with the weapons on the shield, rises on the shield, says in a decision with any word "Amen" or refuses this acclamation by silence. A fundamental study by Erik Peterson, which in its scientific significance goes far beyond the scope of its special subject, has described *acclamatio* and its forms for the first Christian centuries. Where there are still people and where they are really gathered somewhere, even as a crowd of spectators in the racecourse, and express signs of political life, they express their will by acclamation. In truth, there is no state that could do without such acclamations. Even the absolute prince needs the crowd of his people forming a trellis and shouting high. The acclamation is an eternal phenomenon of every political community. No state without people, no people without acclamations (Schmitt, 1927/2014, pp. 51–52).

This idea of democratic homogeneity as the unity of the will of the people expressed in acclamation brings us to Schmitt's concept of the political: the friend-enemy distinction. Schmitt retains his political decisionism as the acts of sovereignty to restore the conditions of normality, i.e., *homogeneity*, which runs through both his young writings and his works in the Weimar Republic. In *Der Begriff des Politischen* (1932/1979), however, the idea that homogeneity fundamentally refers to the *existential unity of the people* becomes much clearer. Like *Politische Theologie* (1922/2015), this book has had an international reception in the social sciences and humanities. The important edition of Walter (Schmitt, 1927 1932/2018) has shown how Schmitt expanded and revised the original 1927 edition in the 1932 edition. Meier's famous book (2016) has also shown how the philosopher Leo Strauss exerted a remarkable influence on Schmitt's work. I will not explain all of these receptions, but will focus only on an explanation of the first three sections of *Der Begriff des Politischen*.

The political idea of homogeneity, which is at the core of the decisionist idea of sovereignty, essentially refers to the existential unity of the people as a precondition for the concept of the state. In the first section of the essay, this conception is explained in terms of the friend-enemy distinction. The premise that guides Schmitt's argument is that "the concept of the state presupposes the concept of the political" (1932/1979, p. 19). Thus, the concept of the state already presupposes this existential unity: "In its literal sense and in its historical appearance the [modern national sovereign] state is a specific entity of a people" (1932/1979, p. 19). Schmitt criticizes the fact that in the juridical literature of his generation the concepts of the state and the political are used as synonyms: "The state thus appears as something political, the political as something pertaining to the state —obviously an unsatisfactory circle" (1932/1979, p. 20). The confusion of the state and the political, Schmitt argues, leads to confusing the sphere of the state with the sphere of society, so that all spheres of social life (religion, culture, economy) may be absorbed into the state. Thus, "the equation state =

politics becomes erroneous and deceptive at exactly the moment when state and society penetrate each other" (1932/1979, p. 22). Schmitt (1932/1979, p. 23) criticizes that the concept of the political has been defined in opposition to the religious, cultural, economic, legal, and scientific. None of these criteria constitutes a 'positive' conception of the political, i.e., an autonomous and adequate definition of its essence.

In the second section of the essay, Schmitt arrives at the idea that "the specific political distinction to which political actions and motives can be reduced is that between friend and enemy" (1932/1979, p. 26). Importantly, he says that "this provides a definition in the sense of a criterion and not as an exhaustive definition or one indicative of substantial content" (1932/1979, p. 26). For Schmitt, the political "must therefore rest on its own ultimate distinctions, to which all action with a specifically political meaning can be traced" (1932/1979, p. 26). The emphasis on the distinctiveness of the political lies in the fact that each sphere of social life has its own criterion that distinguishes it from the others: "Let us assume that in the realm of morality the final distinctions are between good and evil, in aesthetics beautiful and ugly, in economics profitable and unprofitable" (1932/1979, p. 26). For this reason, "the distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation" (1932/1979, p. 26). The friend-enemy distinction shows that the existential unity of a people is constructed through opposition and exclusion of other groups. I have already mentioned that this is Schmitt's concept of democratic homogeneity. In line with this idea, he points out that the enemy is the other, the one who represents a relationship of intensity and conflict:

> The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions. But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible. These can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party (Schmitt, 1932/1979, p. 27).

In the third section of the essay, Schmitt explains the distinction of the enemy as an expression of the existential unity of the people even more clearly: "The friend and enemy concepts are to be understood in their concrete and existential sense, not as metaphors or symbols" (1932/1979, p. 27). Yet, as his manuscripts from this period attest (Schmitt, 1920?), here he takes up the critique of liberalism that he had already found in Donoso Cortés.

It is important to note that parallel to the first edition of *Der Begriff des Politischen* (1927 1932/2018), Schmitt published a text on "Donoso Cortés in Berlin" (1927/2001) in

which he emphasizes the defense of dictatorship as a concept with polemical character. In my view, both essays should be treated as part of the same argument. The point here is to expand on Schmitt's idea that the radical negation of the enemy is necessary in the face of the state of exception (something that parliamentarism avoids through debate). In his essay on the concept of the political, Schmitt echoes this idea when he says that liberalism "has attempted to transform the enemy from the viewpoint of economics into a competitor and from the intellectual point into a debating adversary" (1932/1979, p. 28). Liberalism does this because "in the domain of economics there are no enemies, only competitors, and in a thoroughly moral and ethical world perhaps only debating adversaries" (1932/1979, p. 28). The enemy is a *public enemy*, not a private one, "because everything that has a relationship to such a collectivity of men, particularly to a whole nation, becomes public by virtue of such a relationship. The enemy is *hostis*, not *inimicus* in the broader sense" (1932/1979, p. 28).

This brings Schmitt to his central argument, for the friend-enemy distinction is the criterion underlying his decisionist idea of sovereignty. When Schmitt explains why the friend-enemy distinction is so important, he claims that this expresses the existential unity of the people as the criterion that precedes the concept of the state. This topic runs through Schmitt's Weimar works, especially in his *Verfassungslehre*, in which he defines the concept of constitution precisely as the political unity of the people: "Constitution can describe the state itself, and, indeed, an individual, concrete state as political unity or as a particular, concrete type and form of state existence" (1928/2008, Chapter 59). When Schmitt defines the constitution as the decision of the constituent power, he already presupposes this existential unity of the people. The constituent power "is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence" (1928/2008, Chapter 125). The people's decision, then, "defines the existence of the political unity in toto" (1928/2008, Chapter 125). In short, the concepts of democracy as homogeneity, constitution as the decision of the constituent power, and sovereignty as the decision in a state of exception are based on this first 'primitive decision' about the existential unity of the people through the friend-enemy distinction:

> The political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping. In its entirety the state as an organized political entity decides for itself the friend-enemy distinction. Furthermore, next to the primary political decisions and under the protection of the decision taken, numerous secondary concepts of the political emanate. (...) Words such as state, republic, society, class, as well as sovereignty, constitutional state, absolutism, dictatorship, economic planning, neutral or total state, and so on, are incomprehensible

> if one does not know exactly who is to be affected, combated, refuted, or negated by such a term (Schmitt, 1932/1979, pp. 29–30, 31).

The friend-enemy distinction as a prerequisite for the other concepts of modern state theory brings us back to the discussion of Schmitt's decisionist idea of sovereignty. At the beginning of this section, I explained the remarkable influence of Donoso Cortés on Schmitt's evolution from his legal decisionism in his young writings to his anti-parliamentary political decisionism, which advocated counterrevolutionary dictatorship in the Weimar Republic.

Schmitt presents Donoso Cortés's idea of dictatorship as an expression of his own idea of political decisionism: "Dictatorship is the opposite of discussion. It belongs to the decisionism of one like Donoso Cortes to assume the extreme case, to anticipate the Last Judgment" (1922/2005, p. 63). In the final paragraph of *Politische Theologie*, he says that the Spanish politician's decisionism was essentially dictatorship, not monarchical legitimacy because he "was convinced that the moment of the last battle had arrived; in the face of radical evil the only solution is dictatorship, and the legitimist principle of succession becomes at such a moment empty dogmatism" (1922/2005, p. 66). He concludes, "every claim of a decision must be evil for the anarchist, because the right emerges by itself if the immanence of life is not disturbed by such claims" (1922/2005, p. 66). Schmitt's idea of sovereignty as a decision in the face of a state of exception to restore *homogeneity* is different from that of *sovereign dictatorship*. The concepts of *dictatorship* and *constituent power* always presuppose a *mandate* or *commission* from the sovereign. I think Colón-Ríos (2020, p. 242) is right when he says that the *sovereign* is more than a *sovereign dictatorship*. The sovereign can be a de facto power that creates a new constitutional order without having a *mandate* from the constituent power. The sovereign decision, according to Schmitt, "frees itself from all normative ties and becomes in the true sense absolute" (1922/2005, p. 12).

2. Sovereignty and Sovereign Dictatorship

Before the distinction between the concepts of sovereignty and sovereign dictatorship in Schmitt's work, he distinguishes between sovereignty and dictatorship. In the introduction to the first edition of *Die Diktatur* (1921/2015), Schmitt points out that every dictatorship has a commissarial character: "Every dictator is necessarily a commissar – in a very specific sense (Schmitt, 1921/2014, p. xliii). To prove this, Schmitt distinguishes at least three conceptions of dictatorship. First, he claims that the liberal tradition has associated the concept of dictatorship with the centralization of power, so that Caesarism, Bonapartism, authoritarian governments, and dictatorships are considered synonyms (1921/2014, p. xxxviii). In contrast, in the tradition of socialist literature of Kautsky, Lenin, and Trotsky, the concept of dictatorship of the proletariat is defined as a means to achieve a revolutionary goal (1921/2014, p. xxxix). Dictatorship here is only a transition in the process of abolishing the political order of the bourgeoisie, i.e. liberal democracy (1921/2014, p. xl). Schmitt uses the example of the socialist dictatorship to show that dictatorship can also be conceived as a state of exception. This is the legal-philosophical conception he later develops in *Politische Theologie* (1922/2015) of dictatorship as the suspension of the constitutional order. In this conception, dictatorship can also be linked to the notion of a sovereign act to restore the conditions of normality and *hegemony* for the realization of the law (1921/2014, p. xlii).

Schmitt relates the commissarial character of dictatorship to the notion of *mandate* or *commission*, which is an essential component of Sieyès's idea of constituent power. To substantiate the commissarial character of dictatorship, he develops an intellectual historical account in *Die Diktatur*. The central concern of the book is to distinguish between the concepts of *commissary dictatorship* and *sovereign dictatorship*. It finds this transition in the period between the Puritan revolutions of the 17th century and the revolutions of the late 18th century. The first chapter deals with the idea of the Roman dictatorship and its reception by the state theorists of the 16th and 17th centuries, focusing on Machiavelli and Bodin. The second chapter deals with the practice of royal commissars in the 18th century, while the third chapter deals with the transition from commissary dictatorship to sovereign dictatorship. Emphasis is placed on Rousseau's theory of sovereignty and his conception of the *législateur*. The fourth chapter looks at the concept of sovereign dictatorship and how this transition from Cromwell's dictatorship to the dictatorship of the constituent assembly of 1789 is based on Sieyès's idea of constituent power. The fifth chapter deals with the practice of people's commissars in the French Revolution and the final chapter with dictatorship in the legal order

of the state of siege. Schmitt summarizes the historical relationship between the concepts of dictatorship and constituent power thus:

> In this book I wish to give a theoretical account of the transition from the older 'dictatorship of reformations' to the 'dictatorship of revolutions', on the basis of the *pouvoir constitutant* of the people. An understanding of dictatorship appears for the first time in the history of the Christian west in the eighteenth century. In this understanding, the dictator still remains a commissar. But, as a consequence of the constituted, and not the constitutive, nature of the people's power, he remains a direct commissar of the people [*Volkskommissar*] – a dictator who also dictates to his superior, without ceasing to legitimise himself through that superior (Schmitt, 1921/2014, p. xliv).

The central idea I argue in this section is that, for Schmitt, the difference between *sovereignty* and *sovereign dictatorship* lies in the latter's commissarial form. Commissary dictatorship is the commission of a *constituted power*, while sovereign dictatorship is a commission from the *pouvoir constituant*. It is a political legitimacy difference, since the sovereign in a state of exception could create or destroy a constitutional order without a mandate from the people to restore conditions of normality and *homogeneity*. In contrast, a sovereign dictatorship always has a *mandate* or *commission* from the constituent power.

My analysis consists of four parts. In the first part, I analyze the concept of commissary dictatorship with a focus on Schmitt's analysis of Machiavelli and Bodin. Schmitt draws primarily on Bodin's theory of the commissar to affirm the commissarial nature of dictatorship. The second section examines Schmitt's idea of sovereign dictatorship based on the notion that the creation of the constitution is a commission from the constituent power. Schmitt points out that this makes sovereign dictatorship a mandate of the sovereign people, which I have defined in previous chapters as Sieyès's problem of delegation of sovereignty. In the third section, I develop a study of how the case of Cromwell exemplifies for Schmitt the case of a dictatorship with 'sovereign powers' without a mandate from the constituent power. Here I critically analyze how the secondary literature has confused the concepts of sovereignty, constituent power, and sovereign dictatorship. My study ends with Schmitt's concept of the constitution as the decision/will of the constituent power. The natural expression of the mandate of the constituent power is *acclamation*. The two forms of mandates as *acclamations* of the people are the *revolutionary mandate* and the *plebiscitary mandate*. Here I show that these concepts underlie Schmitt's idea of *popular autocracy*.

a. Commissary Dictatorship from Machiavelli to Bodin

In the literature, the concept of commissary dictatorship has been examined in terms of the concepts of state of exception, political theology and decisionism. It is already part of the traditional literature to associate Schmitt's theory of commissary dictatorship with the history of Article 48 of the Weimar Constitution and the legitimation of Hitler's rise to power (Kelly, 2016, pp. 232–236; Thiele, 2003, pp. 419–427; Voigt, 2019, pp. 115–117).

Every dictatorship, whether *commissary* or *sovereign*, is commissarial in nature. Since Machiavelli's writings on Roman dictatorship and Hobbes' *Leviathan*, it has been clear that not every dictator is a sovereign and not every sovereign is a dictator. Schmitt, inspired by his reading of Machiavelli's and Bodin's conceptions of dictatorship, summarizes his concept of *commissary dictatorship* on this premise. He also differentiates dictatorship and sovereignty by explaining the transition from state-technical theory (*staatstechnische Theorie*) to constitutional theory (*rechtsstaatliche Theorie*). For him, state-technical theory refers to the tendency of 16th-century political thinkers, especially Machiavelli, to view politics from strategic and military questions. In the context of *The Prince*, Schmitt points out that "a purely technical interest was dominant – which was, by the way, characteristic of the Renaissance, and consequently a number of Renaissance artists pursued the technical rather than the aesthetic problems of their business" (1921/2014, p. 5). For Schmitt, Renaissance political thinkers believed that "dictatorship was a wise invention of the Roman Republic and the dictator was an extraordinary Roman magistrate, introduced after the expulsion of the kings" (1921/2014, p. 1). I will briefly explain Machievelli's idea of dictatorship.

Machiavelli develops his reflections on the Roman dictatorship in chapters 33 and 34 of Book I of the *Discorsi sopra la prima deca di Tito Livio*. Machiavelli (1998, p. 71) affirms that given the threats to Rome, one of the remedies found against the urgent dangers was the creation of the dictator. This meant giving all power to a single man who acted "without any consultation and execute his decisions without any appeal" (1998, p. 71). Machiavelli acknowledges that the creation of the figure of the dictator "was the cause of avoiding infinite evils that the republic would have incurred without that remedy" (1998, p. 73). For Machiavelli, the Roman dictator could not harm the Republic because he had a limited term (*Il Dittatore era fatto a tempo, e non in perpetuo*) and was dependent on the Senate and the Roman people. "He could not do anything that might diminish the state" (*non poteva fare cosa che fussi in diminuzione dello stato*) (1998, p. 74). In Chapter 33 of Book I, Machiavelli ends his reflections on the Roman dictatorship by stating that this institution prevented the

ruin of the Republic: I say that those republics that in urgent dangers do not take refuge either in the dictator or in similar authorities will always come to ruin in grave accidents [*quelle repubbliche, le quali negli urgenti pericoli non hanno rifugio o al Dittatore o a simili autoritadi, sempre ne' gravi accidenti rovineranno*] (1998, p. 75).

In the first chapter of *Die Diktatur*, Schmitt attempts to show that Machievelli distinguishes between the Roman dictator and the sovereign (monarch). He begins with a description of the *Discorsi*, pointing out that Machiavelli's "remarks on dictatorship display a profound and genuine interest in politics and a remarkable capacity for discernment" (1921/2014, p. 3). Schmitt aims to show that Machiavelli was a political thinker who considered dictatorship as part of the technical aspects of preserving the republican constitution. For Machiavelli, he says, "the dictator was not a tyrant and dictatorship was not a form of absolute government but rather an instrument to guarantee freedom" (1921/2014, p. 4). Schmitt affirms that Machiavelli's idea of dictatorship is based on Aristotle's distinction between *deliberatio* and *executio*. Most importantly, the dictator is not sovereign because he cannot change or create the fundamental laws of the state: "For Machiavelli (...), dictatorship seemed to be an institution congenial to the free Roman Republic, so that people did not distinguish between two different types of dictatorship, the commissary and the sovereign. Therefore they never regarded the absolutist prince as a dictator" (1921/2014, p. 5).

The contrast between the concepts of *sovereignty* and *dictatorship* is essential to Schmitt's reading of Machiavelli. The prince has sometimes been portrayed as a dictator, but this notion "runs entirely against Machiavelli's conception" (1921/2014, p. 5). The prince is sovereign, and his methods of holding onto power are consistent with this political condition. Machiavelli's success is that his sovereign is the prince, while his dictator is essentially an 'organ of the state', an extraordinary magistracy subordinate to the sovereign. Schmitt affirms that "the dictator is always – admittedly, by extraordinary appointment, yet constitutionally – a republican organ of the state (*republikanisches Staatsorgan*); he is a '*capitano*', like the consul and other '*chefs*' (*Discorsi*, II, ch. 33). On the contrary, the prince is always sovereign (*Der Principe dagegen ist souverän*)" (1921/2014, p. 5, 1921/2015, p. 7). The classic study by Rossiter (1948/2002, p. 5) has called this emergency government a 'constitutional dictatorship'. For Schmitt, however, Machiavelli did not develop a constitutional theory of dictatorship, but he is interested in the 'technical aspects' of dictatorship. This, he argues, "is evident in the passages where he discusses diplomatic and political issues: for example how one can be successful, or how one 'does' certain things" (1921/2014, p. 5). Schmitt notes that the means of maintaining power vary depending on the type of government, but these means

are always something "that can be managed technically" (1921/2014, p. 6). Thus, Machiavelli examines "neither the moral nor the juridical justification, but rather the rational technique of political absolutism [*die rationale Technik des politischen Absolutismus*]" (1921/2014, p. 6).

Schmitt's reading of Machiavelli emphasizes the technical aspect in his reading of Chapter 8 of *The Prince*, entitled "States Won by Crime." This emphasis on the technical has been criticized in the literature. Galli is right when he points out that "to characterize Machiavelli in terms of 'technics' is, if not a serious misunderstanding, then certainly a very partial interpretation" (2015, p. 61). However, Schmitt affirms that "the most telling passages in *The Prince* are those where Machiavelli shows his true colors - that is, his hatred and dismissal of the dilettante, that inept character in political life who does things half-heartedly, with half-baked cruelty and half-baked virtue" (1921/2014, pp. 5–6). In this chapter Machiavelli examines the situation "when a man seizes power by some terrible crime" (2014, p. 33). *The Prince* describes the case of Agathocles, who was a Sicilian who murdered his political enemies and then appointed himself king of Syracuse. Machiavelli explains the case of Agathocles as that of a man who uses cruel means for taking political power: "Methods like that may bring you power, but not glory" (2014, p. 34). The technicity of power in *The Prince* refers to the calculation of the quantity and regularity – a form of rationality – of the use of cruelty: "Cruelty is badly used when you're not drastic enough at the beginning but grow increasingly cruel later on, rather than easing off" (2014, p. 36).

Machiavelli's idea of dictatorship implies for Schmitt this same rationality and a technicity of rule over the people. It should be emphasized that Schmitt's reading overstresses the technical aspects of *The Prince*, which he depicts as a work of "absolute technicity" (*absolute Technizität*) (1921/2014, p. 6). For the German jurist, this resembles the activity of an engineer who has a "purely technical interest in producing a thing without having any interest in its use" (1921/2014, p. 6). Moreover, he says that the basis of this technicity implies that "people are irrational" so that "one cannot negotiate with them or forge contracts" because "only the rational can lead and act" (1921/2014, p. 7). However, Schmitt says that this and technicity "is in accordance not only with Aristotelian scholasticism, but also with Renaissance Platonism, with the Stoic classical tradition" (1921/2014, p. 7). Thus, for Schmitt, this philosophical tradition is integrated into Machiavelli's concept of dictatorship as a technical aspect within the 16th-century theory of the state:

> Such a technical understanding [*technische Auffassung*] was of immediate significance, both for the origins of the modern state and for the problem of dictatorship. The rationality of this technology [*Technizität*] implied, first of all, that

> the constructing artists of the state [*der konstruierende Staatskünstler*] viewed the mass of people [*Menschenmenge*] that needed to be organised into a state as an object that had to be shaped, like a material, by their will (...) Rationality dictates. From scholasticism on, the phrase *dictamen rationis* ('dictate/ judgement of reason') has been integrated with natural law (...) If the idea of a dictate was successful on the grounds of its rational superiority, at the same time it was, independently, the consequence of a purely technical interest (1921/2014, p. 7, 1921/2015, p. 9).

The dictator as an executive power is above all as a "commissar of action" (*Aktionskommissar*). After defining dictatorship as 'rationality' and 'technicity' in modern state theory, Schmitt analyzes the executive character of dictatorship. For him, the content of the dictator's actions is aimed at "achieving a certain goal" (*etwas "ins Werk zu richten"*) (1921/2014, p. 7). For example, "the enemies should be defeated, the political opponent nullified or destroyed" (1921/2014, p. 7). The dictator "is the executive, in contrast to a merely decision-making process or judicial verdict – in contrast to *deliberare* and *consultare*" (1921/2014, p. 8). For this reason, the German jurist sees a contrast between *action* and *norm*: "he has the capacity not to obey general norms'' (1921/2014, p. 8). Besides, "in cases of emergency we can only say this much: the dictator is entitled to do everything that is appropriate in the actual circumstances" (1921/2014, p. 8). Schmitt's executive conception of dictatorship is linked to the rationality and technicity of the state theory of the 16th century:

> Therefore, especially in a dictatorship, only the goal governs [*Daher herrscht gerade in der Diktatur ausschließlich der Zweck*], which is freed from restrictions imposed by the law and is only determined by the need to create a concrete situation. (...) From the position of a purely technical understanding of the state [*Der absolut technischen Staatsauffassung*], it does not make sense to have an unconditional value that is independent from the intrinsic value of law. (...) Apart from rationalism and pure technicality, we can find here the third connection with dictatorship: within the executive, the organs of execution must bow unconditionally to the interest of what is a technically flawless process (1921/2014, p. 8, 1921/2015, p. 11).

However, Machiavelli was not a constitutional theorist of dictatorship. Schmitt's reading of the Florentine has been widely commented upon in the literature (Galli, 2005; McCormick, 1999, pp. 129–133; Moudarres, 2015, p. 365). Mainly because Schmitt also published a short text in which he gives his view of the Florentine (Schmitt, 1927/1995), and also wrote a book review of Meinecke's work on Machiavelli (Schmitt, 1926). Lucchese (2017, p. 9) has gone even further by associating Machiavelli's idea of dictatorship, when analyzed in Schmitt's theory of dictatorship, with Sieyès's idea of constituent power. On the contrary, the importance that Schmitt attaches to Arnold Clapmarius (1574-11604) has produced little reception. Clapmarius's book *De Arcanis Rerumpublicarum* (1605/2014) is

still unknown internationally, but Schmitt rightly points out that this work summarizes the political thought of Renaissance state theorists. Schmitt takes from Clapmarius, above all, his conception of the *arcana dominationis* as those secrets to maintain the power of the state. More importantly, however, Clapmarius provides a theoretical hinge between the conceptions of dictatorship of Machiavelli and Bodin: "Dictatorship, in particular, is described as a specific *arcanum dominationis* of the aristocracy. Its purpose is to create an institution that frightens the people into believing that it constitutes an authority against which there is no possibility of provocation (1921/2014, p. 12). In contrast to Machiavelli, Clapmarius (1605/2014, pp. 303–305) was a state theorist who thought of the right of exception (*Ausnahmerecht*) and dictatorship from a constitutional law perspective. For Schmitt, this is the perfect introduction to his own reading of Bodin's constitutional theory of the dictator as commissar.

For Schmitt, Bodin "is a moderate figure (*Gemäßigter*), in other words a *politicien* who stands between Machiavellian technicity and the monarchomachic lawful state (*der monarchomachische Rechtsstaat*)" (1921/2014, p. 20, 1921/2015, p. 25). Schmitt (1921/2014, p. 14) contextualizes Bodin by explaining the political theory of the monarchomachs in 16th-century France. He uses Bodin's theory of the state to contrast the concepts of commissar (*commissaire*) and magistrate (*magistrat*). Whereas for Mommsen (1874/1952, pp. 141–142), the Roman dictator was an extraordinary magistrate (*außerordentliche Magistratur*), for Schmitt, the dictator is a commissar of action (*Aktionskommissar*) associated with the right of exception. I will briefly explain Bodin's theory of sovereignty.

For Bodin, the temporality or permanence of absolute power is the key criterion for defining sovereignty. He was the most important theorist of sovereignty in 16th century France. His most famous work was *Les Six Livres de la République* (1576), which influenced other state theorists like Grotius, Pufendorf, Hobbes, and Locke. Bodin defines the concept of sovereignty in Chapter 8 of Book I: "Sovereignty is that absolute and perpetual power vested in a commonwealth which in Latin is termed *majestas*" (1576/1993, p. 111). Then the French state theorist explains why this kind of power is different from the powers of other state authorities. Bodin says he describes sovereignty "as perpetual because one can give absolute power (*puissance absolue*) to a person or group of persons for a period of time (*à certain temps*), but that time expired they become subjects once more" (1576/1993, p. 112). Unlike temporal power, the true sovereign remains always seized of his power. For this reason, Bodin states that neither the Roman dictator was a sovereign authority, nor the commissioners or magistrates "who have absolute power to govern the commonwealth for a certain term only"

could be called sovereigns (1576/1993, p. 113). The concept of sovereignty in Bodin's state theory establishes a hierarchy of the perpetual and absolute holder of sovereign power over other authorities of the state, such as commissars and magistrates, who are dependent on the will of the sovereign:

> However much he gives there always remains a reserve of right in his own person, whereby he may command, or intervene by way of prevention, confirmation, evocation, or any other way he thinks fit [*ou ainsi qu'il lui plaira*], in all matters delegated to a subject, whether in virtue of an office or a commission. Any authority exercised in virtue of an office or a commission can be revoked, or made tenable for as long or short a period as the sovereign wills [*ou la tenir en souffrance tant et si longuement qu'il lui plaira*] (Bodin, 1576/1993, p. 112).

Schmitt (1921/2014, p. 20) took up a sophisticated approach to the relationship between the sovereign and the dictator in Bodin's state theory. The German jurist points out that "the sovereign remains master over any subject who is given an official duty – even if this duty is entrusted to a regular officer or to a commissar" (1921/2014, p. 20). The dictator has a commission that is subordinate to the sovereign. However, "Bodin does not distinguish between the sovereignty of the state and the sovereignty of the bearer of the power of the state [*Staatsgewalt*]" (1921/2014, p. 21). This raises a complex question: Is the dictator sovereign if he holds all state power? Schmitt says that, for Bodin, "whoever has absolute power is therefore the sovereign, and who that is must be defined case by case (...) and "a legal construction, namely the ability to derive no matter how much actual power, is the decisive factor (1921/2014, p. 21). I explained that the key criterion in Bodin is that sovereignty is absolute and perpetual power. But, in chapter 8 of Book I of the *Six Livres*, the French state theorist asks what happens to those authorities who make their magistracy an everlasting power. Bodin (1576/1993, p. 117) holds that this is the case of a tyrant who usurps power by violence and force (*tyrannus absque titulo*). Rather than seeing a paradox in this tyrant who holds the power of the state, for Bodin, a tyrant could potentially be a sovereign:

> A perpetual authority therefore must be understood to mean one that lasts for the lifetime of him who exercises it. If a sovereign magistrate is given office for one year, or for any other predetermined period, and continues to exercise the authority bestowed on him after the conclusion of his term, he does so either by consent or by force and violence. If he does so by force, it is manifest tyranny. The tyrant is a true sovereign for all that [*Si c'est par force, cela s'appelle tyrannie, et néanmoins le tyran est souverain*]. The robber's possession by violence is true and natural possession although contrary to the law, for those who were formerly in possession have been disseized (Bodin, 1576/1993, pp. 116–117).

This paragraph also opens the possibility that the dictator may be sovereign. Although it is known that Bodin was an advocate of sovereign monarchy rather than tyranny, it is also theoretically possible to think of a 'sovereign' tyrant when reading his conception of sovereignty. Schmitt was aware of this problem, and he had to get to the heart of his explanation of how "the separation of dictatorship from sovereignty soon led to a controversy as to whether dictatorship, in its very concept, is not really a case of sovereignty" (1921/2014, p. 21). The German jurist affirms that in the state theory of the monarchy of the 16th and 17th centuries, the sovereign is clearly not a commissar like the dictator. However, according to Schmitt, "for Bodin, distinguishing a sovereign dictatorship from sovereign monarchy was unthinkable" (1921/2014, p. 21). Schmitt sees that this complex discussion of the relationship between sovereignty and dictatorship in Bodin's political thought does not exist in Grotius's theory of sovereignty. For this Dutch political theorist, Schmitt argues, "the dictator truly holds *summum imperium* [supreme power] and in the case of *res morales* [ethical matters], as legal concepts are, what matters is their *effectus* [what they achieve] and not their duration" (1921/2014, p. 22). Schmitt concludes this discussion of Grotius on sovereignty and dictatorship by stating that "for the period of his tenure the dictator would therefore be a sovereign – and not just a magistrate, as Bodin thinks" (1921/2014, p. 22).

The difference between sovereign and dictator becomes much clearer when the dictator is seen as the protector of the sovereign's will. This notion goes back to the notion of protectors in Hobbes' *Leviathan*. Although Bodin elaborates the possibility of a tyrant who is 'sovereign' in the usurpation of state power (*tyrannus absque titulo*), what is essential in Bodin is his conceptualization of the commissar. To distinguish his idea from the idea of sovereign dictatorship, Schmitt returns to Hobbes. The German jurist points out that Hobbes "calls the dictator – a title he places next to that of protector, in allusion to Cromwell – a temporary monarch, on the grounds that in this case there is a power that must be seen to be equal to that of the monarch" (1921/2014, p. 23). Moreover, according to Schmitt, "Hobbes distinguishes between sovereignty itself and its exercise, and thereby he evades the final consequence of his theory" (1921/2014, p. 24). Here, the German jurist follows the reasoning of the German sociologist Ferdinand Tönnies (1855-1936) in his successful work on Hobbes (1896/1925, p. 255), noting that this conception of sovereignty "Hobbes distinguishes between sovereignty itself and its exercise, and thereby he evades the final consequence of his theory" (1921/2014, p. 24). Therefore, Schmitt argues, "Hobbes' construction hints at the problem of sovereign dictatorship" (1921/2014, p. 24). The German jurist rounds out the

contrast between the concepts of dictator and sovereign by noting that Bodin's theory of dictatorship is built on the distinction between the public duties of officers and commissars:

> In fact the controversy was essentially about the contradiction between commissary and sovereign dictatorship. Bodin limited himself to commissary dictatorship, for which he provided, however, an extraordinarily clear and detailed juridical foundation. He discusses it in chapter 2 of Book III of his *Republic*, as a case of commissarial fulfillment of public duties. Advancing towards a general concept in constitutional law, he employs a distinction that has already been discussed in detail in canon law and by commentators [*Glossatoren*] on the doctrine of the commissarial judge; and in it he contrasts the regular officer (*officier*) with the commissar (*commissaire*) (1921/2014, p. 25).

The distinction he makes in this passage between the *regular officer* and the *commissar* shows, I think, that Schmitt's dictator is a *political commissioner*. For Bodin and Schmitt, the dictator is not an *extraordinary magistrate* but a *commissar*. Commissars are, by definition, 'purely' extraordinary. In chapter 2 of Book III of the *Six Livres*, Bodin says that the commissar "has an extraordinary public charge occasioned by some particular circumstance" (1576/1993, p. 267). Bodin then claims that the commissars "were in ancient times dictators, and members of commissions set up by the people, on the request of the magistrates, to inform about crimes" (1576/1993, p. 267). The French state theorist wraps up his idea by saying that "a commission is held at will, a precarious loan that the lender can call at any time he chooses'' (1576/1993, p. 271). This is very different from Mommsen's reading of the Roman dictator. Contrary to Mommsen's reading, there are no cumulative functions between magistrates and commissars here. The dictator is exclusively commissar. For Bodin and Schmitt, the magistrate is the bearer of a permanent office in the *République*, whereas the commissar has only an "occasional task" (*selon l'occasion qui se présente*) linked to a specific goal that he must fulfill. While Mommsen sees the dictator as an *extraordinary magistrate*, Schmitt defines the dictator as Bodin's idea of the commissar because of its purely exceptional character in constitutional law:

> The regular officer is a 'public person' who has a legally circumscribed remit: '*l'officier est la personne publique qui a charge ordinaire limitée par edict*' ['the officer is the public person invested with a regular charge, limited by edict']. The commissar is a public person too, but he has an extraordinary duty, defined by a specific mandate: '*le commissaire est la personne publique qui a charge extraordinaire, limitée par simple commission*' ['the commissar is the public person invested with an extraordinary charge, limited by simple commission']. Both have a public function, a *charge publique*, a *munus publicum*, in contrast to the private

> person, although for Bodin the commissar is no magistrate; he always calls the latter *officier* (*Republic*, III, ch. 3) (1921/2014, p. 25).

If one follows the view of Mommsen (1874/1952, pp. 141–142), Schmitt's interpretation of the 'purely' commissarial character of the dictator from Roman legal history is questionable. Bodin (1576/1993, pp. 265–266) himself acknowledges how difficult it is to distinguish a magistrate from a commissar when a magistrate is conceptualized as the bearer of *quelque charge* from the prince. According to Bodin (1576/1993, p. 266), this approach would assume that all magistrates are also commissars (*en cette sorte tous Commissaires seraient Magistrats*). The distinction between the dictator as *extraordinary magistrate* (Mommsen) and the dictator as *political commissioner* (Schmitt) is not only semantic. Schmitt wanted to avoid the reading of Mommsen's concept of the Roman dictatorship. Schmitt (1921/2014, pp. 26–27) takes up Bodin's reading of the commissar to radicalize the contrast between the terms magistrate and commissarial dictator:

> The opposition between commissars and magistrates as regular bearers of an office was only developed systematically by Bodin, who synthesised the vast material on this issue under the general ideas of a theory of the state. (...) Hence the difference between the official and the commissar cannot reside exclusively in arbitrary command [*willkürliche Anordnung*]. Moreover, a lawful monarchic state is a prerequisite that fundamentally respects the existing organisation of offices, and therefore it constitutes a hierarchy of established offices with a predefined remit. (...) The content of the commissar's duty should, according to Bodin, be different according to the concrete situation [*Lage der Sache*], '*selon l'occasion quie se présente*'. Therefore a dictator was nominated *si res ita postularent* ['if the situation demanded so']. One may wonder whether it is from this that Bodin draws his conclusion that the commissar, in contrast to the regular official, should have less freedom and no discretion (1921/2014, pp. 27–28, 1921/2015, p. 35).

By radicalizing Bodin's theory of the state, Schmitt (1921/2014, pp. 28–29) attempts to establish a link between the concepts of the dictator and the commissar because the latter is supposedly 'freer' than the magistrate in duties bound by law. Schmitt's concept of commissar is subject to the will of the sovereign and therefore freer than the authority of the magistrate. This discussion has gained renewed prominence in Lee's important work on Bodin's concepts of the magistrate and the commissar (Lee, 2013, 2021, Chapter 2). The magistrate has command and established authority, so he has some discretionary power. In contrast, the commissar has a revocable command, authority granted upon request. Schmitt explains that the commissar's occasional power only depends on the will of the sovereign.

The conceptualization of the magistrate as bound to the constitution and the commissar as freer to the constitution but bound to the sovereign will is key to Schmitt's conception of the commissary dictatorship. From a historical approach, Scheuerman (2020, pp. 33–34) affirms that Schmitt's theory of dictatorship establishes a conceptual link between "legal indeterminacy" and "dictatorial power" to destroy the Weimar Republic. While this is historically true, the theoretical question is more complex when viewed from the perspective of political and constitutional theory. The German jurist states that "the difference between the regular duty of the official and commission is that the former has a legally circumscribed content, and therefore (generally speaking) a restricted one" (1921/2014, pp. 28–29). For Schmitt, this proves that the commissar's duty "is disconnected from any place or time – from the *occasion*, in other words from the particular or special circumstances of the case at stake" (1921/2014, p. 29). Therefore, "the regular official is bound to the law (*an das Gesetz gebunden*), and the decision he makes, in each individual case, is just the concretization of a decision already entailed by the law" (1921/2014, p. 29, 1921/2015, p. 36). Unlike the magistrate, Schmitt argues, "the commissar is less bound, and therefore freer than the regular official (*freier als der ordentliche Beamte*), who is circumscribed by the framework of a normative and legislative remit" (1921/2014, p. 29, 1921/2015, p. 36).

From an approach based on political theory, which also stands in opposition to Mommsen's constitutional reading of the Roman dictator, Schmitt pushes a radical reading of Bodin's distinction between *magistrate* and *commissar* by stating that the latter is 'freer' from being bound by law and dependent on the sovereign's mandate (*Auftrag des Souveräns*):

> The meat inspector, the numerous commissars of the police and administration – even the commander in chief, the envoy, the dictator – all are, for Bodin, commissars in the same way. Their duty is always based on an order given by the sovereign and not on a general legal prescription [*Nun beruht ihre Tätigkeit allerdings immer nur auf einem Auftrag des Souveräns und nicht auf einer generellen gesetzlichen Bestimmung*], but the content of their duty, as well as their powers, essentially differ from each other. The meat inspector and the numerous administrative commissars fulfil their duty, as long as the reason for their appointment is that they are truly commissars (1921/2014, p. 30, 1921/2015, p. 37).

Schmitt's reading of Bodin's commissary dictatorship and Rousseau's theory of government indicates that the exercise of the *pouvoir constituant* means that the government, established by the people, can be "dismissed at any point in time and be subject to the people's discretion in an absolute way" (1921/2014, p. 19). However, this is a foreshadowing of events to come. I have highlighted the idea of the sovereign's commision (*Auftrag des*

Souveräns) because Schmitt gives it great importance in his reading that Bodin's idea is behind Rousseau's radical concept of popular sovereignty: "The concept of 'commission' radicalises what the government was given by the people, so that the government becomes the commissar of the people" (1921/2014, p. 19). Richard Tuck (2016, p. 9) has also highlighted a similar connection between Bodin and Rousseau in the distinction between the government and the sovereign. The following section will show how important this idea of the mandate given by the sovereign is in Schmitt's theory of *sovereign dictatorship* and in his reading of Sieyès's idea of constituent power. It should be recalled that the German jurist explicitly points out that the commissar is not sovereign in Bodin's theory of the state. According to Schmitt, the concept of sovereign dictatorship belongs to a conception of sovereignty that developed later, and that began with the political theories of Hobbes, Grotius, Rousseau, Mably, and Sieyès in the 17th and 18th centuries.

Schmitt's reading of Bodin's concept of dictatorship can be summarized as depending directly on the will of the sovereign and therefore being a "commissar of action" (*Aktionskommissar*). The commissar is an occasional *officier*, dependent on the sovereign's mandate and 'freer' from the general legal prescription (*generelle gesetzliche Bestimmung*) that binds the duties of the magistrate, who is the holder of a permanent office of the state. Schmitt (1921/2014, p. 30) deepens the distinction between the terms magistrate and dictator by distinguishing three types of commissars in Bodin's theory of the state: the commissar of duty (*Dienstkommissar*), the commissar of a specific business (*Geschäftskommissar*), and the diplomat commissar (*Verhandlungskommissar*). However, Schmitt says that "the dictator is a commissar afforded an authority that is substantially different from that of the commissar of a certain business or duty" (1921/2014, p. 30). Here, Schmitt echoes Clapmarius's idea of the right of exception to give the dictator not only the character of a commissar, but also the authority to suspend the laws in order to achieve his goal (*Zweck*):

> In the interests of the desired ends and by the means established by the dictator, dictatorship gains an authority whose essential significance consists in the rights of suspending legal restrictions and of interfering with the sovereign rights of third parties, depending on the concrete situation. (...) Moreover, '*Ausnahmen nach Lage der Sache*' ['exception depending on the concrete situation'], a concept that is completely contradictory to the logic of law, will be tolerated. For this kind of commissar I will use the description 'commissar of action' [*Aktionskommissar*]. The dictator would be an absolute commissar of action (*Der Diktator wäre ein absoluter Aktionskommissar*) (1921/2014, pp. 30–31, 1921/2015, p. 38).

Schmitt's theory of commissary dictatorship is a decisionist reading of Bodin. His interpretation is based on three elements: the mandate dependent on the will of the sovereign (*Auftrag des Souveräns*), the right of exception (*Ausnahmerecht*), and the distinction between dictatorship and sovereignty. Because of the contrast he constructs between commissar and magistrate, I have shown that his conception of the *commissary dictatorship* is somewhat different from what authors such as Mommsen and Rossiter consider the Roman "constitutional dictatorship" or the *extraordinary magistracy*. In Schmitt's reading of Bodin's political theory, dictatorship is first and foremost a mandate granted by the sovereign that has an exceptional character, i.e., it is not a permanent office. Since dictatorship here is not merely a technical aspect of the state, as it is in Machiavelli, Schmitt attempts to show that Bodin's theory of dictatorship has made a transition to a constitutional conception of dictatorship. Schmitt concludes this conceptualization by saying that

> dictatorship cannot be a regular office [*ordentliches Amt*]; and it cannot be a *munus perpetuum* [permanent office], either. If dictatorship is granted the *trait perpétuel*, then not only would the dictator be entitled to his office (*so hat der Diktator nicht nur ein Recht auf sein Amt*), he would also become the sovereign and would no longer be a dictator; for Bodin does not recognise sovereign dictatorship as such [*weil Bodin die souveräne Diktatur nicht gelten lassen will*] (1921/2014, p. 31).

In Schmitt's reading of Hobbes's theory of sovereignty and Sieyès's idea of constituent power, the *sovereign dictatorship* is also a *commission*, but of an absolute and unlimited nature. The commissary dictator, on the other hand, is neither sovereign nor a tyrant. Schmitt concludes chapter 1 of *Die Diktatur* by stating, "the mandate to do (*Auftrag*), in an appropriate manner, what the concrete situation [*Lage der Sache*] requires, combined with the corresponding authorisation to represent the authority of the state, is nevertheless the characteristic substance of a *commissio*" (1921/2014, p. 41, 1921/2015, p. 38). It is essential to draw attention to the phrase "to represent the authority of the state" (*die staatliche Autorität zu repräsentieren*). In the political theories of Machiavelli, Clapmarius, and Bodin, there is no notion of commission in the context of a constitutional theory of representation. When Schmitt says that the commission represents the authority of the state, he introduces an issue that is a crucial problem for Sieyès's notion of the *pouvoir constituant*. I refer to the problem of the commission to draft a new constitution as representing the sovereign nation.

Schmitt's concept of the commissary dictatorship finds a practical application in his account of the authority of the Reichspräsident in the Weimar Constitution. Already in the first edition of *Die Diktatur*, Schmitt (1921/2014, pp. 175–176) had portrayed the powers of

the president as a form of commissary dictatorship. But it was not until the appendix to the second edition of *Die Diktatur*, which he presented in Jena (1924/2011), that Schmitt (1921/2014, pp. 206–207) explicitly points out that the emergency powers under Art. 48 of the Weimar Constitution makes the president a commissary dictator. Although the focus here is on the president's powers, it is important to highlight that Schmitt distinguishes between the powers of the monarch, the dictator, and the sovereign dictator. Schmitt (1921/2014, p. 204) points out that in the case of Charles X in France, it is a sovereign because he holds all state power in his hands, including the power to create a constitution. In contrast, the constituent assembly of the French Revolution is a sovereign dictatorship legitimized by the mandate from the people (the sovereign), i.e., according to Sieyès's idea of constituent power. In contrast to the previous two concepts, the Reichspräsident becomes a commissary dictator through the emergency powers of Art. 48. Schmitt points out that this commissary character of the president is maintained despite the use of the terminology of 'unlimited powers' to define his authority. This brings us to Schmitt's discussion of the distinction between the terms sovereignty, commissary dictatorship, and sovereign dictatorship.

b. Sovereign Dictatorship as a Commission from the Constituent Power

The concept of *sovereign dictatorship* is based on Sieyès's idea of constituent power. Schmitt was fascinated by Sieyès from the beginning of the Weimar Republic to the end of the 1970s. Sovereign dictatorship is one of the most important variants of the concept of *popular autocracy*, since it is a dictatorship exercised in the name of the *pouvoir constituant*. Before presenting his reading on the concept of sovereign dictatorship, it is important to briefly explain the importance of Sieyès in the work of the German jurist.

Sieyès's idea of constituent power was constantly present in Schmitt's work. Rubinelli (2020a, p. 136) rightly points out the importance of Sieyès's ideas in Schmitt's most important books in the Weimar Republic. Schmitt's reading of constituent power first appears in *Die Diktatur* (1921/2014, Chapter 4). It then appears briefly toward the end of the third chapter of *Politische Theologie* (1922/2005, p. 51) to emphasize that after the Revolutions of 1848, the epoch of monarchical legitimacy was over. The concept of constituent power also reappears in the third chapter of *Volksentscheid und Volksbegehren* (1927/2014, pp. 49–52) to theorize *acclamation* as a form of *democratic homogeneity*. Schmitt develops his reading further in *Verfassungslehre* (1928/2008, Chapter 8), playing a crucial role in his proposal of the concept of the constitution as a decision of the constituent power. Here appears his influential reading of Sieyès's idea of constituent power as a political-theological concept. The concept reappears in his discussion of the Reichspräsident as the guardian of the will of the people in the Weimar Constitution (Schmitt, 1929, p. 212). In his writings during the National Socialist period (Schmitt, 2021a), the concept of constituent power disappears, but it reappears in the postwar period. It is often forgotten that towards the end of the 1970s Schmitt returned to the concept of constituent power in his last published work: *Die legale Weltrevolution* (1978). Here Schmitt repeats what he had already presented in the 1920s:

> French legal doctrine has made its concept of the *pouvoir constituant* the precondition and legitimation of all *pouvoirs constitués*; it has even created, with resounding success, ideal types of legal forms and procedures that apply precisely to democratic constitutional doctrine: Convocation of a constituent assembly, proclamation of human and civil rights. In this formal respect, at any rate, it was more juridical than the American proclamations that preceded it, to which a state person in the sense of continental European state thought was as alien as the classical continental European state itself and the associated relationship between state and society. Even stranger than the Anglo-Saxon constitutional model is and remains the specifically French-legalistic style of thinking of the inspirer of the French constitutional legislation of 1789-1799, the Abbé Sieyès. He transferred Spinoza's political-theological relation *natura-naturans* in its relation to *natura-naturata* into the juridical-legalistic relation

> of the *pouvoir constituant* to the *pouvoirs constitués* created by him and thus determined the conceptual structure of written constitutions. In doing so, he created an example of political theology whose impact is surpassed only by Max Weber's doctrine of charismatic legitimacy (Schmitt, 1978, p. 337).

The intellectual relationship between Sieyès and Schmitt has been extensively commented upon in the literature for decades (Breuer, 1984; Cristi, 1997; Kelly, 2004; Thiele, 2003; Vinx, 2013). This literature has found its most important development in the books of Rubinelli (2020a) and Colón-Ríos (2020). It is often assumed that Schmitt did not use the notion of constituent power out of any particular interest in the concept, but only to legitimize his conception of dictatorship with a 'democratic' narrative, disregarding the liberal and moderate intentions of Sieyès's idea of constituent power (Rubinelli, 2020a, pp. 138–139). Following this reading, studies on the correspondences and contrasts between the ideas of Sieyès and Schmitt have repeatedly emerged in the international scholarship to date (Fasel, 2022; Herrero, 2023; Verdugo, 2023). My study departs from these traditional approaches by starting from an analysis of Schmitt's reading of Sieyès in dialogue with an examination of archival material. I begin with a brief explanation of Schmitt's intellectual sources and then describe his reading of Sieyès's idea of constituent power. I conclude with a discussion of the distinction between the concepts of *sovereignty* and *sovereign dictatorship*.

Schmitt's personal archive (*Nachlass*) shows an intense preoccupation with Sieyès's idea of constituent power. Unfortunately, to my knowledge, there is no folder in the archive containing his study materials on Sieyès. However, I have found in his personal notes that his first thoughts on constituent power in the early 1920s arose from reading Egon Zweig's work (1909) and Karl Loewenstein's dissertation (1919/1922) on the National Assembly of 1789.

Personal notes make it possible to specify the author's sources. In the second sheet of his notes on Zweig's work (Schmitt, n.d.-b), I was able to verify the accuracy of Nippel's claim (2011), later taken up by Kelly (2016), Rubinelli (2020a) and Pasquino (2021), that Schmitt was familiar with Mommsen's discussion of dictatorships with 'constituent powers' in Sulla and Julius Caesar. However, as I will show below, this does not prove that Schmitt's concept of sovereign dictatorship is based on the same ideas of Mommsen and Zweig. I also found some references to Schmitt's reading of the idea of constituent power in his notes on Donoso Cortés (Schmitt, 1921?), which would also support Colón-Ríos' reading (2020, pp. 246–247) that Schmitt was inspired by the Spanish politician's interpretation. From his personal notes on Loewenstein's book (Schmitt, n.d.-c), which may not have been written by him, I have found that Schmitt was familiar with Sieyès's speeches in the French Revolution, especially the speech of September 7, 1789, on the royal veto (Sieyès, 1789/1989a). This

finding casts doubt on Rubinelli's thesis (2020a, p. 136) that Schmitt did not know Sieyès's works in detail. On the contrary, his personal notes show that Schmitt used the references in Loewenstein's book to get an overview of the French and German literature on Sieyès. His personal notes show transcriptions of several passages of Sieyès's speeches in French. Schmitt thus knew the political writings and speeches of Sieyès, but also of other politicians such as Mounier, Mirabeau, and Robespierre, from reading the constitutional debates of 1789 in the edition of the *Archives Parlementaires* (Laurent et al., 1875).

The concept of *sovereign dictatorship* is developed in the intellectual context that links Rousseau's ideas to the Russian Revolution. Schmitt's study notes on Loewenstein's dissertation (Schmitt, n.d.-c), which I cannot prove were written by him, show an enthusiasm for Loewenstein's proposed linkage between Rousseau's theory of *the volonté générale* with the Soviet state. Schmitt's use and abuse of Rousseau's ideas has been widely discussed in the literature (Bates, 2017; De Wilde, 2019; Mehring, 2021, pp. 227–240; Salzborn, 2017). However, the correspondence between the vocabulary of Rousseau's theory of government as *commission* and the Russian Revolution has been overlooked. At the Second Congress of Soviets on November 9, 1917, "a provisional workers' and peasants' government" is established, forming the executive branch of the Soviet state under the name of the 'Council of People's Commissars' (*Sovnarkom* [Совнарком]), "which is to govern the country until the Constituent Assembly is convened" (*Sovnarkom*, 2015). Thus, the revolutionary decree states that "the management of individual branches of state activity is entrusted to commissions, whose members shall ensure the fulfillment of the program announced by the Congress." Finally, it says: "Control over the activities of the People's Commissars, with the right to replace them, is vested in the All-Russia Congress of Soviets of Workers, Peasants and Soldiers Deputies and its Central Executive Committee" (*Sovnarkom,* 2015).

The connection between Soviet state theory and Schmitt's concept of sovereign dictatorship has been widely discussed in the literature (Adler, 1922/2019, pp. 140–142; Arato, 2017a, pp. 495–497; Lukina, 2022). Interestingly, Talmon (1952) developed the same link between Rousseau, the French Revolution, and the Soviet state in the 1950s with his influential concept of "totalitarian democracy." Schmitt (1921/2014, pp. xxxix–xl) was aware of the debates between Kautsky, Trotsky, and Lenin in the late 1910s on the connection between the political foundations of the French and Russian revolutions. Thus, his personal notes on the concept of the nation in the French Revolution are entitled "Remarks on the State Theory of Bolshevism" (*Bemerkungen über die Staatstheorie des Bolschewismus*) (Schmitt, n.d.-c). This observation is fundamental, since it coincides with the subtitle of *Die Diktatur*:

"From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle." The last paragraph of the book ends with the connection Schmitt makes between the dictatorship of the proletariat and the sovereign dictatorship in the French Revolution: "What Engels required for his 'praxis', in his address to the League of Communists in March 1850, also held for a political theory of the state of this transition to statelessness [*Staatlosigkeit*]: it was the same situation 'as in France 1793'" (1921/2014, p. 179).

The connection between Rousseau's theory of government and the concept of sovereign dictatorship is developed by Schmitt in the third chapter of *Die Diktatur*. Schmitt presents the Genevan philosopher as the political theorist who facilitates the transition from Bodin's idea of commissary dictatorship to the new concept of sovereign dictatorship on the basis of Sieyès's idea of constituent power. In his exposition, the concept of *volonté générale* is understood as Rousseau's concept of sovereignty, i.e., the power of the people to make laws. Schmitt thus portrays Rousseau's account of sovereignty as a counterposition to Montesquieu's theory of the separation of powers. Schmitt (1919/1998, p. 32) had drawn on his reading of the historian Hippolyte Taine to portray Rousseau in *Politische Romantik* as the intellectual of Jacobin dictatorship, *la Terreur*, and "abstract rationalism" advocated by revolutionaries such as Robespierre. I have explained how Rousseau also appears in his political-theological idea of the *législateur* in *Politische Theologie* (1922/2005, p. 38). Likewise, Rousseau's theory of the *volonté générale* appears in his conception of democracy as *homogeneity* and *identity* in his essay on parliamentarism (1923/1988, p. 14). However, as Mehring (2021, p. 233) has pointed out, Schmitt engaged more intensively with Rousseau in twelve pages of *Die Diktatur* to build up his theory of the sovereign dictatorship.

There are three concepts that Schmitt takes from Rousseau's *Contrat Social* (1762) for his concept of sovereign dictatorship: the *volonté générale*, the government as *commission*, and the legislator. Let us start with the first concept. Schmitt (1921/2014, p. 100) describes Hobbes' theory of contract to introduce Rousseau. Here, the *volonté générale* is described in terms of three characteristics. First, it refers to what belongs to all, as opposed to what is private: "It is something that everyone owns not as a private person, but as a citizen" (1921/2014, p. 102). Likewise, it strives for the general: "it aims (...) at the common interest, the *utilité publique* [public utility] or *le bien général* [the common good]" (1921/2014, p. 102). Finally, the will is truly *general* because "it cannot concern itself with any individual case, it cannot make any individual distinction, it cannot recognise any privilege or extraordinary right, and it cannot make any concrete decision" (1921/2014, p. 102). For Schmitt, the theory of *volonté générale* expresses the 18th century conception of legislation as

a *loi de raison* [law of reason] that is consistent with the *loi de nature* [law of nature]. He thus claims that the *volonté générale* is the central concept in Rousseau's *Contrat Social*:

> *Volonté générale* is the essential concept in Rousseau's philosophical construction of the state. It is the will of the sovereign and it constitutes the state as a unity. In this respect it displays a conceptual quality that distinguishes it from any particular individual will. In collective will, what is always coincides with what should rightfully be. Just as power and right are unified in God and, according to the concept of God, whatever he wills is always good and the good is always his true will, so too the sovereign – *la volonté générale* – appears in Rousseau as something that, through its mere existence, is always just what it must be: *le souverain par celà seul qu'il est, est toujours tout ce qu'il doit être* ['the sovereign, just by virtue of being, always is what it should be'] (I, 7.5). The *volonté générale* is always 'right' (*droite*: II, 6.10); it cannot err (II, 3); and it is reason itself, in relation to which it is determined with the same necessity by which natural law governs the physical world (II, 4.4). It is imperishable, unchangeable and pure (IV, 1) (Schmitt, 1921/2014, pp. 100–101).

For Schmitt, Rousseau's idea of *commission* is one of the key elements to explain the transition to sovereign dictatorship based on Sieyès's idea of constituent power. The concept of *volonté générale* allows the German jurist to emphasize Rousseau's political radicalism, which assumes that the people are the sovereign and that government and dictatorship are nothing more than a mere *commission*. Indeed, the first chapter of the third book of the *Contrat Social* states that government "is simply a commission, a job, in which the leaders — mere officials of the sovereign— exercise in its name the power that it has lodged with them." Similarly, Schmitt affirms that "the government or the administration can be nothing but the execution of the *volonté générale*, this is their only justification" (1921/2014, p. 101). Schmitt had already anticipated his reading of Rousseau in the first chapter of *Die Diktatur*:

> Only when a people appeared in its unmediated and unorganised mass, rejecting representation, did the new radicalism come into being. At the same time this means that, with Rousseau, another side of this new radicalism becomes apparent: the concept of 'commission' radicalises what the government was given by the people, so that the government becomes the commissar of the people (*Kommissar des Volkes*) and can both be dismissed at any point in time and be subject to the people's discretion in an absolute way. But this theoretical development presupposes an historical genesis according to which the 'commissar' plays an important role (Schmitt, 1921/2014, p. 19, 1921/2015, pp. 24–25).

The analysis of Rousseau's theory of dictatorship appears here. This theme is originally developed in the sixth chapter of the sixth book of the *Contrat Social*, in which the Genevan philosopher describes dictatorship in the Roman Republic. For De Wilde (2019, pp. 1119–1122), Schmitt's linking of Rousseau's idea of dictatorship with the concept of

sovereign dictatorship is inaccurate, since dictatorship was understood by Rousseau as limited and exceptional, not sovereign. De Wilde's analysis, however, overlooks the fact that Schmitt is not saying that *sovereign dictatorship* is precisely Rousseau's idea of dictatorship. For Schmitt, any dictatorship, whether *commissary* or *sovereign*, is always a commission from a principal. He finds the meaning of commission first in Bodin and then in Rousseau's theory of government. Thus, Schmitt presents the transition to sovereign dictatorship through Rousseau's theory of dictatorship as a commission to protect the general will:

> Rousseau calls dictatorship [*une*] *importante commission* [an important commission]. The concept of commission is a tacit but basic notion in Rousseau's theory of the state. It is an expression of the idea that, with respect to the state, there are only duties and no rights – more precisely, that every exercise of sovereign rights can only be done in a commissarial manner (Schmitt, 1921/2014, p. 107).

A passage fundamental to Schmitt's reading of Sieyès's idea of constituent power is that he sees that in Rousseau's *Contrat Social* not only the government, the prince, and the dictatorship are commissarial, but also (if they exist) the representatives:

> What people do and wish is subject to his will; the person who is working on behalf of the realisation of the people's will can only act in a commissarial manner. There is neither a delegation nor a representation of this will, and even less a right to exercise it. The representatives and the deputies of the people, when they exist, are no more than *commissaires* ([*Contrat Social*], III, 15.5). There ought to be some representatives in the executive power, but the executive is just the arm of the law; it has no will of its own, and it is in essence only a commission, too. (...) The prince, and likewise the delegate of the people and the dictator, are therefore commissars. The dictator dictates to the outside world, but insofar as he is a commissar he himself must (internally [*im Innenverhältnis*]) be dictated to (Schmitt, 1921/2014, pp. 108–109).

Schmitt thus arrives at his idea that the transition to the concept of sovereign dictatorship occurs with the synthesis between the notion of the dictator as *commissar* and the concept of the *legislator*. He also anticipates his reading that the constituent power is the *mandate* from the people to create a constitution. De Wilde (2019, p. 1120) rightly warns that Schmitt reads Rousseau's *Contrat Social* against the letter. Moreover, Mehring (2021, p. 237) has pointed out that Schmitt's notion of the legislator is the basis for his later reading of Hitler as the *Führer* who "protects the law" (Schmitt, 1934a). In *Die Diktatur*, however, Schmitt attempted to develop an autocratic reading of constituent power. He points out that "the legislator is posited outside and prior to the constitution, whereas dictatorship is a constitutionally defined suspension of the existing legal system" (1921/2014, p. 109). The

legislator is not a commissar, but stands outside the constitutional order. In *Politische Theologie*, Schmitt compares him with the "creator" or "architect": "The world architect is simultaneously the creator and the legislator, which means the legitimizing authority. Throughout the Enlightenment period until the French Revolution, such an architect of world and state was called the legislator" (1922/2005, p. 48). He says that the legislator "is not a magistrate, not a sovereign, and in fact he is nothing, because he himself should first create the state in which such concepts come into being for the first time" (1921/2014, p. 110). Schmitt thus presents the dictatorial legislator as the transition to a sovereign dictatorship:

> The legislator stands outside the state, but he is in the right; the dictator stands outside the right, but he is within the state. The legislator is nothing but right that is not yet constituted; the dictator is nothing but constituted power. When a relationship emerges that makes it possible to give the legislator the power of a dictator, to create a dictatorial legislator and constitutional dictator, then the commissary dictatorship has become a sovereign dictatorship. 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 as a separate power: *le pouvoir constituant* [the constituting power] (Schmitt, 1921/2014, pp. 111–112).

This brings us to Schmitt's core idea: every exercise of constituent power is commissarial, but not every commissar exercises constituent power. The connection he makes between the concepts of commission and legislation in Rousseau's political theory finds its deepening in Sieyès's idea of constituent power. Schmitt says that the constituent power is not only a mandate from the sovereign to create a constitution, but also a mandate that represents the will of the people. Recall that the concept of a mandate implies the authorization of a principal to an agent to act on his behalf. For Schmitt, this distinguishes the medieval idea of the mandate from the revolutionary idea of the mandate: "God is a commissioner different from the bearer of this *pouvoir constituant*" because the divine commission "is something different from the *acte impératif* [imperative act], which Boutmy defines as the exercise of the *pouvoir constituant*" (1921/2014, p. 121). Schmitt emphasizes the difference between Bodin's idea of the commissary and the mandate of the constituent power in the French Revolution. The people is a pre-state entity that has neither an institutional form nor a magistracy. The commissar in the sense of constituent power is thus a "direct commissar of the people" who, "unlike the commissar of the absolutist prince, no longer has a stable reference point for his dependence" (1921/2014, p. 121). Schmitt concludes that if one combines Rousseau's idea of the commissar with the notion that "'the represented' is the people, all this acquires a completely new meaning" (1921/2014, p. 121).

Schmitt's reading of Sieyès underscores the *unlimited* and the *general* character of the mandate or commission from the people, as constituent power, to create a constitution. As I argued in the first chapter, Sieyès understood the constitution to mean two things at once: the political order expressing the will of the people and the written constitution drawn up by the extraordinary representatives. Schmitt takes up Sieyès's approach and introduces the distinction between the concepts of *constituent* and *constituted power* in *What is the Third Estate* (1789/2003). For Schmitt, Sieyès noted that "all existing powers are subject to the validity of laws, rules and procedures, which these powers cannot change just by themselves, because the basis of the existence of such things is the constitution" (1921/2014, p. 121). Thus, "all constituted powers are opposed to a constituent power, which lays down the foundations of the constitution" (1921/2014, p. 121). The German jurist points out that the mandate from the people as *pouvoir constituant* "is in principle unlimited and can do everything, because it is not subject to the constitution: it provides the foundation for the constitution itself" (1921/2014, p. 121). Therefore, "any enforcement or any legal form, any commitment of any kind, is completely unthinkable at this level" (1921/2014, p. 121).

For Schmitt, the mandate from the people is primarily *general* and not specific, what Colón-Ríos (2020, p. 88) calls a "free mandate." In contrast, Rubinelli (2020a, pp. 117–118) says that Schmitt presents the constituent power as unlimited and arbitrary. Unfortunately, the English translation confuses Schmitt's meaning by inserting the term "arbitrary constitution" into the concept of the people as sovereign, who do not determine the content of the constitution, but have only given the mandate to create a constitution at will:

> As bearer of constituent power, the people [*das Volk*] cannot commit itself and is entitled to give itself an arbitrary constitution at any time [*Das Volk als Inhaber der konstituierenden Gewalt kann sich nicht binden und ist jederzeit befugt, sich jede beliebige Verfassung zu geben*]. The constitution is the basic law [*la loi fondamentale*] not because it is unchangeable and independent of the will of the nation, but because not one of the organs invested with state authority can change anything in the constitution that warrants it (Schmitt, 1921/2014, pp. 121–122, 1921/2015, p. 137).

This paragraph shows that Schmitt conceptualizes constitution-making as a mandate from the people as *pouvoir constituant*, in contrast to the readings of Mommsen (1874/1952) and Zweig (1909) in terms of Roman public law. Here, the error of the reading introduced by Nippel (2011) and continued by Rubinelli (2020a) and Pasquino (2021), that Schmitt's concept of sovereign dictatorship is derived from Mommsen's work, becomes apparent.

Schmitt distances himself from the constitutional literature of his time on constituent power, which was influenced primarily by reading Georg Jellinek (2013). Zweig was a

disciple of Jellinek in Vienna (Kelly, 2014, pp. 341–342). The *positivist* conception of the constituent power points out that "the problem of the constitution becomes once more the problem of organising the constituent organ" (1921/2014, p. 122). The theory of the "organs of state" (*Staatsorgane*) originating from the Paul Laband tradition dominated in the early 20th century (Schönberger, 1997; Stolleis, 1992). Here constituent power is understood merely as the authority of the constituent assembly, an organ that "completely lacks a subjectivity of its own" because "even the highest state organ is no more than an organ" (1921/2014, p. 122). Thus, Schmitt places Zweig's work (1909), inspired by Mommsen's reading of the constituent power in Roman public law, within this trend of legal positivism of his time: "Even Egon Zweig's historical outline of this theory, extremely valuable as it is, is affected by the fact that he portrays the entire development as one going from the material to the formal concept of constitution" (1921/2014, p. 123). For Zweig (1909), the constitution is synonymous with a political order, so that any supreme power that creates the fundamental laws, whether or not there is a mandate, is a constituent power. In contrast, for Schmitt, the idea that the mandate to create a new constitutional order represents the will of the people is an expression of the idea inherent in the rationalism prevalent in the French Revolution.

Thus we arrive at Schmitt's reading of Sieyès's idea of constituent power as a concept in which a principal (the people) has no institutional form. The people commission an agent, but the people are not an organ of the state, nor are they synonymous with a magistracy. The people are a pre-state entity. Schmitt here extends Sieyès's idea that all authority is nothing more than an agent created by the constituent power. In this way, Schmitt presents his influential reading of constituent power as a concept similar to the idea of *natura naturans* in Spinoza's philosophy. In contrast to Mommsen's account of Roman law, for Schmitt constituent power is an idea inherent in the rationalism prevalent in the French Revolution:

> Sieyès' theory can only be understood as the expression of an attempt to find the principle that may organise the unorganisable. The idea of the relationship between *pouvoir constituant* [constituent/constituting power] and *pouvoir constitué* [constituted power] finds its complete analogy, systematic and methodological, in the idea of a relation between *natura naturans* [nature nurturing/creating] and *natura naturata* [nature natured/created]. And even if this idea has been integrated into Spinoza's rationalistic system, this demonstrates even more that this system is not exclusively rationalistic. The theory of the *pouvoir constituant* is incomprehensible simply as a form of mechanistic rationalism. The people, the nation, the primordial force of any state – these always constitute new organs. From the infinite, incomprehensible abyss of the force [*Macht*] of the *pouvoir constituant*, new forms emerge incessantly, which it can destroy at any time and in which its power is never limited for good. It can will arbitrarily [*Sie kann beliebig wollen*] (Schmitt, 1921/2014, p. 123, 1921/2015, p. 139).

When Schmitt says that the constituent power "can will arbitrarily," he actually means that the people can only *will* because, as a pre-state entity, it has only rights but no duties. The English translation again creates confusion by accommodating the concept of arbitrariness, whereas Schmitt refers rather to the rights of the *pouvoir constituant*. The important work of Fasel has criticized this reading by pointing out that Sieyès's conception of the will of the nation is in fact limited by natural law. Sieyès said: "The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation there is only natural law" (1789/2003, p. 136). For Fasel (2022, p. 1112), natural law plays two interrelated roles in the concept of constituent power. First, natural law justifies the creation of political associations and constitutions. Second, once the constitution exists, "natural law guides and directs them toward a particular goal: the protection and promotion of individual freedom and rights" (2022, p. 1112). Going beyond Sieyès's natural law doctrine, however, Schmitt emphasizes that the content of the nation's will "has always the same legal value like the content of a constitutional definition", so "it can intervene arbitrarily [*beliebig*] – through legislation, through the administration of justice, or simply through concrete acts" (1921/2014, p. 123). The nation "never constitutes itself, but always something else" (1921/2014, p. 123). Schmitt thus emphasizes the fact that the constituent power is a pre-state entity in a state of nature that has only rights expressed in its will:

> The nation is always in a natural state, runs one of Sieyès' famous statements. On the other hand, it was essential to the theory of the natural state [*Naturzustand*] that only individuals are in a state of nature. Here the oft-cited phrase that a nation is in a natural state does not mean, as it often does elsewhere, that the nation is in a state of nature by comparison with other nations; we are not dealing here with the construction of international law. The natural state rather concerns the relation of the nation to its own constitutional forms and to all the functionaries who act in the name of that nation. The nation is one-sided in the natural state: it has rights only, but not duties. The *pouvoir constituant* is not obliged to anything. The *pouvoirs constitués* [constituted powers], on the other hand, have only duties but no rights. This has an odd consequence: one part always remains in a natural state, while the other in a legal state – or, or more accurately, in a state of duty (Schmitt, 1921/2014, p. 124).

Since the nation is in a state of nature, the content of its will is not clear, but the mandate of the *pouvoir constituant* is: to create a constitution that mirrors the will of the people. Colón-Ríos (2020, p. 88) defines this idea as a "free mandate." The people mandate a constitution, but they do not express themselves on the specific, only on the general. This theme will be central to my later examination of the distinction between the concepts of *sovereignty* and *sovereign dictatorship*. Schmitt points out that in Sieyès's writings, the goal

of the extraordinary representatives is to complete the formation of the will of the constituent power. This does not mean, however, that the representatives can change or fix the will of the people, for they must merely mirror that *will* in their work. In other words: Their task as representatives is to be spokespersons for the will of the people. In the first chapter, I explained how Sieyès's idea of constituent power is a mandate that requires representatives to mirror the *volonté générale*. Schmitt thus says that representatives help shape the will of the people while maintaining the commissarial nature of their representation:

> But Sieyès introduces here the legitimacy of representation. He saw the delegates of the Constituent Assembly of 1789 as representatives, in contrast to the bearer of a *mandat impératif* [imperative mandate]. They should not be messengers delivering an already existing will; rather they have to 'shape' it first. (...) A peculiar relationship with the omnipotence of the constituting will emerges from this state of affairs. Even if the will of the people does not exist in terms of content but is shaped primarily through representation, the representative's dependence on this will – a dependence that is unconditional and, to put it succinctly, commissarial – still subsists. The will can be unclear. In fact it is even the case that it must be unclear, if the *pouvoir constituant* is to be truly unconstitutionable (Schmitt, 1921/2014, p. 124).

In contrast to his concept of sovereignty in *Politische Theologie*, Schmitt's concept of constituent power in *Die Diktatur* has always a commissarial character. He says: "More than Rousseau, Sieyès emphasised that all actions performed by the organs of state are of a commissarial nature," so that "the nation, can manifest itself at any time, in the immediacy of its plentitude of power" (1921/2014, p. 125). Schmitt contrasts *representation* and *imperative mandate*, pointing out that the content of the will of the people must be interpreted when the constitution is made: "In fact the will should not be precise, because as soon as it has been shaped in any way it ceases to be constituting/constituent and becomes a constituted will" (1921/2014, p. 125). The extraordinary representatives in the constituent assembly are "dependent commissars" whose powers allow them to shape the constituent will. Unfortunately, the English translation here reinstates the notion of "arbitrariness," whereas the proper sense of the exercise of the constituent power, as I explained in the first chapter, is that the extraordinary representatives will exactly as the people will:

> In point of form, the representatives acting on behalf of the *pouvoir constituant* are, then, unconditionally dependent commissars; but, in point of content, their mandate is not to be limited. One should assume that the most general and basic drawing-up of the constituting will – that is, the draft of a constitution – represents the genuine content of the mandate. But this is so not on account of the legal nature of the constitution, since concrete measures, too, can be interpreted as the will of the people. Unlike ordinary representatives, the extraordinary ones – those who execute the

> *pouvoir constituant* – can have some arbitrary authority. The exercise of the *pouvoir constituant* must therefore be distinguished from its substance; otherwise the *pouvoir constituant* would be already constituted in its extraordinary representative. If the extraordinary representatives have the mandate to draft the constitution, then, depending on the interpretation of the content of this mandate, they should be entitled to pass the constitution itself, or to submit it to a people's referendum. Either way, the mandate is performed when this has come to pass (Schmitt, 1921/2014, pp. 125–126).

The exercise of the constituent power must create the conditions for the destruction of the old order to be completed and the new order to be established. Schmitt says that because of the problems of restoring order after the revolution, the people may find themselves in a situation that limits their will. In this case, the solution is always to appeal again to the constituent power: "The task of clearing the way by eliminating the existing order through a revolution would then appeal once more to the *pouvoir constituant* and would make itself dependent upon it" (1921/2014, p. 126). He affirms that the exercise of constituent power always has a commisarial character and thus presupposes the existence of a mandate from the people as sovereign. This leads Schmitt to the conclusion that there is a "minimum of constitution" in the exercise of constituent power, i.e. the constitution not in the sense of the *written constitution*, but in the sense of *the constitution as the will of the people*:

> But, while the commissary dictatorship is authorised by a constituted organ and has an identity in the existing constitution, sovereign dictatorship exists only *quoad exercitium* [in relation to what it does], and it derives directly from the amorphous *pouvoir constituant*. [Sovereign dictatorship] is truly a commission, not a refusal to pass it on to earthly representatives, as the appeal to the mission of a transcendent God would be. It appeals to the ever present people, who can take action at any time and therefore can have immediate legal significance. A 'minimum of constitution' ['*Minimum von Verfassung*'] still remains as long as the *pouvoir constituant* is recognised (Schmitt, 1921/2014, p. 127).

This paragraph brings us to the distinction between the concepts of *sovereignty* and *sovereign dictatorship* in Schmitt's work. The concept of *commission* or *mandate* remains at the core of the idea of constituent power in Sieyès and Schmitt. The decisionist idea of sovereignty knows no mandate, while the commissary and sovereign dictatorships are based on a commission. Colón-Ríos theorized this issue by explaining that for Schmitt, "sovereignty was the type of power held by absolute monarchs, a power exercised in the absence of a commission," while the sovereign dictator "ultimately acted on a commission from a sovereign who is unable (or unwilling) to exercise its unlimited political force directly" (2020, p. 227). This is correct, since Schmitt emphasizes that the commissary dictatorship has a mandate to defend the existing constitution: "In practice [*in concreto*] the commissary

dictatorship suspends the constitution in order to protect it – the very same one – in its concrete form" (1921/2014, p. 118). In contrast, the sovereign dictatorship has a commission from the constituent power: "From the perspective of sovereign dictatorship, the entire existing order is a situation that dictatorship will resolve through its own actions" (1921/2014, p. 119). Unfortunately, the English translation does not use the full name ('sovereign dictatorship') when referring to this type of dictatorship, which does not protect an existing constitution but has the commission to create a new constitutional order:

> [Sovereign] dictatorship does not suspend an existing constitution through a law based on the constitution – a constitutional law; rather it seeks to create conditions in which a constitution – a constitution that it regards as the true one – is made possible. Therefore [sovereign] dictatorship does not appeal to an existing constitution, but to one that is still to come (Schmitt, 1921/2014, p. 119, 1921/2015, p. 134).

Sovereign dictatorship, unlike the decisionist conception of sovereignty in a state of exception, is subject to the will of the people. In *Politische Theologie* (1922/2005), Schmitt's account of sovereignty is not subject to any commission or mandate, as its theory of legitimation is the restoration of *homogeneity* or conditions of normality. In contrast, in the fourth chapter of *Die Diktatur* (1921/2014), the theory of sovereign dictatorship is subject only to the mandate of the constituent power. For Schmitt, the attribution of sovereignty becomes a mere category of the restoration of order, for example, in the face of an existential crisis of the state. For this restoration of order, the sovereign can create and destroy a constitutional order at will, since he has all the powers, including the constituent power. Unlike Rubinelli (2020a), however, I do not distinguish between *sovereignty* and *constituent power* in the sense that the former is absolute and unlimited and the latter is exercised and limited only in a channeled form. Schmitt's theory of constituent power is, as I anticipated in the first chapter on Sieyès's idea of constituent power, a *delegation of sovereignty*. Schmitt's sovereign dictatorship, then, is not the sovereign of *Politische Theologie*, but a political body that exercises unlimited powers according to a commission given by the constituent power:

> Consequently this dictatorial power is sovereign, but only as a 'transition'; and, because of its dependence on the task to be accomplished, this power is sovereign in a completely different sense from that in which the absolute monarch or a sovereign aristocracy can be said to be 'sovereign'. The commissary dictator is the unconditional commissar of action of a *pouvoir constitué*, and sovereign dictatorship is the unconditional commission of action of a *pouvoir constituant* (Schmitt, 1921/2014, p. 127).

In the appendix to the second edition of *Die Diktatur,* Schmitt consolidates his concept of the sovereign dictatorship as a mandate of the constituent power that ends as soon as the new constitution is created:

> The legal plenitude of power of a constituent assembly rests upon its exercise of the *pouvoir constituant*; therefore omnipotence lasts only until the constituting of powers through the constitution's coming into force. The very moment the assembly has accomplished its work and the constitution has become established law, every sovereign dictatorship comes to an end. Moreover, the constitutional possibility of a sovereign dictatorship comes itself to an end. A sovereign dictatorship is irreconcilable with a constitutional form of government (Schmitt, 1921/2014, p. 204).

Nevertheless, there are some extreme cases in which the distinction between *sovereignty* and *sovereign dictatorship* could blur. While it is true that sovereign dictatorship is commisarial, Schmitt opens a complex discussion when he asks what would happen when a sovereign dictatorship is confronted with a *state of exception*. His answer is that the sovereign dictatorship should restore order and act as a simple dictatorship. This discussion has major implications for my study of the distinction between the concepts of sovereignty and sovereign dictatorship. The German jurist explains this problem in the French Revolution: "The National Convention assembled on 20 September 1792 was given the task of drafting a constitution, and it was the extraordinary organ of a *pouvoir constituant*" (1921/2014, p. 127). Up to this point, Schmitt sees that the constituent assembly is consistent with the idea of the commissarial nature of the sovereign dictatorship: "After it drafted the constitution of 24 June 1793 and the people accepted it in a general election, its mandate, and therefore its authority, were concluded" (1921/2014, p. 127). However, Schmitt then points out that on October 10, 1793, due to the state of war and counter-revolutionary movements that threatened the constitutional order of the revolution, the National Convention decided to suspend the Constitution of 1793 until the revolutionary process was completed.

This leads Schmitt to ask whether a sovereign dictatorship can transition to a dictatorship aimed at restoring *homogeneity* and conditions of normality, i.e., a dictatorship that goes beyond the commission from the constituent power. It is precisely the National Assembly of 1792 that Schmitt presents as the emblematic case of a sovereign dictatorship that, because of the state of exception, went beyond its commission to save the revolution:

> Although here a constitution already agreed upon was suspended, this is an example of sovereign dictatorship. On the execution of its mandate, the Convention ceased to be a constituted organ. Neither in the mandate to draft the constitution nor in the constitution itself was there any mentioning of a suspension of the constitution. Hence

> a constituted organ that could declare the suspension did not exist. Consequently the Convention acted through a direct appeal to the *pouvoir constituant* of the people, in which it simultaneously claimed that it was inhibited in its exercise by the war and by the counter-revolution. It called its dominion 'revolutionary' (Schmitt, 1921/2014, pp. 127–128).

The problem with this passage is that Schmitt seems to suggest that the sovereign dictatorship, which had the commission from the *pouvoir constituant* to create a constitution, has now devolved into a dictatorship that suspends a constitution to protect the revolution from the counter-revolutionary movements. This would lead to the incoherence that it would be impossible to separate the *sovereign dictatorship* from the *commissary dictatorship*. Unfortunately, the analysis of this problem has been neglected in the literature, where there are only traditional studies that distinguish the concepts of *commissary* and *sovereign* dictatorships. There are also some historical studies on whether Schmitt's term "sovereign dictatorship" existed in the vocabulary of the French revolutionaries (De Wilde, 2021, pp. 149–152). A study of a sovereign dictatorship (in the form of a constituent assembly) in the face of a state of exception is still pending. This has led to confusion between the concepts of sovereignty, constituent power, and sovereign dictatorship. In my view, however, the work of Colón-Ríos (2020) is an important exception, as he has taken this theoretical discussion in Schmitt's work seriously and proposed an original solution to the problem.

The distinction between sovereign and sovereign dictatorship suggests that the *sovereign dictatorship* of the National Convention simply became a *dictatorship* in the face of the state of exception of 1793. Colón-Ríos has developed this reading by opposing the traditional interpretation that claims that Schmitt moved from the commissarial/sovereign typology to an anticonstitutional approach between *Die Diktatur* (1921/2014) and *Politische Theologie* (1922/2005). Colón-Ríos is correct in saying that the concept of legitimation in *Politische Theologie* is about how someone makes himself sovereign in a state of exception. A sovereign in this context, then, "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" (2020, p. 246). This means that even a constituent assembly with a commission from the *pouvoir constituant* to create a constitution can turn into a simple dictatorship: "The French National Convention, for example, was a sovereign dictator that became a sovereign (or simply, a dictator) when it went beyond its commission and decided that the threat of counter-revolution required it to assume all powers of government" (2020, p. 246). For Colón-Ríos, this explains the difference between the decisionist idea of sovereignty and the sovereign dictatorship, which

has a commission from the people: “This is why, in *Dictatorship*, Schmitt wrote that the sovereign dictator ‘is sovereign in a completely different sense from that in which the absolute monarch or a sovereign aristocracy can be said to be ‘sovereign’” (2020, p. 246).

For Schmitt, there is no doubt that the subject of the sovereign dictatorship was none other than the National Convention. It was precisely during this period that the dictatorship of the Jacobins and the Reign of Terror developed. For Schmitt, the sovereign dictatorship, which had the mandate of the constituent power to draft a constitution, has now turned into a dictatorship. Colón-Ríos’ explanation is consistent with Schmitt’s interest in finding the use of the term dictatorship among the politicians of the National Convention. De Wilde’s study (2021, p. 151) has shown that Schmitt’s citations of the use of the term dictatorship by revolutionaries such as Bertrand Barère are inaccurate. Nevertheless, Schmitt is correct in saying that the separation of powers, enshrined in Article 16 of the *Declaration of the Rights of Man*, was abolished toward the end of 1793. But then he emphasizes that the National Convention became a dictatorship that sought to install a new constitutional order: “In a very general sense, any exception from a condition conceived of as normal can be called a dictatorship (...). But the concept always remains in a state of functional dependence on an existing or imagined constitution” (1921/2014, p. 128). Schmitt says it is wrong to imagine the executive power of the Committee of Public Safety, dominated by Robespierre, as the subject of a *sovereign dictatorship*.

This leads Schmitt to argue that only the National Convention was the subject of a sovereign dictatorship, thanks to a mandate that originally emanated from the constituent power. The political legitimacy of the dictatorship of the National Convention of 1793 against counterrevolution thus derives from its *original* mandate by the people:

> In critical situations, when they acted without a specific mandate, they did so at their own peril and always appealed to the authority of the Convention, as in the betrayal of Dumouriez. The Convention always retained the impulsion [*impetus*]. Any state authority established in France between 1792 and 1795 – and with such immediacy and unscrupulousness – was rooted in the National Convention: it ‘emanated’ from it, as they liked to say at the time, and its functions were direct emanations of a *pouvoir constituant* similarly recognised only by itself (Schmitt, 1921/2014, pp. 130–131).

The possibility of a sovereign dictatorship in the form of a constituent assembly transforming into a simple dictatorship to restore order or *homogeneity* in the sense of establishing the conditions of normality is consistent with other examples Schmitt gives in *Die Diktatur*. This is the case of the constituent assembly of 1848 in France. For Schmitt, this assembly was a sovereign dictatorship that emerged from a mandate of the *pouvoir*

constituant. However, Schmitt (1921/2014, p. 174) describes how this constituent assembly transformed into a dictatorship in the face of a state of siege during the Revolutions of 1848. The key moment was the appointment of General Cavaignac by the constituent assembly to put down the June Days uprising. For Schmitt, the Cavaignac case shows that even a sovereign dictatorship can appoint some commissars with 'sovereign powers' to restore order and ensure the smooth functioning of the constituent assembly. The distinction between sovereign dictatorship (with a commission from the constituent power) and sovereignty (without a commision) is important for Schmitt's interpretation of Sieyès's idea of *pouvoir constituant*. But his idea that the constituent assembly could also develop into a dictatorship is very much inspired by his reading of Donoso Cortés' speech on dictatorship (1849/2000).

Schmitt cites how for Donoso Cortés the constituent assembly of 1848 was a "dictatorship in republican disguise" (1921/2014, p. 294). This reading strongly influenced Schmitt's distinction between *sovereignty* and *sovereign dictatorship*. Colón-Ríos is right when he says that for Donoso Cortés, dictatorship has unlimited powers because "it was a dictator that would have all powers, even the constituent one: if the saving of society required the creation of a new constitution, then the sovereign has the power— and the duty— to create it" (2020, p. 247). In contrast, Colón-Ríos points out that for Schmitt, "a constituent assembly authorized to adopt a new constitution is not the sovereign, but a sovereign dictator commissioned to exercise constituent power on behalf of the true sovereign" (2020, p. 247). Schmitt (1921/2014, p. 127) assumes that the authority of the sovereign dictatorship ends with the fulfillment of the commission to create a new constitutional order. This leads Colón-Ríos to the conclusion that Schmitt, by distinguishing Donoso Cortés' dictatorship from the sovereign dictatorship in the French Revolution, implicitly distinguishes between *sovereignty* and *constituent power*. I have found further evidence for the distinction between sovereignty and sovereign dictatorship in Schmitt's description of the case of Cromwell, a dictator with 'sovereign powers' but no commission from the constituent power.

c. Dictatorship with 'Sovereign Powers' but without a Commision

The distinction between sovereignty and sovereign dictatorship allows for a more complex analysis of the distinction between the concepts of *autocracy* and *popular autocracy*. Cromwell's military dictatorship is the paradigmatic example by which Schmitt shows that not every dictatorship with 'sovereign powers' is a *sovereign dictatorship*. For Schmitt, Cromwell established an autocracy but not exactly a popular autocracy. There is little literature on the significance of Cromwell's dictatorship in Schmitt's work (Magalhães, 2016, p. 299; Meier, 2011, pp. 58–59; Schulman, 2012, p. 162). It is not my aim to detail Cromwell's role in the context of the Second Civil War (1648-1649) and the Protectorate (1653-1658), but merely to present Schmitt's reading without examining whether his account is historically accurate. Schmitt's core idea is that Cromwell was *sovereign* but not a *sovereign dictator*, that is, a dictator with a mandate or commission from the constituent power. In the fourth chapter of *Die Diktatur*, the German jurist points out that it is not enough for Cromwell to claim that his power emanates from God or for him to use a narrative of popular legitimacy to qualify as a sovereign dictator. As I already explained, a sovereign dictatorship can only be proven if there is actually a mandate from the constituent power to create a new constitutional order. The case of Cromwell has important implications for the distinction between *sovereignty* and *sovereign dictatorship*, as Schmitt clearly distinguishes between dictatorships with and without a commission from the constituent power. I will briefly explain the presence of Cromwell in Schmitt's most important works.

The figure of Cromwell has been present in Schmitt's work since the early 1920s. His access to Cromwell's speeches and letters was through the volumes edited by Thomas Carlyle (1864). Inspired by his reading of Hobbes, Schmitt devotes several pages in *Die Diktatur* to the question of how, after the dissolution of the Rump Parliament and the establishment of the Protectorate, Cromwell made itself dictator in the manner of a "temporary monarch:"

> But the impression that the experience of the English Revolution and of its development into Cromwell's Protectorate made on Hobbes can also be recognised in his judgement on dictatorship. In the *Leviathan* (1651) he calls the dictator – a title he places next to that of protector, in allusion to Cromwell – a temporary monarch [*zeitweiliger Monarch*], on the grounds that in this case there is a power that must be seen to be equal to that of the monarch (Schmitt, 1921/2014, p. 23)

This interest in the figure of Cromwell as a dictator with 'sovereign powers' is maintained in his later works. Cromwell is portrayed by Schmitt in his book on Roman

Catholicism (1923/1996, p. 3) as a politician of the Puritan Revolution with a radical religious discourse akin to that of a "demonic rage." In his short essay on the political theory of the myth (1923/1940, p. 9), Cromwell is conceptualized as a military dictator who crushed the movement of the Levellers who were advocating popular sovereignty. The same reference to Cromwell's dictatorship appears in his essay on parliamentarism (1923/2017, p. 77). In *Verfassungslehre* (1928/2008, p. 92), Schmitt expands his reading by noting that "Cromwell's 'Instrument of Government' from the year 1653 is the first example of a modern written constitution." He also cites a famous speech by Cromwell that appears in a passage of *Der Begriff des Politischen* (1932/2007, pp. 67–68), in which the Spanish Empire is portrayed as an enemy of the English state. In *Der Hüter der Verfassung* (1929, p. 161), Cromwell's death is mentioned by Schmitt to illustrate how this leads to a discussion of how his Protectorate anticipates the French concept of guardianship over the constitutional order of the late 18th century. Cromwell also reappears in his famous book on Hobbes' theory of the state to show that the idea of the sovereign in *Leviathan* is not exactly Cromwell as Lord Protector:

> For several years in the middle of the seventeenth century, it appeared as if Cromwell's dictatorship would lead England to become both a centralized state and a great sea power. The image of the sea monster leviathan as a symbol of the English state held for a brief historical moment, and it is a curious coincidence that the *Leviathan* appeared in 1651, the year in which the Acts of Navigation were published. But the domestic political configuration of the English commonwealth was not forged by Cromwell. The image of the leviathan in Hobbes' concept of the state in England had become attached since 1660 to monarchical absolutism and thus to the Stuarts (Schmitt, 1938/2008, p. 79).

In *Die Diktatur*, however, Cromwell receives the most attention from Schmitt for the distinction between the concepts of *sovereignty* and *sovereign dictatorship*. The German jurist contextualizes Cromwell in the reactions his authority provoked in England, expressed in manifestos such as the *Agreement of the People* of October 1647. Here, the Levellers "saw Cromwell as a traitor because he retained his sovereign power after the abolition of the monarchy" (1921/2014, p. 114). In light of this, "Cromwell suppressed the Levellers' movement, which he considered to be an enthusiastic reverie [*Schwärmerei*], and imprisoned John Lilburne, their radical leader" (1921/2014, p. 114). Thus, for Schmitt, it is clear that Cromwell accumulated so many powers after 1653 that he definitely became *sovereign*; however, he doubts that Cromwell established a *sovereign dictatorship*:

> Numerous pamphlets exploded now in outrage about the fact that in the past England had been governed by a king, the Lords and the Commons, whereas now it was

> governed by a general, a military court and the Commons; about the absence of a general right to vote; and so on. For our present purposes, these writings, which are valuable for the history of the political idea, show that the question of sovereignty had already been decided upon at the time. Cromwell was the sovereign [*Cromwell war Souverän*]. The question is whether his dominion [*Herrschaft*] must be called a sovereign dictatorship (Schmitt, 1921/2014, p. 114, 1921/2015, pp. 128–129).

This passage shows that Schmitt considers Cromwell *sovereign*, but the central question for him is whether Cromwell has a mandate from the people to create a new constitutional order. For Schmitt, Cromwell is not a *sovereign dictator* because the political legitimacy he gives himself is influenced by a religious discourse peculiar to Puritanism, where the rationalism that the idea of constituent power has in the 18th century has not yet been prefigured: "The justification that Cromwell gave for his own sovereignty is the best witness to how superficially the pious Protestantism managed to break off the existing social order through an all-encompassing, yet never self-constituting omnipotence of the people" (1921/2014, p. 113). It is undeniable that "the Puritan Revolution was the most obvious example of a disruption in the continuity of the existing order in the state" (1921/2014, p. 113). The problem, however, is whether Cromwell's account of his legitimation by the people is really an appeal to the idea of constituent power. Schmitt problematizes this issue by saying that "in the directives and constitution drafts left by Cromwell's army it is stated that 'the people' is the source of all political authority" (1921/2014, p. 113). Also, "the notion of an unconditional dependence of the parliament on the people was spreading in Cromwell's independent army among other republican ideas, so that the army – that is, its entrusted people [*Vertrauensmänner*] – identified automatically with the people" (1921/2014, p. 113).

Schmitt argues that Cromwell as Lord Protector simply invokes the narrative of popular legitimacy, not because it is based on a mandate of the constituent power, but because this is the vocabulary of parliamentary representation in 17th-century England:

> The crucial sentence in the constitution drafts of that period is that the representatives of the people depend exclusively on those who have elected them. The power of the people's representatives over anyone (here the king is meant: the political enemy) is unlimited; but this has the unavoidable corollary that their dependence on the people they represent is likewise unlimited (Schmitt, 1921/2014, p. 113).

For the German jurist, Cromwell was originally a commissary dictator who became sovereign after the dissolution of the Long Parliament in 1653. Schmitt (1921/2014, p. 114) highlights that in Cromwell's speeches the political legitimacy is given by the grace of God and by the people. Schmitt cites this form of Puritan popular legitimacy in Cromwell's speech

of September 12, 1654, in which the military dictator says: “I called not myself to this place” (...) “If my calling be from God, and my testimony from the People, —God and the People shall take it from me, else I will not part with it.” Schmitt says that in this speech Cromwell acknowledges that he “was appointed by the Long Parliament as captain general of all troops in England, Scotland and Ireland,” so that his commissary dictatorship was “commissioned by the Long Parliament, bearer of the sovereignty of the Commonwealth and of the free state of England” (1921/2014, p. 114). The question, however, is whether Cromwell, when he dissolved the Long Parliament in 1653, was still acting as a *commissary dictator* or rather as a *sovereign* or *sovereign dictator*. Schmitt’s answer is that in destroying the constitutional order, Cromwell acted not as a *sovereign dictator* but simply as a *sovereign*:

> A commissary dictatorship had to cease with the dissolution of the parliament from which it was derived; but a sovereign dictatorship was not simply established as a result of that [*Dadurch wurde aber nicht einfach eine souveräne Diktatur herbeigeführt*]; and Cromwell himself, mind you, was the one who dissolved the Long Parliament on 20 April 1653. Gneist interprets as a ‘pure military dictatorship’ the interregnum that occurred. In reality, that was already Cromwell’s sovereignty [*die Souveränität Cromwells*] (Schmitt, 1921/2014, p. 114, 1921/2015, p. 129).

This passage is central to the distinction between the concepts of *sovereignty* and *sovereign dictatorship*, because it shows that not every destruction of the constitutional order is automatically a *mandate* or *commission* from the people. Schmitt (1921/2014, p. 115) describes how Cromwell’s sovereignty exercises unlimited powers to create fundamental laws and dissolve parliaments. This is evident first in his appointment of the members of the Barebone’s Parliament and then in his ‘Instrument of Government’ of December 16, 1653, both of which consolidated Cromwell’s sovereign power as Lord Protector. Although his ‘Instrument’ established the separation of powers, Cromwell decided to dissolve parliament on June 22, 1655. A new parliament was convened on September 17, 1656, which appointed Cromwell as ‘perpetual protector’ and asked him to be crowned king on March 25, 1657. Cromwell refused this request of the parliament. On February 4, 1658, this third parliament was dissolved by Cromwell himself until he died on September 3, 1658. His son, Richard Cromwell, inherited his office as Lord Protector. Schmitt concludes this historical account by saying, “these are the actual and the legal circumstances in which Cromwell became sovereign after the dissolution of the Long Parliament” (1921/2014, p. 115).

According to Schmitt, Cromwell’s sovereign powers after 1653 was not based on a commission from the people, but on a personal legitimation of the power that the military dictator exercised to restore order in England. Schmitt says that Cromwell wanted to rule with

a parliament and a constitution, which shows that he wanted "to regulate his own sovereignty constitutionally and, by that, to limit its exercise by law" (1921/2014, p. 115). Thus, when Cromwell creates the fundamental laws for England, he does so as an act of his sovereignty: "To this extent one can view the 'instrument of government' of 1653 as the first example of a constitutional monarchy with an imposed constitution" (1921/2014, p. 115). For this reason, "there was no doubt that Cromwell maintained sovereignty, understood as a basically unlimited power that remained above all the functions limited by rules; the decision on 'the necessity of the state'" (1921/2014, p. 115). However, Cromwell also exercised sovereign power to destroy the monarchical constitutional order: "Only the dissolution of the Long Parliament in 1653 was in fact a disruption of the legal context, a revolution" (1921/2014, p. 115). Schmitt points out that "what happened later were Cromwell's attempts, founded upon that event, to circumscribe his sovereignty by his own will" (1921/2014, pp. 115–116). The German jurist concludes that Cromwell exercised his sovereignty with commissars, which in turn raises the question of whether his sovereignty can be defined as a sovereign dictatorship, similar to the National Convention in the French Revolution:

> One can only speak of a military dictatorship insofar as, after the dissolution on 22 January 1655 of the parliament assembled for the instrument, Cromwell governed a certain period of time through eleven major-generals, who can be viewed as commissary dictators. (...) Cromwell praised their service in the restoration of public peace in his speech of 7 September 1656. There is indeed a similarity between these major-generals and the commissars of the National Convention; but their dictatorship rested within the boundaries of Cromwell's sovereignty, from which it derived. It was a military dictatorship in the sense of a commissary dictatorship exercised by the military commander; but Cromwell had given that up already in 1656, because – as Gardiner says – he opposed any military dictatorship. Therefore the question remains whether the sovereignty exercised by Cromwell himself can be called a sovereign dictatorship (Schmitt, 1921/2014, p. 116).

After this passage, Schmitt (1921/2014, pp. 116–118) begins a complex conceptual explanation of why not every *dictator* is a *sovereign dictator*. For him, Cromwell could be called a sovereign dictator only if one defines the concept of dictatorship simply as the destruction of the separation of powers. However, the use of this general conception of dictatorship leads to the incongruity that an absolute monarchy would also be a 'dictatorship', so there would be no difference between dictatorship and sovereignty. Schmitt returns here to his discussion of the concept of *commissary dictatorship*, which he developed in the first chapter of *Die Diktatur*. The distinguishing element of any dictatorship is its commissarial character. Schmitt therefore points out that it is not sufficient for the definition of a sovereign

dictatorship that a coup d'état takes place and a monarchy is abolished. If dictatorship is understood in this sense, Schmitt argues, then Cromwell and Napoleon "are typical dictators simply because they were generals" (1921/2014, p. 117). He emphasizes that in both sovereign dictatorship and commissary dictatorship, "the idea of a situation that ought to be created by the practice of the dictator is implicit in the concept" (1921/2014, p. 117). For this reason, "the status of the absolutist prince does not depend on the accomplishment of a specific task, and his responsibilities do not represent a form of empowerment with regard to an end that has to be achieved" (1921/2014, p. 119). Schmitt thus returns to his explanation of the concept of sovereign dictatorship as a commission from the *pouvoir constituant*:

> To every dictatorship there is a commission, and the question is whether a commission compatible with sovereignty exists and, if so, to what extent it may contradict the concept of sovereignty according to which the commission depends on a specific task. The specificity of the *pouvoir constituant* makes such a dependence possible by reason of the fact that, given the character of this *pouvoir* as a non-constituted and never constitutable entity, it is conceivable that the bearer of stately power puts himself in a dependent position without it being the case either that the power he makes himself dependent on comes to be that of a constitutional sovereign or that, on the contrary, any earthly institution disappears, as in the sovereign's dependence on God (Schmitt, 1921/2014, pp. 119–120).

But Schmitt points out here that Cromwell's 'sovereign powers' stems not from constituent power but from his Puritan notion of fulfilling a God-given mission. The well-known work of Meier (2011, pp. 58–59) has highlighted these theological analogies in Cromwell's speeches. Meier cites them in *Der Begriff des Politischen* (1932/2007) to argue that there is a political-theological reading of Cromwell by the German jurist here. Beyond the theological discussion, it is important to emphasize that Schmitt defines the legitimacy of Cromwell's sovereignty from religious-traditional categories (mandated by God) and not from the 18th-century concept of constituent power as a *commission* from the people:

> Cromwell appealed to God for his mission. Although he occasionally talked about the people's consent to his dominion, nevertheless, in a decisive moment such as the dissolution of the Long Parliament, there was never any doubt that he saw in God the source of his power and he did not relate his sovereignty to the people, as the radical democrats of his time understood it. On 12 September 1657, in his grand speech to the newly appointed parliament, he declared that he would be frightened of committing a sin were he to return prematurely, to the parliament, the power he had been entrusted with by God; and that he would rather die in disgrace than see the parliament rejecting his protectorate, which had been mandated by God (Schmitt, 1921/2014, p. 120).

This passage brings us to my central argument: the military dictatorship of Cromwell is the emblematic case that not every dictatorship with 'sovereign powers' is a *sovereign dictatorship*. The distinction between the concepts of *sovereignty* and *sovereign dictatorship* is thus condensed into a case study in Schmitt. The element Cromwell lacks to be a sovereign dictator is the political legitimacy of his destruction and creation of a new constitutional order in England under the idea of a mandate of the *pouvoir constituant*. For Schmitt, Cromwell legitimized his power by saying he was fulfilling a God-given mission. However, invoking a mandate from God is not the same as the idea of a mandate of the constituent power. In this context, Schmitt cites the important reading of Émile Boutmy, a famous French political scientist of the late 19th century and founder of *L'École libre des sciences politiques,* now known as *Sciences Po*. Boutmy (1885, p. 238) defines the exercise of the constituent power as an *imperative act* (*acte impératif*) of the nation, since the French Constitution was created as a mandate of the *pouvoir constituant*. In fact, Boutmy understands the imperative act as the political foundation of the American and French revolutions, where the constituted order is created by a mandate from the people. Since this *imperative act* does not exist in Cromwell's context and vocabulary, Schmitt concludes that his military dictatorship is *sovereign* as a narrative of a mandate from God, but not a *sovereign dictatorship*:

> God is a commissioner different from the bearer of this *pouvoir constituant*; and God's dispensation, providence – which, as Esmein accurately observes, for Cromwell had the same meaning as in Bossuet's philosophy of history – is something different from the *acte impératif* [imperative act], which Boutmy defines as the exercise of the *pouvoir constituant* (Schmitt, 1921/2014, p. 121).

The distinction between the concepts of dictatorship with 'sovereign powers' and *sovereign dictatorship* has important theoretical and empirical consequences. The difference between these dictatorships lies in the foundations of political legitimacy, for the sovereign dictatorship leaves open the possibility that the sovereign (the people) can revoke the mandate of the sovereign dictatorship, but not vice versa. This differentiation in Schmitt's work makes it possible to distinguish dictatorships with or without a *mandate* or *commission* from the people to create a new constitutional order. I will briefly examine this problem.

As far as consequences are concerned, there is no difference between a dictatorship with 'sovereign powers' and a sovereign dictatorship, since both concentrate power in one authority, create new fundamental laws, and abolish the separation of powers. This is the Mommsenian approach of Nippel (2011), further developed by Kelly (2016), Rubinelli (2020a), and Pasquino (2021). For this reading, any dictator who creates the fundamental laws

of the state, regardless of the political foundations of the dictatorship, is called a sovereign dictator. The approach that confuses and overlaps the concepts of sovereignty, constituent power, and sovereign dictatorship in Schmitt's work has been consolidated for decades. For example, in his study of the 1973 coup d'état in Chile, Cristi defines Pinochet as a sovereign dictator in Schmitt's sense, which leads to the erroneous assumption that the coup d'état was a commission from the people: "As an absolute or sovereign dictator, Pinochet seized *pouvoir constituant,* eliminated the whole existing constitutional order, and generated a new constitution" (1999, p. 1768). This reading overlooks the fact that the Cromwell case shows that not every dictator with 'sovereign powers' is a sovereign dictator. As I will explain later, the literature on Schmitt's Reichspräsident has extended this conceptual error when referring to this president as the new embodiment of the constituent power by virtue of the emergency powers of Article 48 of the Weimar Constitution.

In the decisionist idea of sovereignty, there is no mandate or commission from the people. Cromwell's dictatorship is consistent with the account of the dictator with 'sovereign powers' in *Politische Theologie*. The dictator can create the fundamental laws and dissolve parliament if he needs to save society. Schmitt's sovereign was strongly inspired by the notion of dictatorship in Donoso Cortés' famous speech (1849/2000). This dictator is not subject to any mandate, because his legitimacy is to be the savior of the existence of the state. It is about his decision to restore *homogeneity* in the face of the state of exception. Therefore, he is exempt from all existing constraints of the current constitution and positive law. However, the question remains open whether it can be the will of the people to create a new constitutional order with a monarch as the new bearer (*Träger*) of the constituent power. Schmitt's answer is that if this is the mandate from the people, it must be *explicitly* expressed. In *Verfassungslehre* (1928/2008, Chapter 8), the analysis of the different manifestations of constituent power is developed. The emblematic case is Napoleon III in the foundation of the Second French Empire. For Schmitt, the plebiscites of 1851-1852 are a mandate of the *pouvoir constituant* in the form of an *acclamation*. This opens the possibility that a person and not only a group (constituent assembly) can be the holder of a sovereign dictatorship.

d. The Constitution and the Explicit Expressions of the Constituent Power

When the people, as the bearer of the constituent power, give the mandate to create a new constitutional order, this must be *explicitly* expressed. It is not enough for an authority to invoke the narrative of popular sovereignty or to say that it has received a 'mandate' from the people to create a constitution; this mandate *must* be true. Schmitt calls this the "activation" (*Betätigung*) of the constituent power. His core idea is that the natural expression of the mandate of the constituent power is in the form of *acclamation*. And the two main forms of acclamation are revolutions and constitutional plebiscites. The theme of acclamation as *democratic homogeneity* has already been developed in Schmitt's essays on parliamentarism (1923/2017) and on referendums and plebiscites (1927/2014). In *Verfassungslehre*, he summarizes the explicit expression of the constituent power as follows: "The people initiate [*betätig*] their constituent power through some recognizable expression [*erkennbarer Ausdruck*] of their direct comprehensive will, which is targeted at a decision [*Entscheidung*] on the type and form of the existence of the political unity" (1928/2008, pp. 130–131, 1928/2017, p. 82). Thus, Schmitt extends the political application of his concept of the creation of a constitutional order as a *mandate* or *commission* from the people, which he had developed in his concept of *sovereign dictatorship* in *Die Diktatur*. His concept of constituent power is now presented for the case of the creation of a constitution as in the Weimar Republic. In this section, I focus my analysis on Schmitt's *Verfassungslehre* (1928/2008).

With the title of the book, Schmitt intended to place his work in the theories of republican constitutions that had been developed in European public law. The term '*Verfassungslehre*' was not coined by Schmitt. Rather, the term already existed in 19th-century German state theory, and even a Czech activist such as J. V. Frič (1873) used the term as a subtitle in his political essay against German liberalism. However, Schmitt was the first to publish a work in German law that used the term as a book title, and he therefore believed he was pioneering a scholarly field in Germany (Mehring, 2009, p. 215). As Schmitt mentions in his introduction to the book (1928/2017, p. vii), his aim was not a monograph similar to the constitutional handbooks, but the attempt to build a system ("*der Versuch eines Systems*"). He points out that *Verfassungslehre* is a special branch of European public law that developed into constitutional law in Germany in connection with the *Bismarcksche Verfassung* (1871). In France, this doctrine consolidated in the early 20th century in the *Droit Public* of the Third French Republic. Schmitt's work aims to join the ranks of those who have analyzed the concept of constituent power in constitutional law: "Today, the characteristic property of this

part of public law finds expression in famous names such as Esmein, Duguit, and Hauriou. It is predictable that the scholarly treatment of the Weimar Constitution also leads in Germany to the formation of a constitutional theory" (1928/2008, p. 53).

In his *Verfassungslehre* (1928/2008, 1928/2017), Schmitt explains his theory of constituent power and how the mandate fom the people is explicitly expressed. The book is primarily a work on the constitutional theory of the Weimar Constitution. It is divided into four sections with a total of thirty chapters. I will briefly review the most important contents.

The first section of the book deals with the concept of constitution. Schmitt here presents his theory of the constitution as the *form of existence* of a political order and as the *decision* or *will* of the constituent power. Unfortunately, in the English edition the term "*pouvoir constituant*" was simply translated as "constitution-making power," whereby the meaning of the *decision* as a *mandate* from the people was lost. Schmitt calls it "the positive concept of the constitution (the constitution as the complete decision over the type and form of the political unity)" (1928/2008, Chapter 3). The eighth chapter deals with Sieyès's idea of constituent power and how the mandate from the people is *explicitly* expressed. Of importance are the ninth chapter on the democratic legitimacy of the constitution, the tenth chapter on the *permanence* of the constituent power, and the eleventh chapter on the distinction between constitution-making (as an activity of the constituent power) and constitutional reform (as an activity of the *constituted powers*). The second section of the book deals with "the *Rechtsstaat* component of the modern constitution," in which Schmitt develops the foundations (fundamental rights) and organization (separation of powers) of the liberal constitutional state. The third section deals with the "the political component of the modern constitution," in which the concepts of democracy, monarchy, and parliamentarism are defined, focusing on the parliamentary government of the Weimar Republic. Finally, Schmitt concludes the book with the constitutional theory of federation.

Schmitt's core idea is that the mandate from the people to an agent (such as a constituent assembly) to create a new constitution must be *explicitly* expressed. The mandate of the constituent power manifests itself *naturally* through a recognizable form of *acclamation* (like a revolution) and is then put into practice (in "execution" or "formulation") in the organization of constituent assemblies and plebiscites. In his constitutional theory, Schmitt merges his concept of the constitution as the *form of existence* of a political order and his idea of the *pouvoir constituant* as the will of the people. This conception of constituent power as an explicit mandate from the people is strongly inspired by Boutmy's understanding of the *acte impératif* (imperative act). Schmitt cites the French political scientist's idea in key

passages of *Die Diktatur* (1921/2014, p. 121), *Politische Theologie* (1922/2005, p. 46) and *Verfassungslehre* (1928/2008, p. 125). For Boutmy (1885, p. 238), the imperative act is found in the constitutionalism of the American and French Revolutions because a revolution is an explicit *authorization* from the people to establish a new constitutional order. For Schmitt, however, the question remains open in which other possible forms we can recognize this authorization emanating from the mandate: "Special questions and difficulties stem from the distinctiveness of the subject of this constituent power" (1928/2008, p. 131). In *Verfassungslehre* (1928/2008, Chapters 8, 10), he explains the explicit expressions of the constituent power after presenting his remarks on the different conceptions of the term constitution. I will first explain Schmitt's ideas on the concept of constitution.

For Schmitt, the constitution is essentially the political order of the state. In the first chapter of *Verfassungslehre*, he calls this idea the *absolute concept of the constitution*. He distinguishes two conceptions of this political order. The first conception is the *constitution in the absolute sense*, i.e., "the concrete manner of existence that is a given with every political unity" (1928/2008, p. 59). The second conception is the constitution as a *legal fundamental regulation*, that is, as a "unified, closed *system* of higher and ultimate norms (constitution equals norm of norms)" (1928/2008, p. 62). This second conception includes the meaning of the constitution as a political order created by the mandate of the *pouvoir constituant*. However, Schmitt distinguishes five meanings within these two conceptions of the *absolute concept of constitution*. I will briefly explain these conceptions and meanings.

The *constitution in the absolute sense* has three meanings (Schmitt, 1928/2008, pp. 59–62). The first is the constitution as the *form of existence* of the political order of the state. Indeed, there is no separation here between the concepts of constitution and the political order of the state. Schmitt uses it to refer to the ancient Greek idea of the constitution in the work of Aristotle. He takes up this conception in other works such as *Der Hüter der Verfassung* (1931/2016) and retains it in his National Socialist writings (Schmitt, 1933). Schmitt speaks of this constitution "as a unified whole," by which he means the political unity of the people, referring to its *form of existence*: "In this limited meaning, 'constitution' can describe the state itself, and, indeed, an individual, concrete state as political unity or as a particular, concrete type and form of state existence" (1928/2008, p. 59). The constitution is "the complete condition of political unity and order" (1928/2008, p. 59). Thus, the state *has* no constitution, but the state *itself* is a constitution in the sense of a political order. Schmitt draws on the Aristotelian conception of the constitution as a political order of the state:

> The state *is* constitution, in other words, an actually present condition, a *status* of unity and order. The state would cease to exist if this constitution, more specifically, this unity and order, ceased to exist. The constitution is its "soul," its concrete life, and its individual existence. The word "constitution" often has this sense in Greek philosophy. According to Aristotle, the state (πολιτεία) is an order (τάξις) of the naturally occurring association of human beings of a city (πόλις) or area. The order involves governance in the state and how it is organized. By the virtue of this order, there is a ruler (κύριος). However, a component of this order is its living goal (τέλος), which is contained in the actually existing property of the concrete political formation (*Politics*, bk. IV, chap. I, 5). If this constitution is eliminated, the state is as well; if a new constitution is founded, a new state arises (Schmitt, 1928/2008, p. 60).

While this first meaning of *constitution in the absolute sense* refers to the *form of existence* of the political order of the state, the other two meanings refer primarily to the *forms of state*. The second meaning is the constitution as a type of political and social order. The constitution is a specific form of state: "The constitution is a special form of rule, which is part of every state and not detachable from its political existence, for example, monarchy, aristocracy, or democracy" (1928/2008, p. 60). Since the constitution is a form of state, for Schmitt a revolution, such as that of November 1918 in Germany, creates a new constitution in the sense of a republican state. The third meaning of constitution, however, is different, for it expresses an order that is *emergent* and *dynamic*. Schmitt ties in with Rudolf Smend's constitutional theory of *integration*. The constitution of the state is synonymous with the formation of a new state: "The constitution is the active principle of a dynamic process of effective energies, an element of the becoming, though not actually a regulated procedure of 'command' prescriptions and attributions" (1928/2008, p. 61). Schmitt also places Lorenz von Stein's constitutional theory within this third meaning of the constitution as a process of forming a state order: "In the state constitution, state life rises from below to above; in the state order, it proceeds from above to below. The state constitution is the free formation of the state will; the state order is the organic execution of the will so formed" (1928/2008, p. 62).

After Schmitt has presented the three meanings of *constitution in the absolute sense*, he moves on to the conception of the constitution as a normative order. He calls it the constitution as a *legal fundamental regulation*, i.e., the constitution as "a closed *system* of higher and ultimate *norms* (constitution equals norm of norms)" (1928/2008, p. 62). This is not a descriptive but a *prescriptive* conception of the constitution, which has two meanings.

The first meaning is the constitution as a system of norms: "It involves the entire normative framework of state life in general, the basic law in the sense of a closed unity, and of the 'law of laws'" (1928/2008, p. 62). In contrast to the *constitution in the absolute sense*, no equality is established here between the constitution and the political order of the state, but

the state is a *normative* concept: "The constitution is the state, because the state is treated as something genuinely *imperative* that corresponds to norms, and one sees in the state only a system of norms" (1928/2008, p. 63). Interestingly, Schmitt relates this meaning of the constitution to Hans Kelsen's state theory. Schmitt says that Kelsen "portrays the state as a system and a unity of legal norms," but without explaining "the substantive and logical principle of this 'unity' and of this 'system'" (1928/2008, p. 63). Here he merely repeats his criticism of Kelsen in *Politische Theologie* (1922/2005, Chapter 2). Schmitt summarizes this prescriptive meaning of constitution with his reading of Kelsen's theory of the *basic norm* (*Grundnorm*): "A normative unity or order is only derivable from systematic, correct principles, which are normatively consistent and, therefore, valid in themselves by virtue of reason and justice without regard for their 'positive validity'" (1928/2008, p. 62).

However, the second meaning of this conception of the constitution as a *legal fundamental regulation* refers to Schmitt's theory of constituent power. This constitution is an order created by the will of the people: "In truth, a constitution is valid because it emanates from a constituent power (i.e. power or authority) and is set by its will" (Schmitt, 1928/2017, p. 9). Unfortunately, the English edition has translated the term 'constituent power' (*verfassunggebende Gewalt*) in this passage as "constitution-making capacity" (1928/2008, p. 64), thereby losing the meaning of the constitution as a normative order established by the will of the people. The term "will" here has the same meaning as *mandate*, for Schmitt points out that the will expresses the origin of an "ought:" "In contrast to mere norms, the word 'will' denotes an actually existing power as the origin of an ought/command [*Ursprung eines Sollens*]. The will is existentially present; its power or authority lies in its being" (1928/2008, p. 64, 1928/2017, p. 9). For Schmitt, "a norm is valid because it is positively established, in other words, by virtue of an existing will" (1928/2008, p. 64). A norm, in this sense, never establishes itself. Schmitt criticizes Kelsen because the constitution is not an order in the sense of a pure system of norms. Rather, he argues, the Weimar Constitution is a legal order because it expresses the will (in the form of a mandate) of the constituent power:

> The concept of legal order contains two entirely different elements: the normative element of justice and the actually existing element of concrete order [*das seinsmäßige Element der konkreten Ordnung*]. The unity and order lies in the political existence of the state, not in statutes, rules, and just any instrument containing norms. (...) The unity of the German Reich does not rest on these 181 articles and their validity, but rather on the political existence of the German people. The *will* of the German people, therefore something existential, establishes the unity in political and public law terms beyond all systematic contradictions, disconnectedness, and lack of clarity of the

> individual constitutional laws. The Weimar Constitution is valid because the German people "gave itself this constitution" (1928/2008, p. 65, 1928/2017, p. 9).

This passage leads us to the third chapter of *Verfassungslehre*, where Schmitt presents his theory of the constitution as the creation of the constituent power. He calls this "the positive concept of the constitution (the constitution as the complete decision over the type and form of the political unity)" (1928/2008, p. 75). As we have seen, this concept is already contained in the conception of the constitution as a *legal fundamental regulation* presented in the first chapter. For Schmitt, the constitution is a political order created by the constituent power, so that "a concept of the constitution is only possible when one distinguishes constitution and constitutional law" (1928/2008, p. 75). The activity of the constituent power is not expressed in the particular, but in the *general*. Therefore, the mandate of the constituent power refers to the totality of the *form of existence* of the political order of the state:

> The constitution in the positive sense originates from an act of the constituent power [*Akt der verfassunggebenden Gewalt*]. The act of establishing a constitution as such involves not separate sets of norms. Instead, it determines the entirety of the political unity in regard to its peculiar form of existence through a single instance of decision [*Entscheidung*]. This act *constitutes* the form and type of the political unity, the existence of which is presupposed. It is not the case that the political unity first arises during the "establishment of a constitution." The constitution in the positive sense entails only the conscious determination of the particular complete form, for which the political unity decides (1928/2008, p. 76, 1928/2017, p. 21).

Thus Schmitt introduces his distinction between the concepts of *constitution* and *constitutional law*. The decision of the constituent power does not necessarily create a new state, but a new constitution. The constituent power is always exercised by a subject who represents the will for a new constitutional order. Schmitt says that "such a constitution is a conscious decision, which the political unity reaches for itself and provides itself through the bearer of the constituent power" (1928/2008, pp. 75–76). Examples of this conscious decision to create a new political order are both new states and states where revolutions have taken place that have led to major social changes. For Schmitt (1928/2008, p. 76), the United States of America in 1775 and Czechoslovakia in 1919 are cases where a new constitution is created at the same time as a new state. However, he points out that this is not always the case, as the French and Russian revolutions show. The exercise of constituent power presupposes the existence of a political unity that decides on the totality of the form of existence of its state. For this reason, "the unity of the constitution lies not in the constitution itself, but rather in the political unity, the peculiar form of existence of which is determined through the act of

constitution making" (1928/2008, p. 76). The expression of the constituent power is a *decision* for a constitution, while the constitutional law exists *within* the constitution:

> The constitution is valid by virtue of the existing political will of that which establishes it. Every type of legal norm, even constitutional law, presupposes that such a will already exists. On the contrary, constitutional laws are valid first on the basis of the constitution and presuppose a constitution. For its validity as a normative regulation, every statute, even constitutional law, ultimately needs a political *decision* that is prior to it, a decision that is reached by a power or authority that exists politically (Schmitt, 1928/2008, p. 76).

This passage brings us to the central point of my remarks: Schmitt's concept of the constitution as a *decision* of the people leads to the question of how the constituent power is *explicitly* expressed. Using Schmitt's historical examples, I have established that there are two explicit mandates of the people: the *revolutionary mandate* and the *plebiscitary mandate*. I have identified three features that these mandates have in *Verfassungslehre*. First, it is a mandate for the *whole*, that is, for the creation of a new constitutional order. Second, it is an "act of will" (*Willensakt*) that is recognizable because it is *true*. The act has an *imperative* character, i.e., a mandate from the people that is recognizable in critical situations, as in the case of revolutions. Finally, the mandate of the constituent power has as its *natural* expression the *acclamation* of the people on the form of existence of the political order. I will now explain each of these features in the expressions of the mandate of the constituent power.

The mandate of the constituent power does not refer to the *particular* (e.g. to the amendment of a group of constitutional laws), but to the *whole* political order. In *Verfassungslehre*, Schmitt (1928/2008, p. 77) states that the decision about the *form of existence* of the political order is inherent in the conception of *constitution in the absolute sense* (1928/2008, pp. 59–62). The commissioner of the constituent power has the mandate to decide on the entire constitutional order that he wants to create. Thus, the exercise of the constituent power is always aimed at the creation of a political order of the state and not only at the protection of the constitution in force: a guardian of the constitution (Schmitt, 1931/2016) is always a *guardian*, not a *bearer* of the constituent power (the people). He explains the essence of the constituent power by saying that "prior to the establishment of any norm, there is a fundamental political decision by the bearer of the constituent power" (1928/2008, p. 77). Thus, "in a democracy, more specifically, this is a decision by the people; in a genuine monarchy, it is a decision by the monarch" (1928/2008, p. 77). This leads to Schmitt's idea that the bearer of the constituent power can be the people or the monarch.

But before discussing the bearer (*Träger*) of the constituent power, Schmitt says that the mandate of the constituent power is an *imperative act*. Schmitt takes up Boutmy's understanding of the constituent power as a mandate: "One may say that the constitution must be a decision and *every act of the constituent power* must necessarily be command [*Befehl*]. It is, as Boutmy (p. 241) puts it, an '*acte impératif*'" (1928/2008, p. 125). The constitution must be understood as an "act of will" (*Willensakt*) in the sense of expressing the will of the people. This "act of will" is essentially a *mandate,* i.e., a *decision* of the constituent power about the form of existence of the *whole*. In the eighth chapter of *Verfassungslehre,* he explains that the activation of the constituent power always takes the form of a mandate about the *whole*: "The constituent power is the political *will,* whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence. The decision, therefore, defines the existence of the political unity in toto" (1928/2008, p. 125). Thus, the constitution "is based on a political decision concerning the type and form of its own being, which stems from its political being;" the constituent power is thus "political *will*, more specifically, concrete political being" (1928/2008, p. 125).

Schmitt's statement that a revolution is a form of mandate of the constituent power leads him again to Sieyès and the French Revolution. In these passages of *Verfassungslehre*, Schmitt takes up his reading of Sieyès's idea of constituent power, which he had already developed in his study of the concept of *sovereign dictatorship* in *Die Diktatur* (1921/2014, Chapter 4). For Schmitt, "Sieyès bound the antidemocratic theory of the representation of the people's will through the National Constituent Assembly with the democratic theory of the constituent power of the people, which directed itself against the existing absolute monarchy" (1928/2008, p. 128). He then extends his reading of Sieyès's idea of constituent power as a mandate by explaining that the *explicit* expression of the constituent power is not a formal commission, but a mandate expressed in a revolution to create a new constitutional order:

> With complete awareness, a people took its destiny into its hands and reached a free decision on the type and form of its political existence. That revealed itself immediately as the Estates General, convened by the king on 17 June 1789, constituted itself as the *National Constituent Assembly*. The estates constituted themselves without being legitimated through a formal commission [*formeller Auftrag*], as the commissioners of the people exercising its constituent power and derived their powers from this constituent power. Sieyès formulated the theory of the "pouvoir constituant" of the nation. He rightly designated it an act of the Revolution [*Tat der Revolution*] that the Revolution immediately at its inception established the difference between constitutive and constituted power. Despite the great influence of the American model, the year 1789 first signifies the beginning of the new political principles (Schmitt, 1928/2008, p. 127, 1928/2017, p. 78).

This passage summarizes Schmitt's idea of how the mandate from the people to decide on the form of existence of the political order of the state could be expressed as a *revolutionary mandate*. First, he says that "the people should decide on the basic questions of their political form and their organization without themselves being formed or organized" (1928/2008, p. 131). Then he says that Sieyès's idea of constituent power shows that "there cannot be a regulated procedure, through which the activity of the constituent power would be bound" (1928/2008, p. 130). Therefore, "the people initiate their constituent power through some recognizable expression of their direct comprehensive will" (1928/2008, p. 131). The people are neither authority nor magistracy, but a pre-state entity living in a state of nature, similar to Spinoza's idea of *natura naturans*. The people can express their will and say 'yes' or 'no' to the fundamental questions that affect the form of existence of the political order. The people do not need procedures in positive law to express their will. Schmitt clarifies that secret elections cannot be used as a procedure for recognizing the activation of the constituent power, because this would be a restriction of the will of the people.

Understanding the revolution as an *explicit* expression of the mandate of the constituent power brings Schmitt to his idea of the *acclamation* of the people. For Schmitt, the constituent power is always an "act of will" (*Willensakt*) in the form of a *general* mandate (like the idea of the *volonté générale* itself) to create a new constitutional order. But the natural expression of this will or mandate is acclamation: "The natural form of the direct expression of a people's will is the assembled multitude's declaration of their consent or their disapproval, the acclamation. In modern, large states, the acclamation, which is a natural and necessary life expression of every people, has changed its external form" (1928/2008, p. 131). I will now explain the special significance of acclamation in *Verfassungslehre*.

While in his essays on parliamentarism (1923/2017) and on referendum and plebiscite (1927/2014), acclamation is understood as an expression of *democratic homogeneity*, the conception of acclamation in *Verfassungslehre* is essentially a mandate from the people to create a new constitutional order. Based on the examples Schmitt develops toward the end of chapter eight, he seems to assume that acclamation is tantamount to a revolution or a major political change that finally reshapes the form of the state. This is consistent with his idea that the people can always decide about the form of existence of the political order. Schmitt points out that such declarations are rarely necessary in peacetime because the existing constitutional order is not called into question. Thus, if nothing is changed in the political order, one assumes an "enduring consent to the existing constitution" (1928/2008, p. 132). But in critical

times, like a revolution, the will of the people "directs itself against an existing constitution" (1928/2008, p. 132). For Schmitt, the November Revolution of 1918 was an explicit expression of the constituent power against the German monarchy. Although this was understood as a mandate for a republican form of government, it was not clear whether the will of the people was for a liberal democratic or a socialist republic. Schmitt ties in here with his thesis, explained in *Die Diktatur* (1921/2014, p. 124), that the mandate in the form of popular acclamation concerns only the *general*, because the concrete political content must then be shaped by the agents who received the commission to draft a constitution:

> The no in regard to a republic of the bourgeois *Rechtsstaat* variety could once again mean something different depending on the circumstances, a return to monarchy, dictatorship, council system, or some other political form. The people's constituent will always expresses itself only in a fundamental yes or no and thereby reaches the political decision that constitutes the content of the constitution (Schmitt, 1928/2008, p. 132).

After pointing out that acclamation is the natural expression of the mandate of the constituent power, Schmitt describes the practice of this mandate in constitutional history. In all of these cases, the authority charged with creating a constitution is described by Schmitt (1928/2008, p. 132) as the "executor" and "formulator" of the political decision of the people.

In revolutions, the most important formulating authorities are the *constituent assembly* and the *constitutional convention*, in which a constitution was drafted and adopted by majority vote. For Schmitt, the National Constituent Assembly of 1789 was the execution of a *revolutionary mandate*, as he defines it as the "commissioner of the people's constituent power" (1928/2008, p. 134). Likewise, the French Constitution of 1791 and the Weimar Constitution were the result of a mandate from the constituent power in the form of a revolutionary *acclamation* and democratic elections, which was then expressed in the organization of a constituent assembly (1928/2008, p. 132). Schmitt highlights that in the two aforementioned cases, no popular vote (referendum) on the new constitutional text was required after the drafting of a constitution by the deputies. However, Schmitt also refers to cases in which popular approval was required. Here he refers to the National Convention of 1792 in France, which stipulated that all constitutional laws had to be ratified by the people. The Constitution of 1795 in France also required popular approval. The German jurist points out that in the case of the Federal Constitution of 1787 in the United States, there was also a special form of ratification in the thirteen states by specially elected assemblies.

However, the mandate of the constituent power can also be expressed through constitutional plebiscites, that is, a *plebiscitary mandate* to create a new constitutional order. Schmitt (1928/2008, p. 134) refers to the plebiscites of Louis Napoleon. This case is extremely important because it shows that the acclamation in this form is also a mandate of the constituent power. To understand why Napoleon's plebiscites are, for Schmitt, a mandate of the constituent power, we should recall that the coup d'état of 1851 took place in a context of crisis and polarization between the president and the coalitions in the parliament of the French Second Republic. The coup d'état was analyzed in Karl Marx's famous analysis of class struggles entitled *The Eighteenth Brumaire of Louis Bonaparte*. Schmitt explains that the practice of Bonapartist plebiscites was present in the French Constitution of 1799 and also in the Constitution of 1804 with Napoleon I as Emperor of the French. But Schmitt highlights the constitutional plebiscites of December 20 and 21, 1851 under the president of the French Second Republic Louis Napoleon. With the coup d'état of December 2, 1851, Napoleon dissolved parliament and called a plebiscite to ask citizens if they agreed to delegate the president the power to draft a new constitution.

Schmitt thinks that the *plebiscitary mandate* of the constituent power in the Napoleonic plebiscites is *explicitly* expressed in the constitutional questions answered by the French citizens. We should remember the content of these questions. The question of the plebiscite of December 20 and 21, 1851, was: "The French people want Louis Napoleon Bonaparte to retain his authority and delegate to him the powers necessary to establish a constitution on the basis proposed in his proclamation of December 2, 1851" (Maury, n.d.-a). While the question of the plebiscite of November 21 and 22, 1852, which established the Second Empire was: "The people want the imperial dignity of Louis Napoleon Bonaparte, with heredity in his direct, legitimate or adopted descendants, and to be granted the right to regulate the succession to the throne in the Bonaparte family" (Maury, n.d.-b). Since there was majority approval for both plebiscites, Schmitt understands the constitutional plebiscites as an explicit mandate of the constituent power: "The President of the Republic, Louis Napoleon, was commissioned with powers of government under a wide-ranging delegation of authority for constitutional legislation" (1928/2008, p. 134). Schmitt concludes that the plebiscite of 1852 gave Louis Napoleon the mandate to become Emperor of the French.

Schmitt's description of Louis Napoleon's plebiscites is an expression of his autocratic theory of constituent power, which I consider one of the most important variants of the concept of *popular autocracy*. For the German jurist, the *plebiscitary mandate* of the constituent power is always about the form of existence of the political order of the state.

Schmitt shows in his essay on referendum and plebiscite (1927/2014) that these are a form of expression of the people's acclamation. Therefore, Napoleon's plebiscites show that an individual can also execute the mandate of the constituent power, because the head of the state becomes the commissioner of the people to create a new constitutional order. This opens a new problem for the intellectual history of constituent power, because Schmitt says that constituent power can be exercised autocratically by concentrating all power with a head of the state who has legitimized himself with mechanisms of popular consent. From the point of view of the mandate, Napoleon's constitutional plebiscites have the same political value for Schmitt as the mandate of the German revolution: "The 1852 French constitution contained the decision by the French people for the hereditary empire of Napoleon III, etc. These political decisions are fundamental for the Weimar Constitution" (1928/2008, p. 77).

Schmitt points out that Napoleon's plebiscites show that constituent power can manifest itself not only in revolutions and the organization of constituent assemblies, but also in coups d'état and plebiscites: "Where the constituent power exists, there is also always a constitutional minimum, which need not be impinged on by statutory violations of constitutional laws, revolution, and coup d'états, when only the constitution's foundation, the constituent power, remains" (1928/2008, p. 140). This leads Schmitt to his idea that the various expressions of the mandate mean that the people always remain as the bearer of the constituent power. He calls this the *permanence* of the constituent power:

> The practice of the Napoleonic plebiscite rests on the democratic principle of the people's constituent power. Constitutional violations could thus be easily corrected through the consent of the people. (...) Under some circumstances, the revolutionary elimination of a constitution can even be designated somewhat rightly as mere constitutional change, but naturally only when one presupposes this permanence of the subject of the constituent power (Schmitt, 1928/2008, p. 141).

The theory of the *permanence* or *continuity* of the constituent power is of remarkable importance for the concept of popular autocracy. For Schmitt (1928/2008, pp. 142–143), not every acclamation (like a revolution or coup d'état) changes the bearer (*Träger*) of the constituent power. For him, the coups in France of 1848, 1851, 1852 only changed the form of the state, e.g., from the Second Republic to the Second Empire of Napoleon III. However, these coups did not change the basis of the political legitimacy established since the French Revolution: the people as bearer of the constituent power. On the contrary, democratic revolutions, such as that of 1789, changed the bearer of the constituent power because they brought about a change from the sovereignty of the monarch to the sovereignty of the people.

For this reason, the German Revolution of 1918-1919 did not create a new bearer of constituent power because the German people were already recognized as the basis of the German imperial state. Schmitt therefore speaks of a *permanence* or *continuity* of the German Empire of 1871 in the Weimar Constitution because both constitutions recognize the people as bearer of the constituent power: "That the constitutional condition as it was since 1871 had the consent of the German people cannot be disputed after the acclamation of the war of 1870 and the founding of the Reich of 1871" (1928/2008, p. 143). This statement is fundamental to the distinction between constitutional *annihilation* and *elimination*.

In the eleventh chapter of *Verfassungslehre*, the popular autocracy of Louis Napoleon's coup d'état in 1851 is presented as a case of retaining the people as bearer of the constituent power. Schmitt views this case as a *constitutional elimination* rather than *constitutional annihilation*. The concept of constitutional annihilation refers to the abolition of the existing constitution and also of the bearer of the constituent power that supports it. This is the case with the French Revolution that annihilates monarchy and establishes the people as sovereign. Constitutional elimination, on the other hand, refers to the case where an existing constitution is abolished but the same bearer of the constituent power remains in the constituent power. Schmitt explains the latter case for the German Revolution of 1918-1919. In contrast to the previous two terms, Schmitt speaks of *constitutional change* or *revision* when constitutional laws are changed according to the procedures of the existing constitution. Finally, Schmitt points out that a *violation of the constitution* occurs when these constitutional procedures are not followed. This last case would be Louis Napoleon's coup d'état on December 2, 1851, because "a state president, for example, dissolves a parliament incapable of acting because of its splintered party composition" (1928/2008, p. 148). Schmitt sees this coup as a *permanence* or *continuity* of the constituent power, since Napoleon's political legitimacy is based on the people as the true bearer of the constituent power.

The case of Louis Napoleon, however, brings us to a key aspect of the idea of *popular autocracy*: the relationship between the concepts of constituent power and monarchy. The Caesarian legitimacy of Napoleon III raises the question of whether the people exercised a plebiscitary mandate by acclamation to establish a new constitutional order in the form of a new monarchy. The question is extremely complex, as he recognizes monarchs as potential bearers of constituent power. Schmitt (1928/2008, p. 129) cites the Bourbon Restoration (1814-1830) as an example in which the monarch was the new bearer of constituent power. This raises a new problem and potential contradiction with his theory of constituent power, for the German jurist seems to argue that the Bourbon monarch has no *mandate* or

commission from the people. As sovereign, the legitimist monarch is the bearer of all powers, including the constituent power. Louis Napoleon, however, proves for Schmitt that his constitutional theory is not contradictory, for this Emperor of the French was not a new bearer of constituent power. Napoleon's popular autocracy, an emperor created by the mandate of the constituent power, is not *sovereign* (monarch) but a *sovereign dictator*:

> In the Caesarist monarchy, as it was realized in the Bonapartes' empire, the monarch is only a dictator on a democratic foundation. In the course of development, this type of monarchy can become a genuine monarchy. Ultimately, however, the democratic principle supports it, and it turns the monarch into a representative of the political unity borne by the will of the people, who, as such, is constituted by an act of the constituent power of the people (Schmitt, 1928/2008, p. 309).

The idea that Bonapartism is a dictatorship on behalf of the people preserves Schmitt's distinction between *sovereignty* and *sovereign dictatorship*. The Bourbon monarch is the bearer of constituent power because, as sovereign, he has all the powers. In contrast, Napoleon III, as 'Emperor of the French', is a commissioner of the constituent power. Schmitt thus distinguishes between the traditional legitimacy of the Bourbon monarchy and the 'democratic' legitimacy he sees in Napoleon's dictatorship. Here there was a mandate from the constituent power in the form of the plebiscites of 1851 and 1852 to create a new constitution. However, Schmitt further complicates these distinctions when he points out that not every *plebiscitary dictator* is a *sovereign dictator*. The plebiscitary dictator in the Weimar Constitution is a guardian of the constitution (1931/2016). The complex relationship between constituent power, monarchy, and the plebiscitary "guardian" (*Hüter*) requires in-depth study, which I will develop in the next chapter on Schmitt's idea of the Reichspräsident.

3. Conclusions

Schmitt's work contains three variants of the concept of popular autocracy: the sovereign dictatorship of the constituent assembly, the Bonapartist dictatorship, and the Reichspräsident as guardian of the will of the people. These variants were recognized by the distinction between the concepts of *sovereignty* and *sovereign dictatorship* in Schmitt's work. In terms of outcome, there is no difference, since both involve the concentration of state power in a single entity (individual or group). However, the difference lies in the foundations of political legitimacy, especially in regard to the concept of constituent power.

The decisionist idea of sovereignty is developed by Schmitt essentially in *Politische Theologie*. Already in his youthful writings, his understanding of the concept of sovereignty had adopted the notion of restoring the conditions of normality and *homogeneity*. This is evident in his work *Der Wert des Staates*, in which Schmitt defines the "act of sovereign decision" as a form of "realization of the law" (*Rechtsverwirklichung*). In the Weimar Republic, Schmitt takes up this decisionism by conceiving of the sovereign as the one who decides in a state of exception, i.e., in the face of a situation that threatens the existence of the state. His sovereign is not subject to any *mandate* or *commission*. In *Politische Theologie*, the sovereign is the one who exercises unlimited powers to restore order and create a "homogeneous medium." The legitimacy of the sovereign is a personal one. If the sovereign must create a new constitution to save society, he can do so at will because he has unlimited powers. This understanding is strongly inspired by Donoso Cortés's idea of dictatorship. The sovereign may or may not be based on democratic legitimacy, as it can only be a de facto power that is in a state of exception. Schmitt's sovereign could thus simply be an *autocrat*, but not necessarily a *popular autocrat*, since he has no mandate from the people.

In contrast, Schmitt points out in *Die Diktatur* that all dictatorships are commissarial. His concept of sovereign dictatorship is an important variant of *popular autocracy*. Before he introduces the concept of sovereign dictatorship, he points out that commissary dictatorship appears in the dictatorship notions of Machiavelli and Bodin. In particular, in the latter, the dictator is always an agent of the sovereign to protect the constitutional order. The dictator is not the sovereign, no matter how unrestrictedly he exercises his power. The sovereign dictatorship always presupposes a mandate from the true sovereign (the people) to create a new constitutional order. The legitimacy of the sovereign dictatorship lies in the mandate from the *pouvoir constituant*, which is understood as an *imperative act*. This dictatorship expresses the will of the people. Thus, for Schmitt, Sieyès's idea of constituent power is

primarily a *mandate* or *commission* that ends with the creation of a new constitutional order. Schmitt here presents two important variants of the concept of popular autocracy. The first is the sovereign dictatorship of the constituent assembly in the French Revolution. This is an assembly that acts as an agent of the constituent power to create a new constitutional order. The second form of sovereign dictatorship, on the other hand, is the Bonapartist dictatorship. Here, the mandate to create a new constitution is exercised by a person (the head of state). In contrast to Schmitt's concept of sovereignty, in the sovereign dictatorship there is always a pre-existing mandate from the people to create a new constitutional order.

The distinction between sovereignty and sovereign dictatorship allows for a more complex analysis of the distinction between the concepts of *autocracy* and *popular autocracy*. Schmitt analyzes the case of dictatorships that have 'sovereign powers' but no mandate from the *pouvoir constituant*. This is the case with Cromwell's dictatorship in his Protectorate. For Schmitt, Cromwell was originally a commissary dictator who then became a sovereign in 1653. But however much his account of political legitimacy may have invoked popular consent, Cromwell was a sovereign, not a sovereign dictator. In Schmitt's approach, Cromwell established an *autocracy*, but not exactly a *popular autocracy*. The reason is that in his dictatorship there was no mandate from the people to create a new constitutional order. Cromwell exercised his power with personal legitimacy to restore political order in the context of the English Civil War. Despite the radical nature of the Puritan Revolution and the sovereignty of his Protectorate, Cromwell's dictatorship does not contain the rationalist idea of Sieyès's idea of *pouvoir constituant* used in France toward the end of the 18th century. For a mandate of the constituent power, there must be an *explicit* expression of the people.

The *explicit* expression of the constituent power is always the form of a mandate. For Schmitt, the natural expression of this mandate is *acclamation*. From the historical examples he describes in his works, two forms of mandate emerge: the *revolutionary mandate* and the *plebiscitary mandate*. Both found a popular autocracy, but were exercised in different ways. The first case is that of the French Revolution, in which Schmitt locates the constituent assembly theorized by Sieyès. The revolutionary assembly is a sovereign dictatorship because it is based on the idea of constituent power as a mandate to draft a new constitution. However, the plebiscitary mandate is found in the constitutional plebiscites of 1851 and 1852 by Louis Napoleon. This is an important variant of the concept of popular autocracy, as it is a dictatorship exercised by an individual rather than an assembly. For Schmitt, the results of these plebiscites are an expression of a mandate from the people to create a new constitutional order. Thus Napoleon III became an 'Emperor of the French' in the sense that he was a

commissioner of the people. The case of Napoleon III is important because Schmitt recognizes that the mandate of the constituent power can be exercised by a group or a single individual. In both cases, the mandate of the constituent power must be *explicit*.

The case of Louis Napoleon, however, leads us to a complex discussion of a third variant of the concept of popular autocracy. This is a dictatorship that protects the will of the people and relies on *plebiscitary legitimacy*, but does not have a *plebiscitary mandate* to create a new constitutional order. This dictatorship is potentially *sovereign*, but it never becomes a *sovereign dictatorship*. It is a popular autocracy because it represents the people in plebiscitary form. However, it does not have a mandate from the *pouvoir constituant*, but only the mandate to protect the decisions made by the constituent power in the past. In essence, it is a constitutional mandate for the head of state to act as protector of the will of the people, and thus resembles Sieyès's idea of the king in the French Revolution. For Schmitt, this is a commissary dictatorship of the head of state that seeks to protect the will of the people within the framework of the existing constitution, that is, it does not seek to change or interpret the will of the people in order to create a new constitutional order. This complex conceptual distinction brings us to the idea of Schmitt's idea of the Reichspräsident.

Chapter 4: The Reichspräsident as Guardian of the Will of the People

> "Aber in diesem Einrücken in gleichartige Befugnisse, in der Übernahme einer Gesamtposition zeigt sich, wie sehr die Stellung des Reichspräsidenten der eines monarchischen Chefs der Exekutive analog ist" (Schmitt, 1928/2017, p. 292).

Introduction

Not every *sovereign* is a *sovereign dictator*; a guardian of the will of the people is not a bearer of the constituent power. This premise summarizes Schmitt's idea of the relationship between the Reichspräsident and Sieyès's idea of constituent power in the Weimar Republic (2015, Chapter 3; 1928/2008, Chapter 22, 1924/2011, pt. Appendix). Schmitt's distinction between the concepts of *sovereignty* and *sovereign dictatorship* is one of his masterstrokes in legitimizing a *popular autocracy*. My study aims to show that Schmitt is speaking here of the constituent power, but not in the sense of a *mandate* or *commission* to create a new constitutional order, but in the sense that the head of state has the mandate to protect the decision/will of the people. In this sense, Schmitt's Reichspräsident is more akin to Sieyès's idea of the king in the French Revolution. Thus, my analysis is not about constituent politics and *sovereign dictatorship*, but about the constitutional powers of the head of state. In the last two decades, however, the reading that Schmitt sees the Reichspräsident as the new bearer or embodiment of the constituent power of the people has prevailed. Because of the president's emergency powers under Article 48 of the Weimar Constitution, Schmitt's president is associated with his decisionist idea of sovereignty set forth in *Politische Theologie* (1922/2005) and with his idea of a sovereign dictatorship explained in *Die Diktatur* (1921/2014). I will briefly explain how the literature on Schmitt's Reichspräsident has confused and overlapped the concepts of *sovereignty* and *sovereign dictatorship*.

In the intellectual history literature, Schmitt's concepts of *sovereign dictatorship* and Reichspräsident have been confused and overlapped. The reading of the Reichspräsident as sovereign dictator was developed by Cristi (1997, 1998a, 1999) and has dominated for decades. In his approach, the concepts of sovereignty and sovereign dictatorship overlap: "By enhancing the role of the Reichspräsident as a bearer of *pouvoir constituant* and potential

sovereign dictator, Schmitt looked to exploit those perceived disharmonies in favor of a strong state" (1998a, p. 70). Cristi (1998a, p. 69) affirms that Schmitt's idea of the Reichspräsident aimed to preserve the monarchical principle in the Weimar Republic. Extending this reading, Cristi also defines Pinochet as a sovereign dictator: "As an absolute or sovereign dictator, Pinochet seized *pouvoir constituant*, eliminated the whole existing constitutional order, and generated a new constitution" (1999, p. 1768). Following Cristi's reading, Kelly asserts that "Schmitt's work, as already implied, attempted to transfer this acknowledged power of the state on to the representative figure of the Reichspräsident" (2003, p. 181), so that the president would be a *pouvoir neutre* and also "the embodiment of the *pouvoir constituant* of the people" (2003, p. 182). Similarly, Rubinelli says that Schmitt "concluded that only the president was capable of representing the nation's constituent will and, consequently, was the only institution legitimate enough to act in cases of emergency to protect the constitution" (2020b, p. 133). The reading of Schmitt's idea of the Reichspräsident as the embodiment or bearer of the constituent power can be summarized as follows:

> In other words, for Schmitt the president is the guardian of the intangible will of the nation as expressed through the constituent power, and this is in virtue of his capacity to represent the nation as a whole. From all the above, it follows that the president of the Reich is, for Schmitt, the dictatorial figure who, in the context of Weimar, represented and embodied the constituent will of the nation. As a result, the president had the task of interpreting the will of the constituent power. In so doing, the figure of the president was a constant reminder of the omnipotent and inalienable presence of the constituent power, behind and beyond the constitutional text, which, in turn, gave the president access to extraordinary powers. The reliance on the idea of constituent power is therefore what allows Schmitt to cut across lively debates in Weimar Germany and offer a consistent explanation for the attribution of dictatorial powers to the president of the Reich (Rubinelli, 2020a, p. 135).

This intellectual-historical literature has found a link to other important debates about the meaning of the Art. 48 of the Weimar Constitution and the Reichspräsident in Schmitt's work. The relationship between the Reichspräsident and the decision/will of the constituent power ('positive constitution') underwent a counterrevolutionary radicalization as Schmitt's perception of the political situation changed in the late 1920s (Hofmann, 2010, pp. 62–63; Kaiser, 2021, pp. 159–160; Mehring, 2009, pp. 238–240; Scheuerman, 2020, pp. 275–283).

The counterrevolutionary radicalization of Schmitt's conception of the Reichspräsident seems to have developed gradually between 1921 and 1932. Biographically, as I have shown from his reading of Donoso Cortés (C. E. Pérez Crespo, 22-26 August 2022), Schmitt opted for a counterrevolutionary conception of dictatorship since the early 1920s

(Mehring, 2021, pp. 61–65). In *Die Diktatur*, the German jurist relates the sovereign dictatorship to the dictatorship of a constituent assembly, that is, to a dictatorship legitimized on the basis of Sieyès's idea of *pouvoir constituant* (1921/2014, Chapter 4). Accordingly, toward the end of the 1920s, Schmitt, in his *Verfassungslehre* (1928/2008, p. 316), portrays the Reichspräsident as a dictator who is not *sovereign* because he has only executive powers and is not the bearer of the constituent power. The dictatorship of the Reichspräsident is subordinate to the constitution, so he would be a *commissary dictator*. In the early 1930s, however, Schmitt radicalized this counter-revolutionary idea in *Der Hüter der Verfassung* (1931/2016, pp. 115–131) and specially in *Legalität und Legitimität* (1932/2004, Chapter 5) by saying that the emergency powers of the Reichspräsident through Art. 48 of the Weimar Constitution constituted the power of an "extraordinary legislator" in the sense of *ratione necessitatis*. Schmitt's idea of the Reichspräsident is thus to be equated with a dictator with 'sovereign powers' because he accumulates legislative and executive powers, but without becoming a *sovereign dictator* because he is still bound by the existing constitution.

Schmitt's idea that the Reichspräsident is not a *sovereign dictator* is related to an important thought of his 1924 lecture in Jena (1921/2014, pp. 180–226), which appeared as an appendix to the second edition of *Die Diktatur* of 1928. In it, Schmitt had argued that the powers of the president lay somewhere between a *commissary* and a *sovereign dictatorship*:

> As a result of the simple fact that the constitution came into force, the dictatorship of the president of the Reich – for one can give this name to his extraordinary authorisations – was by necessity one of the commissarial kind. But its meaning was deliberately kept open; and in its substance, if not in its legal justification, this dictatorship operated like the residue of a sovereign dictatorship (*das Residuum einer souveränen Diktatur*) of the [Weimar] National Assembly (Schmitt, 1921/2014, p. 207, 1921/2015, p. 243).

In the same text, however, Schmitt also makes clear that the Reichspräsident's emergency powers not make him a sovereign dictator, since he has no mandate from the people to create a new constitution:

> For all the phrases like 'unlimited power' or *plein pouvoir*, which are used to describe the functions of the Reichspräsident as defined in Article 48, §2, it would be impossible for him to exercise a sovereign dictatorship on the basis of this constitutional provision, not even jointly with a counter-signing government. Either sovereign dictatorship or constitution; the one excludes the other (Schmitt, 1921/2014, p. 204).

Contrary to the intellectual-historical reading that sees the Reichspräsident in Schmitt as the new embodiment of the will of the constituent power, this passage shows that the potential 'sovereign powers' of the president do not make him a *sovereign dictator*. For Schmitt, the mandate of the Reichspräsident is to protect the will of the people in the Weimar Constitution, not to create a new constitutional order. Besides, it must be taken into account that Schmitt's Reichspräsident is not a guardian of constitutional norms, but a guardian of the constitution itself as an *existential* expression of the political order created by the constituent power (Schmitt, 1928/2008, p. 75; Vinx, 2015b, p. 41). The confusion in the literature, however, stems from the fact that Schmitt's conception of the head of state as a democratically supported power plays a central role in his theory of the dictatorship of the Reichspräsident in the Weimar Republic. In *Politische Theologie*, Schmitt affirmed that "once the dynastic legitimacy of the constitutional monarchy disappeared," the German army and the national civil service "found the possibility of a new basis in the plebiscitary legitimacy of the German president elected by the German people" (1932/2004, p. 13).

However, not every representative of the people is a protector of the will of the constituent power. This difference is clearly reflected in the ideas of the intellectuals of the Weimar Constitution. The November Revolution (1918) overthrew the German monarchy and consolidated popular sovereignty. The "father of the Weimar Constitution" was Hugo Preuß (C. Müller, 2022), who designed a parliamentary democracy that assigned a leading role to the president. For Preuß, the balance between the executive and legislative branches required that the president have the right to dissolve parliament and that his election is by direct vote. Preuß's conception of the presidency was influenced by Robert Redslob's work on English parliamentary government and indirectly by Max Weber's concept of plebiscitary democracy (Gillessen, 2000, pp. 126–127; Hacke, 2018, pp. 48–53; Haungs, 1968, pp. 29–34; Senigaglia, 1998). Preuß's drafts of the Weimar Constitution show his political engagement with a liberal conception of the president. In contrast, for Schmitt, the Reichspräsident is three things at once. First, he is a protector of the 'positive constitution' (Schmitt, 1928/2008, Chapter 3) who uses emergency powers and suspends civil rights. Second, he is a *neutral power* that expresses political unity in the face of the plurality of political parties in parliament. Finally, the Reichspräsident is a democratically legitimized dictator with the right of *appel au peuple* (in Mirabeau's words) (2015, p. 172).

In contrast to Redslob, Weber and Preuß, in *Der Hüter der Verfassung* Schmitt understands the dictatorship of the Reichspräsident as a mandate from the people to protect the 'positive constitution', which is understood as the decision/will of the constituent power:

> The view that the president of the Reich is the guardian of the constitution, moreover, alone conforms to the democratic principle on which the constitution is based. The president of the Reich is elected by the whole German people, and his political competences as against the legislative institutions (in particular the dissolution of the Reichstag and the initiation of a popular referendum) are, in substance, nothing but an 'appeal to the people'. By making the president of the Reich the focal point of a system of plebiscitary institutions and competences that are party-politically neutral, the current constitution of the Reich aims, precisely on the basis of democratic principles, to form a counterweight against the pluralism of social and economic power-groups and to preserve the unity of the people as a political whole (...) The constitution, in particular, seeks to give to the authority of the president of the Reich the opportunity to connect itself immediately with this unified political will of the German people and to act, on that basis, as the guardian and the preserver of the constitutional unity and wholeness of the German people. The existence and permanence of today's German state depends on whether this effort will succeed (Kelsen & Schmitt, 2015, pp. 172–173; Schmitt, 1931/2016, p. 159).

From this passage it is clear that not every plebiscitary protector of the people is automatically a Caesarian monarch. Unfortunately, Schmitt's idea of the president has also been confused in the international literature for decades with a kind of Caesarist or Bonapartist monarchy (Cristi, 1997, pp. 190–193; McDaniel, 2018, p. 319). While there are similarities in the justification as a plebiscitary anchored power, the main difference is that the role of his Reichspräsident is to protect a decision already made in the past by the constituent power about its *form of existence*. In contrast, in the Caesarist dictatorship of Bonapartism there is always a *mandate* from the people to create a new political order.

For Schmitt, the dictatorship of the Reichspräsident is not a Caesarist dictatorship. His guardian has no a *mandate* or *commission* from the constituent power, so he is not a *sovereign dictator*. In *Die Diktatur* (1921/2014, p. 91), he explains that it was an assistant of Mirabeau who, in the French Revolution, first proposed that the head of the state (the monarch) be conceived as a 'republican' dictator. Schmitt clearly distinguishes between the *monarch as sovereign* and the *sovereign dictatorship* (legitimized by Sieyès's idea of *pouvoir constituant*). The legitimacy of the monarchy is primarily religious, that is, by faith in tradition and by the grace of God. In *Verfassungslehre*, Schmitt (1928/2008, pp. 308–309) distinguishes as many as six types of monarchical legitimacy, and then claims that two of them were still in use into the 19th century. The design of the constitutional powers of the Reichspräsident stems from these two post-revolutionary ideas of the monarch. The first is the liberal idea of the constitutional monarch as theorized by Benjamin Constant: the king as *pouvoir neutre* (Schmitt, 1928/2008, p. 312). The second type of monarch, however, is of the Louis Bonaparte type in 1852, i.e., a monarch democratically legitimized by popular vote. In

contrast to the idea of the *pouvoir neutre*, Bonaparte is the commissioner of a mandate of the constituent power. To avoid confusion between monarchical (traditional and religious) and democratic (modern and rational) "types of legitimate rule" (I adopt Weber's (2019b) terminology here), Schmitt prefers to call Caesarism or Bonapartism *dictatorship*.

In contrast to his idea of the plebiscitary Reichspräsident as a *guardian*, his definition of a Caesarian dictator like Napoleon III is based on the idea that the head of state is always the commissioner of the constituent power of the people, i.e. a *sovereign dictator*:

> In the Caesarist monarchy, as it was realized in the Bonapartes' empire, the monarch is only a dictator on a democratic foundation. In the course of development, this type of monarchy can become a genuine monarchy. Ultimately, however, the democratic principle supports it, and it turns the monarch into a representative of the political unity borne by the will of the people, who, as such, is constituted by an act of the constituent power of the people (Schmitt, 1928/2008, p. 309).

Since the French Revolution debates on the royal veto, the notion that the people need a guardian/guarantor/protector of their will and interests has shaped the constitutional theory of the executive. Standing in this tradition, Schmitt's idea of the Reichspräsident is neither a Caesarist monarch, nor a sovereign dictator, nor the bearer or embodiment of the constituent power. His Reichspräsident has only the *mandate* to protect the constitution understood as a political order created by the constituent power (Schmitt, 1928/2008, Chapters 3, 8; Vinx, 2015b, pp. 41–44). The distinction between the concepts of *sovereignty* and *sovereign dictatorship* has sparked an international debate about whether Schmitt really distinguishes between the concepts of *sovereignty* and *constituent power* (Colón-Ríos, 2020, pp. 239–248; Niesen, 2020; Rubinelli, 2020a, pp. 109–118). My aim is to contribute to this discussion by explaining Schmitt's idea of guardianship as the protection of the decision already made in the past by the constituent power about its political *form of existence*. In my view, Schmitt's Reichspräsident is more akin to Sieyès's idea of the king in the French Revolution. My analysis is divided into two sections. First, I explain the idea of the Reichspräsident between two important intellectuals of the Weimar Constitution: Redslob and Weber. Second, I describe Schmitt's idea that the Reichspräsident is a power who protects the will of the people through the use of emergency powers. I conclude that Schmitt's idea of the Reichspräsident in Weimar is one of the main variants of the concept of *popular autocracy*.

1. The Reichspräsident as Representative of the People

The German Revolution of 1918, much like the constitutional debates over the royal veto in the French Revolution, led to a discussion of the powers of the head of state. The idea of the Reichspräsident as the representative of the people and as a democratic counterweight to parliament thus triggered an important debate in the Weimar National Assembly (1919).

Between January 5 and January 12, there was the Spartacist Uprising, an episode of violent protests in Berlin that resulted in the deaths of several civilians and leading left-wing politicians such as Karl Liebknecht and Rosa Luxemburg. Under the impact of this political violence, elections to the National Assembly were held on January 19, 1919, with the Social Democratic Party (SPD), the Catholic Centre Party (DZP), and the German Democratic Party (DDP) winning the majority of votes. On February 11, the National Assembly elected Friedrich Ebert (SPD) as provisional Reichspräsident. On February 13, Philipp Scheidemann (SPD), as Reich Minister President, formed the Weimar Coalition, a government cabinet with members of the SPD, DZP, and DDP. On February 24, Hugo Preuß presented his draft constitution and his idea of the head of state (*Staatsoberhaupt*) as a counterweight to parliament. Richter (1998, p. 222) has beautifully shown that in the early debates of February 25 and 26, some Social Democrats had reservations about Preuß's idea of the Reichspräsident. Hermann Molkenbuhr (SPD) defined Preuß's Reichspräsident as a "substitute for the emperor" (*Kaiserersatz*), based on "the genuinely Napoleonic trick of electing the president by popular vote" (L. Richter, 1998, p. 222). In contrast, as Schmitt (1928/2008, p. 377) also emphasized, Bruno Ablaß (DDP) spoke out in favor of Preuß's idea of the Reichspräsident as a democratic counterweight to parliament ("*Jene demokratische Instanz ist bei uns der Reichspräsident*") at the April 4 meeting (L. Richter, 1998, p. 225).

To understand Schmitt's idea of the Reichspräsident as protector of the will of the people, I contrast his conception with that of other important intellectuals of executive power in the context of the Weimar National Assembly. The idea of the Reichspräsident as the representative of the German people had two meaningful interpretations. The first was represented by the influential liberal reading of Robert Redslob in his book *Die parlamentarische Regierung* (1918), which defends the design of the executive in England as the true model (*wahre Form*) of parliamentary democracy. Redslob rejects the French parliamentary model and defends Montesquieu's reading of the constitutional balance between the executive and the legislature. On the other hand, the second idea is defended by

Weber in his brief but substantial article on the Reichspräsident (1919/1994a). Unlike Redslob, for Weber, the head of state expresses the political leadership that Germany needs within the framework of mass democracy. In his famous January lecture in Munich (*Politik als Beruf*), Weber's idea of the Reichspräsident (1919/1994b), which criticizes parliamentary government and defends the idea of democratic leadership, anticipates Schmitt's idea of the Reinchspräsident. In contrast to Redslob and Weber, in the late 1920s Schmitt presented his idea of the Reichspräsident as the guardian of the 'positive constitution' understood as the decision/will of the constituent power of the people (Schmitt, 1928/2008, Chapter 3).

a. Redslob's Constitutional Monarchy as a Balance of Powers

Robert Redslob held a liberal view of executive power, stemming from his interpretation of the king as the representative of the people in the French Revolution constitutional debates over the royal veto. He was a professor at the University of Strasbourg (where he met Schmitt) and one of the most important German constitutional theorists of the early 20th century. Unfortunately, after the work of Stronk (1976), the research of his work has almost been forgotten. In the interview that Fulco Lanchester (1983/2017) conducted with Schmitt on November 9, 1982, the German jurist acknowledges the importance of Redslob's work and the intellectual common ground he had with him:

> Carl Schmitt: Yes, I knew Redslob quite well. We were almost always together. And Redslob followed my own scientific path: from criminal law to constitutional law. In practice, I started in criminal law, where I wrote a beautiful dissertation on pure criminal law (one hundred percent). For my doctoral advisor [Fritz van Calker], I wrote about criminal law: for example, on the subject of *nulla poena sine lege*, but that also had to do with constitutional law. So, as I said, Redslob was perhaps a precursor. During World War I, Redslob first went to Rostock and then became a professor of constitutional law in Strasbourg and stayed there. During World War II, the Germans returned to Alsace-Lorraine and, of course, drove out the French... But then, I repeat for the second time, I made the same itinerary as Redslob. This is of great importance, and I could bring you as an example many essays on pressing current issues (Lanchester, 1983/2017, p. 213).

Redslob's book (1912) on the National Constituent Assembly of 1789 was well received at the time. His central thesis is that the theories of separation of powers of Locke, Montesquieu, Blackstone, and Lolme intended to secure the freedom of subjects (*die Freiheit der Untertanen zu sichern*) (1912, p. 221). Redslob affirms that the ideas of Locke and Rousseau on the separation of powers establish the executive as a power subordinate to the legislative (1912, pp. 222–223). In contrast, the National Constituent Assembly drafted the separation of powers based on Montesquieu's interpretation of the English Constitution (1912, p. 223). The National Assembly considered the executive and legislative branches as two representatives of the same general will (*volonté générale*): "Der Träger der Exekutive ist hier dem Träger der Legislative gleichgeordnet, weil beide dem souveränen Volkswillen ihr Dasein verdanken und daher beide von ihm abhängig sind" (1912, p. 228). Redslob points out that this idea of separation of powers is not written anywhere, but it is the true idea that maintains the unity of the new French constitutional system. He then describes how, between 1789 and 1791, major politicians such as Mounier, Mirabeau, Robespierre, Barnave, Sieyès,

and others argued fiercely about the king's executive powers (1912, pp. 230–280). Redslob's description aims to show the head of state was a counterbalance to the legislature by the consensus of the 1789 National Assembly for the maintenance of a constitutional monarchy.

In *Die parlamentarische Regierung* (1918), his most famous and influential book in the Weimar Republic, Redslob takes up to his reading of the executive power inspired by Montesquieu and the constitutional debates in the French Revolution. The book was part of a European academic movement concerned with studying the strengthening of executive power in parliamentary governments. For this reason, Redslob's reading had important antecedents in France, where his book was also well received and translated in 1924. The renowned French jurist Joseph Barthélemy, in his influential work on executive power in the Third French Republic, develops an analysis of French parliamentary government similar to Redslob's book, but from the perspective of constitutional history (1907, pp. 649–652). However, it was Léon Duguit who anticipated Redslob's idea of parliamentary government. I will show in the next chapter that Duguit was one of the most important exponents of French public law. For now, it is important to point out that he had already explained that "Le parlementarisme repose essentiellement sur l'égalité des deux organes de l'État, le Parlement et le gouvernement, sur leur intime collaboration à tout l'activité de l'État et sur l'action qu'ils exercent l'un sur l'autre pour se limiter réciproquement" (1911/1928, p. 805). The only difference with Duguit's approach is that Redslob speaks of a "true form" (*wahre Form*) (English constitutional monarchy) and a "false form" (*unechte Form*) (French Third Republic) of parliamentary democracy. For Redslob, the essential feature of true parliamentary government is the English balance between the executive and legislative branches:

> What is a parliamentary constitution? Let us note, first of all, it means a system of balance (*System des Gleichgewichts*) between the executive and legislative powers. It is characterized by a double bond, by an interdependence of the two factors. On the one hand, the ministry provides the impetus for policy. It has the initiative for the administrative ideas. Only this power has its limits. The cabinet should not be in conflict with the majority of the parliament (...) It can be said that the parliament determines the general policy, while the ministry governs freely within this framework (Redslob, 1918, pp. 1–2).

Redslob (1918, p. 3) states that the legislative and executive powers may conflict, so the only guarantee of the balance of powers is the dissolution of parliament. The one who calls for this dissolution is the head of state: "Es fordert den Monarchen, oder, in einer Republik, den Präsidenten auf, neue Wahlen auszuschreiben" (1918, p. 3). The people, defined as the electorate as a whole, are the only ones who can decide to resolve the conflict

between the powers of the state. Redslob affirms that both parliament and the executive are co-equal powers because the only higher power is the people (*beiden Gewalten einen gemeinsamen Herrn über sich haben, das souveräne Volk*) (1918, p. 4). He develops the idea that the *Staatsoberhaupt* is a power that articulates the relationship between parliament and the ministry; thus, it is conceptualized as "*die schöpferische Kraft des Mechanismus*" (1918, p. 4). The head of state (king) appoints the prime minister (head of government), who presides over the council of ministers. Only at the moment of this election, the king as the head of state has a remarkable influence. The constitutional monarch plays a fundamental role in the balance of powers as an intermediary between ministers and parliament:

> The parliamentary system can be compared to a scale (*Wage*). The nominal bearer of power, the monarch or president, holds it in his hands. The two plates are the ministry and the parliament. The gravity corresponds to the irresistible constraint that follows from the elections. The head of state is to establish the balance by distributing the weights to one side or the other (Redslob, 1918, p. 7).

This paragraph brings us to Redslob's liberal idea about the relationship between the king as head of the state and the people. His central idea is that the English monarch is not a representative of the people, but a mediator of conflicts who interprets the people's will (1918, p. 44). Redslob reserves the word "representative" only for members of parliament elected by the people. Although the king is not an *elected* representative, he is still the mediator of conflicts between the ministry and parliament. The people relate to the monarch for reasons of tradition and identification with the royal family. In this sense alone, the king is the "lebendige Verkörperung des Staates" (1918, p. 46). To ensure the balance between the executive and legislative powers, the king interprets the people: "Er sichert die Harmonie, indem er als aufgeklärter Interpret des Volkswillens eingreift" (1918, p. 49). The king aligns the powers of the state to coincide with the people's will: "Er führt die Lords zum Willen des Volks zurück" (1918, p. 49). To realize this alignment with the will of the people, the king uses his two executive powers: the veto and the dissolution of parliament (1918, p. 72). Redslob makes it clear, however, that these powers are not attacking but defending in nature. Thus, the king uses his powers only rarely and in very extreme cases. Redslob concludes that the head of the state is equal to parliament, since both powers are subordinate to the sovereign people: "All diese Feststellungen bestätigen unsere erste These, dass der König der Volksvertretung an Autorität gleichkommt" (1918, p. 75).

Redslob's idea of executive power had a significant influence on Hugo Preuß, the ideologue of the Weimar Constitution (W. J. Mommsen, 1984, pp. 348–352; Schönberger,

1997, p. 384; Senigaglia, 1998, pp. 139–142; Stirk, 2002, pp. 501–508). This influence, however, has been criticized as a history of error, that is, as the influence on Preuß of a distorted picture that Redslob drew of English parliamentary government (Stirk, 2002, pp. 503–505). As an example of this critical judgment, Ernst Fraenkel said that "Robert Redslob is responsible for the fact that in 1918 not the English constitution, but the glosses which French monarchists wrote about it, were taken up" (Stirk, 2002, p. 501).

Since his study of the French Revolution (1912), Redslob identified with the liberal model of the French monarchical constitution of 1791 through Montesquieu's approach. Redslob rejects the parliamentary government of the French Third Republic because here the president as head of state has no veto power and no possibility to dissolve the parliament. For Redslob, this turned the French republic into a "parliamentary dictatorship" (*parlamentarische Diktatur*) (Redslob, 1918, p. 139). Since the Constitutional Deliberations at the Reichsamt des Innern from December 9-12, 1918, Preuß has used Redslob's terminology about a "true" (English) and "untrue" (French) parliamentary democracy (Weber, 1918/1988, p. 84). In the session of February 24, 1919, Preuß appeared in the Weimar National Assembly and presented his constitutional proposal of the Reichspräsident as the guarantor that there would be a balance of powers in a parliamentary government. Preuß states, "Man hat ganz mit Recht staatsrechtlich den französischen Parlamentarismus einen unechten Parlamentarismus gennant, weil er tatsächlich die Monokratie des Parlaments ist" (291). Thus, in order to ensure the balance of powers, the Reichspräsident has the right to dissolve parliament (*vom Gewählten an die Wähler zu appellieren)* and the power of forming a government (*die Bildung der Reichsregierung*) (291).

Redslob's central idea was to emphasize the advantages of strengthening the head of state and the executive to make it equal to the legislative. His conception of the head of state as a counterweight to parliament is an expression of the political philosophy of the liberal and moderate factions he studied in the history of the National Constituent Assembly of 1789. Despite criticisms of Redslob's interpretation of English parliamentary government, his conception of executive power was inspired by his reading of Montesquieu's writings on the English constitution and the liberal conception of the king in the 1791 French constitutional monarchy. I think that his admiration for the English model of separation of powers made Redslob a true 'German Mounier' in Weimar. The central element of his interpretation of the English constitution is the limited power of government and the balance between the powers of the state. Resdlob identifies with the English tradition because he does not see the king as the true representative of the people vis-à-vis parliament. He does not ascribe superior status

to the executive, as this would destroy the balance of powers. His reading of English parliamentarism significantly influenced the ideas of Preuß about the Reichspräsident in the constitutional debates of 1918 and 1919. Unlike Redslob, Weber wanted a strong executive over parliament. Unlike the English idea of the king, Weber anticipates Schmitt's idea of the Reichspräsident by going beyond the balance of powers and placing the president above the legislature through the ideas of leadership and charisma.

b. Weber's Reichspräsident as a Charismatic and Plebiscitary Leader

Weber anticipates Schmitt's idea of the Reichspräsident by strengthening the head of state over the parliament and conceiving it as an expression of democratic leadership. It is important to note, however, that Weber is not a political theorist of Sieyès's idea of constituent power as Schmitt is. Unlike Redslob, Weber goes beyond constitutional concepts and describes the president as a plebiscitary leader in the context of mass society.

After the fall of the Weimar Republic, the influence of Redslob's work ended, while Weber's oeuvre achieved considerable impact internationally (Hanke, 2016; W. J. Mommsen, 2000; Sica, 2022). His political writings have become known and disseminated thanks to Mommsen's fascinating historical and biographical work (1984). We know that Weber exerted an important influence on Preuß's conception of the Reichspräsident, mainly through his enthusiastic participation in the newspapers of the day and the Constitutional Deliberations at the Reichsamt des Innern from December 9-12, 1918 (Baehr, 1989; Weber, 1918/1988, pp. 82–88). Weber's idea of the Reichspräsident was also present in the Weimar National Assembly in the speeches of politicians such as Bruno Ablaß, Erich Koch-Weser, and Friedrich Naumann of the DDP (W. J. Mommsen, 1984, p. 374). Nevertheless, it would be an exaggeration to claim that the proposal Preuß submitted to the Weimar National Assembly was influenced exclusively by Weber and not other sources such as Redslob's work. Both Preuß and Weber agreed that the Reichspräsident should not be elected by parliament, as in the case of Friedrich Ebert, but by direct vote of the German electorate. Since Weber's work is very extensive, I will focus only on his conception of the Reichspräsident as a plebiscitary leader, which, after Mommsen's seminal work (1984), remains controversial among scholars to this day (Anter, 2016, pp. 101–103; Beetham, 2006, pp. 346–347; Palonen, 2023, pp. 441–443).

Weber's idea of the Reichspräsident developed in his role as one of the intellectuals of the Weimar Constitution. In November 1918, in connection with the German Revolution, Weber published articles in the *Frankfurter Zeitung* on the new political situation in Germany. These articles were later edited and published under the title *Deutschlands künftige Staatsform* (1919/1988). Anticipating Schmitt's idea of the antagonism between democracy and parliamentarism, Weber affirmed that "parliamentarism and democracy are precisely far from being identical" (1919/1988, p. 130). He says that the constitutional arrangement of the relationship between the power of the Reichspräsident and the parliament does not lead to a 'pure' parliamentarism as in France (*Ein reiner Parlamentarismus wie in Frankreich*),

because the "*Staatenhaus* would not be a mere First Chamber, but a directly democratic, but land-interested ruled entity, and above all the Reichspräsident would remain an independent power" (1919/1988, p. 131). As Redslob's idea of the balance of powers, Weber rejects French parliamentarism and claims that the Reichspräsident makes a difference: "Quite different [would be in Germany] if a Reichspräsident were chosen not by popular election (*Volkswahl*) but, as in France, by parliamentary election" (1919/1988, p. 131).

Weber's articles impressed Preuß, so he was invited to the Constitutional Deliberations at the *Reichsamt des Innern* from December 9-12, 1918 (W. J. Mommsen, 1984, p. 355). Weber here opposes the proposal of an executive in the form of a directorate and defends his idea of a Reichspräsident against the distrust of parliament in Germany. The report on the constitutional debates reads:

> *Professor Weber*: A president is therefore necessary so that a chief appointed by popular election is at the head of the administration. The civil service and the officers must have their head in the president. (...) In all probability, there would be four major parties in Germany in the future. Presumably, according to Dr. Quarck's proposal [a president emerged from parliament], a compromise candidate with a strong parliamentary routine would be elected. [Weber] said it was very doubtful whether this president would govern or his subordinates. Moreover, [Weber] did not want only the parliamentarians in Germany to have the prospect of participating in the rule. Even if the separation of powers could not be fully enforced, he thought it would make sense to leave some of it in the constitution. Parliaments have also fallen into disrepute today. Entrusting them with all power is questionable. [Weber] would like to see a counterweight to parliament (*ein Gegengewicht gegen das Parlament*), such as that found in the president appointed by the people (Weber, 1918/1988, pp. 82, 84).

This constitutional proposal is distinguished by its attribution of a charismatic legitimacy and plebiscitary character to the Reichspräsident. His famous lecture *Politik als Beruf* was delivered in Munich in January 1919. Here Weber (1919/1992, pp. 160–161, 1919/1994b, pp. 311–312) presents his distinction of the three types of legitimate rule: traditional, rational, and charismatic.

Traditional legitimacy is based on custom, on the preservation of the past. Rational legitimacy is based on legality, that is, on the rationality of laws and statutes. "Charismatic leadership" (*'Charisma' des 'Führers'*), on the other hand, is based on exceptional and personal character ("gift of grace"). Charisma implies personal devotion for reasons of heroism, revelation, or other personal qualities of leadership, so it is the highest form of vocation (*Beruf*): "Devotion to the charisma of the prophet or the war-lord or the exceptional leader is personally regarded as someone who is inwardly 'called' to the task of leading men" (1919/1994b, p. 312). In the West, charismatic leadership appears in the form of the

demagogue and in modern times as a party leader in parliamentary government (1919/1994b, p. 313). Weber then distinguishes between professional politicians who live 'for' politics and those who live 'from' politics (1919/1994b, p. 318). The "professional politicians" (*Berufpolitiker*) have historically developed as servants of princes, but in mass society they have become full-time professionals in the service of the party "machine" in parliament. This machine, Weber says, needs charismatic leadership: "The creation of such machines means the advent of plebiscitary democracy" (1919/1994b, p. 339). As Palonen (2023, p. 442) explains, Weber was indebted to the works of James Bryce (1888/1995) and Robert Michels (1910/1970) and contrasted *leadership democracy with a 'machine'* vs. *leaderless democracy*. Following this approach, Weber points out that the only source of charismatic and plebiscitary leadership in Germany in 1919 was the office of the Reichspräsident:

> But the only choice lies between a leadership democracy (*Führerdemokratie*) with a 'machine' and democracy without a leader (*führerlose Demokratie*), which means rule by the 'professional politician' who has no vocation, the type of man who lacks precisely those inner, charismatic qualities which make a leader. Usually this means what the rebels within any given party call rule by the 'clique'. For the time being only the latter exists in Germany. (...) The only remaining outlet for the desire for leadership might be the office of Reichspräsident if the president were to be elected by plebiscitary rather than parliamentary means (Weber, 1919/1992, pp. 224–225, 1919/1994b, p. 351).

Weber consolidated his idea of the Reichspräsident in his brief article published and edited between February and March 1919. Weber states, "it is essential for us to create a head of state resting unquestionably on the will of the whole people, without the intervention of intermediaries" (1919/1994a, p. 304). For Palonen, this pro-executive stance is due to "Weber's distrust of the electoral system that was applied in the election of the constituent assembly in January 1919" (2023, p. 442). Weber was referring here not to the 18th-century idea of popular sovereignty but to the election of millions of German citizens. Then he says, "the Social Democrats should remember that the much discussed 'dictatorship' of the masses demands a 'dictator', a spokesman elected by the masses themselves, to whom they will subordinate themselves as long as he enjoys their trust" (1919/1994a, p. 305). The Reichspräsident thus represents the principle of the unity of the Reich and a counterweight to the parliamentary majority (1919/1994a, p. 307). Weber defends the idea of the president intervening in the 'machine' of the Reich based on his suspensive veto power, his leadership in the executive branch, and his right to call for a referendum. This would guarantee that the

edifice would not collapse in a parliament crisis. In short, Weber's Reichspräsident expresses the unity of the democratic will of the people in the face of shifting party coalitions:

> Any president of the Reich elected by parliament under particular party constellations and coalitions will be politically dead as soon as there is a shift in that constellation. A popularly elected president, as the head of the executive, of official patronage, and as the possessor of a delaying veto and the power to dissolve parliament and to consult to the people, is the palladium of genuine democracy, which does not mean impotent self-abandonment to cliques but subordination to leaders one has chosen for oneself (Weber, 1919/1994a, p. 308).

International literature rightly points out that Weber's strengthening of the powers of the Reichspräsident vis-à-vis parliament influenced and anticipated Schmitt's idea of the Reichspräsident and his criticism of parliamentary government (Magalhães, 2016, pp. 283–287; Mehring, 2021, pp. 132–136; W. J. Mommsen, 1984, pp. 381–389). Mommsen and Habermas defined Schmitt as a legitimate "son/pupil" of Weber (Engelbrekt, 2009, p. 668; Magalhães, 2016, p. 284), an issue that has sparked a historical dispute over the legacy of Weber's idea of the Reichspräsident. The Weber-Schmitt relationship should be analyzed not only intellectually but also biographically. According to Mehring (2021, p. 133), Schmitt attended various lectures and conferences by Weber until the end of the summer semester 1920. Then Schmitt participated in the commemoration (*Erinnerungsgabe*) of Weber in 1923 with a text on his *Politische Theologie* (1922/2015). Mehring says that a possible intermediary between them was Moritz Bonn, then director of the *Handelshochschule*. In the Lanchester interview (1983/2017), Schmitt confirmed the information given by Mehring and added that Weber was very strict with his students: "Weber's seminar was very well done, but it could happen that at the end of an hour in which we were talking with him, Weber decided to expel you from the class in a very unpleasant way" (1983/2017, p. 82). Mehring (2021, pp. 134–135) affirms that Weber's influence on Schmitt is not entirely convincing because of Schmitt's anti-liberal approach. However, the relationship Weber-Schmitt should be seen in the context of the conception of the Reichspräsident as a democratic and charismatic leader.

For his idea of the Reichspräsident, Schmitt adopts Weber's implicit duality between the *rational legitimacy* of legality and the legitimacy of the president's *charismatic leadership*. Schmitt's reading of the *pouvoir neutre* is partly inspired by Weber's idea of the president as a counterweight to the shifting party coalitions of parliament. Unlike Redslob, Weber wanted the head of state to be stronger than parliament, so it is not the liberal and moderate idea of English parliamentary government that Redslob expounded. Weber advocated a strong executive, so in the context of 1919, to stick with the analogy to the

French Revolution, I think of Weber as a ‘German Mirabeau’. Just as Mirabeau wanted a strong king with the power to dissolve parliament to protect the republic, Weber wanted a strong Reichspräsident to save the parliamentary government in the event of a political crisis. For Weber and Schmitt, the Reichspräsident represents the will and unity of the people. Nevertheless, Schmitt’s Reichspräsident is not just a product of Weber’s ideas, as his approach is developed within a larger context of a pro-executive European movement in constitutional theory, as I will explain below. Schmitt radicalizes Weber’s idea of the executive power for his project of the dictatorship of the Reichspräsident. Indeed, Schmitt uses Weber’s idea of the charismatic legitimacy of the president to legitimize the dictatorial powers of Art. 48 of the Weimar Constitution. I will now explain how Schmitt conceptualized the Reichspräsident as the guardian of the will of the constituent power.

2. The Reichspräsident as Guardian of the Will of the People

In this second section, I develop my central argument on Schmitt's idea of the Reichspräsident as guardian of the will of the people. My analysis is divided into three parts. First, I will explain how Schmitt develops his idea of the president in the context of a European movement that sought to strengthen executive powers in the face of the so-called 'crisis of parliamentarism' (Barthélemy, 1928; Schmitt, 1923/2017). Schmitt's president is a *neutral power* who is against the neutralization/depoliticization of the legislative state and parliamentarism. Second, I show that Schmitt's idea of the guardian of the constitution does not refer to constitutional norms, but to his idea of the 'positive constitution', i.e., the constitution as an *existential* expression of Sieyès's idea of constituent power (Schmitt, 1928/2008, Chapters 3, 8). This shows that the president is not the bearer but the protector of the constitution. When Schmitt speaks of protecting the 'positive content', he means the political order created by the constituent power. Thus, I show that Sieyès's idea of the king in the French Revolution and Schmitt's idea of the Reichspräsident in Weimar share the same theoretical framework. Finally, for the first time in the literature, I present a study of Schmitt's idea of guardianship in his National Socialist writings. Although these texts show Schmitt's moral perversion, I think they are important for a complete historical picture of his idea of the guardian of the constitution. I demonstrate that Schmitt transfers his idea of guardianship from the Reichspräsident to the NSDAP to protect the *völkische Verfassung*.

a. The Strong Executive against Neutralization/Depoliticization

Schmitt's idea of a strong executive is that the Reichspräsident as guardian of the constitution is a neutral power (*pouvoir neutre*), i.e., a power that stands above party interests and can distinguish between friend and enemy. The original concept of neutral power was introduced by Benjamin Constant in the second chapter of his *Principes de politique* (1815), published in the context of the Bourbon Restoration. For Constant (1815, p. 34), the monarch reigns (*régner*) but does not rule (*gouverner*), since he is a *pouvoir neutre* between the ministers, the judiciary, and parliament. Schmitt's idea of the Reichspräsident as a neutral power is presented in *Der Hüter der Verfassung* (1931/2016) as follows:

> In the constitutional history of the nineteenth century, a special doctrine of the *pouvoir neutre, intermediaire* and *regulateur* appears in Benjamin Constant, in the course of the struggle of the French bourgeoisie for a liberal constitution and against Bonapartism and the restoration of monarchy. This doctrine essentially belongs to the constitutional theory of the bourgeois rule-of-law state, and it has had an effect on more than just the two constitutions into which it has been incorporated more or less verbatim. The catalogue of prerogatives and competences of the head of state (monarch or president of state) that is typical of all nineteenth-century constitutions, moreover, can be traced back to it (Kelsen & Schmitt, 2015, p. 152).

However, it is important to point out how this idea of Schmitt's Reichspräsident underwent a pro-executive strengthening toward the end of the 1920s. Between *Verfassungslehre* (1928/2008) and *Der Hüter der Verfassung* (1929, 1931/2016), an important shift occurred in Schmitt's idea of the head of state. Already in *Verfassungslehre* (1928/2008), Schmitt had presented the Reichspräsident as similar to Contant's idea of a neutral power. The president, Schmitt argued, is not a *leader* but a non-partisan, objective authority, a moderating force that does not *decide*. Thus, the Reichspräsident "brings the parties together, and through the prestige and confidence he finds among the parties, he creates an atmosphere of understanding" (1928/2008, p. 370). Schmitt (1928/2008, pp. 370–371) describes the cases of presidents Ebert and Hindenburg in this liberal-moderate conception of neutral power. In contrast, *Der Hüter der Verfassung* portrays the neutral power of the president as a strong democratic leadership in a time of political crisis. In the first line of this book, Schmitt says that "Der Ruf nach einem Hüter und Wahrer der Verfassung ist meistens ein Zeichen kritischer Verfassungszustände" (1931/2016, p. 1). Here Schmitt goes beyond Constant's idea, as his Reichspräsident had not only *passive powers*, such as calling referendums and dissolving parliament, but also an important *active power*: the emergency

powers of Article 48 of the Weimar Constitution. Moreover, Schmitt presents his new idea of neutral power in contrast with his concept of *neutralization/depoliticization*, which he associates with the lack of decision-making and the politics of parliamentary government and shifting political coalitions in the Weimar Republic. I will introduce this discussion about Schmitt's idea of the president as a neutral power with a focus on *Der Hüter der Verfassung* (1931/2016).

To be guardian of the constitution means to be a strong executive power similar to the concept of *commissary dictatorship* (Schmitt, 1924/2011, 1921/2014, Chapter 1). In the appendix to the second edition of *Die Diktatur*, Schmitt (1921/2014, p. 207) explicitly defines the president's authority and his emergency powers as a commissary dictatorship. I have explained that in *Die Diktatur* (1921/2014, Chapter 4) it is clear that only a dictatorship with a *mandate* or *commission* from the people to create a new constitutional order is a *sovereign dictatorship*. Schmitt portrays the Reichspräsident as a *commissary dictator* acting with emergency powers —as a "residue" of the sovereign powers of the Weimar National Assembly— to protect the will of the constituent power (Schmitt, 1921/2014, p. 207). This is precisely the relationship between Schmitt's Reichspräsident and Sieyès's idea of constituent power. In *Der Hüter der Verfassung* (1931/2016), Schmitt takes up his idea of protecting the political order in three sections: the critique of constitutional revision (*Justiz als Hüter der Verfassung*), the critique of pluralism, polycracy, and federalism (*die konkrete verfassungslage der Gegenwart*), and the Reichspräsident as guardian of the constitution. Vinx (2015, pp. 1–16; 2015b) has contextualized Schmitt's and Kelsen's ideas on guardianship in light of the constitutional debates on the powers of the *Staatsgerichtshof* and the political outcome of the *Preußenschlag* of July 20, 1932. However, to understand Schmitt's concept of *neutral power*, we should situate the book *Der Hüter der Verfassung* (1931/2016) within the pro-executive movement that emerged in early 20th century Europe.

The idea of the Reichspräsident as a *neutral power* above party interests and protecting the will of the people appeared at the height of the *Estado Novo* in Portugal and Italian fascism in the late 1920s and early 1930s. The consolidation of fascism also coincided with the scholarly interest of jurists in the French Third Republic in pro-executive reforms of parliamentary government and the general interest in pro-executive constitutions such as the Chilean Constitution of 1925. The movement was intended to strengthen the powers of the head of state in the face of the 1920-1921 depression and the so-called 'bankruptcy' of parliamentary government in the context of the Great Depression of 1929-1939.

The pro-executive movement was mainly represented by the works of famous intellectuals of the time, such as Sergio Panunzio (1987), Michel Dendias (1932, 1937), Joseph Barthélemy (1907, 1928), and Émile Giraud (1925, 1938). It is often forgotten that Kelsen published an important article in 1926 on the Chilean Constitution of 1925, which interested him because, in his opinion, it was the expression of this European movement to strengthen the executive power: "Die neue Chilenische Verfassung ist ein Produkt jener antiparlamentarischen Bewegung, die heute auch in Europa um sich greift. Sie verdient darum ernsteste Beachtung" (1926, p. 616). Interestingly, Kelsen concludes that in Chile the crisis of parliamentary government was solved by the establishment of a presidential dictatorship (*parlamentsloser Diktatur*) (1926, p. 619). The books by Dendias, a forgotten jurist who taught in France and Greece, represent a summary of all the works related to this pro-executive movement. Dendias first published a study (1932) of how the jurists of his generation sought to strengthen executive power in parliamentary government. Here he mentions the works of Redslob in Germany and of Barthélemy and Hauriou in France. But by the end of the 1930s, Dendias (1937) notes that many jurists of his generation, in the context of the deep crisis of parliamentary democracy in Europe, were shifting from the position of strengthening the executive to defending the dictatorship of the executive. This was precisely the case with Barthélemy and Schmitt. Barthélemy did not draw inspiration from Schmitt's work in his position for the executive, but he reaches very similar conclusions in his works.

The intellectual profile of Barthélemy, which is very similar to that of Schmitt, deserves attention, since he is also interested in Sieyès's idea of constituent power. Barthélemy was an eminent jurist who had published important works on French political institutions (Barthélemy, 1919; Barthélemy & Duez, 1926). He was fascinated by the political ideas of Sieyès, on which he even supervised a dissertation dedicated to the *abbé* and wrote the introduction to the book (Koung-Yoeh, 1934). Barthélemy points out that Sieyès was one of the most important figures in Western history, and considers him a philosopher rather than a politician (Koung-Yoeh, 1934, p. iii). Barthélemy says that Montesquieu observed and described facts, while Sieyès was a thinker because of his theological approach. Interestingly, Barthélemy, like Schmitt (1928/2008, p. 126), emphasizes the political-theological elements in Sieyès's ideas. He affirms that Sieyès's thought is accompanied by a belief in transcendental principles and then highlights his idea of constituent power: "Koung-Yoeh has rightly insisted on the importance Sieyès attaches to the distinction between *constituent* and *constituted* power and, above all, to the practical sanction of this distinction" (Koung-Yoeh,

1934, p. iv). Barthélemy concludes that Sieyès was not a moralist, economist, or legislator, but a constitutional thinker: "Sa tète portait une constitution" (Koung-Yoeh, 1934, p. iv).

Unlike Schmitt, however, Barthélemy developed his idea of the strong executive without reference to Sieyès's idea of constituent power. Interestingly, Schmitt (2015, p. 153) mentions in *Der Hüter der Verfassung* that Barthélemy was fascinated by Contant's idea of neutral power as a defense of parliamentary government in France. Originally, Barthélemy (1907, pp. 14–20), like Redslob and Weber, was interested in strengthening the powers of the president of the French Third Republic to ensure a balance of powers in the parliamentary government. However, toward the end of the 1920s, Barthélemy began to made the same sharp criticism as Schmitt (1923/2017) of parliamentarism, which he saw as too slow in decision making: "La discussion est bonne; l'abus seul est nuisible" (1928, p. 64). Almost as if he had copied Schmitt's decisionist criticism against parliament, Barthélemy says: "Il ne faut pas que la réflexion nuise à la décision, que la discussion retarde indéfiniment le vote, que la délibération paralyse l'action, que le contrôle détruise l'autorité" (1928, p. 64). Schmitt and Barthélemy are also similar in their later political support for fascist regimes. After the fall of the French Third Republic, Barthélemy became an important Vichy politician and served Philippe Pétain as Minister of Justice (Barthélemy, 1989). In their intellectual development, both Barthélemy and Schmitt belonged to the same European movement of eminent jurists of their time who, faced with the so-called 'crisis of parliamentarism' (Barthélemy, 1928; Schmitt, 1923/2017), advocated strengthening the executive.

In the context of this pro-executive movement, Schmitt moved from defining the Reichspräsident's neutral power as a "moderating power" in *Verfassungslehre* (1928/2008, p. 370) to a "preserving power" in *Der Hüter der Verfassung* (2015, p. 156). His Reichspräsident is now a strong executive because he is a "neutral, arbitrating, regulating, and preserving power" (2015, p. 157) against the neutralization/depoliticisation of the liberal state. Schmitt's critique of parliamentarism takes up Weber's critique (1919/1988) of parliament and party bureaucracy, although Schmitt radicalizes it by saying that mass democracy has turned parliamentarism into an "empty formality" (1923/2017, p. 10). For Vinx (2015b, pp. 36–39), Schmitt's idea of guardianship is directed against the "legislative state" of political parties. However, within the framework of the European movement that strengthens the executive, Schmitt (1931/2016, pp. 1–3) begins with an intellectual history of the concept of guardianship in constitutional law. He points out that the first modern ideas of a guardian of the constitution emerge after the death of Oliver Cromwell (1658), develop in Harrington's writings on the *Commonwealth of Oceana,* and reach a consolidated form in the 18th century

in Sieyès's idea of a *Jury Constitutionnaire* and the Constitution of the Year VIII with its idea of a Senate as guardian (*conservateur*) of the constitution. Schmitt's core idea is that the Reichspräsident in the Weimar Constitution is a guardian who is understood as a *neutral power* opposing the neutralization/depoliticization of the legislative state (2015, pp. 150–160). The meaning of the term "neutral" in Schmitt's work requires a brief explanation.

Schmitt distinguishes between the concepts of *neutral power* (which brings about a binding decision) and *neutralization/depoliticization* (which does not lead to a decision) (Kennedy, 2004, p. 162). Unfortunately, Vinx's fine English translation (2015) of *Der Hüter der Verfassung* (1931/2016, pp. 111–115) did not include the section on this conceptual clarification. This section was delivered in 1930-1931 in Schmitt's lectures before the Berlin Chamber of Commerce and Industry (2014, pp. 179–183). He explains a total of four negative and four positive conceptions of neutrality. I will briefly explain each of them.

Let us begin with the negative conceptions of neutralization. The first conception defines it in terms of non-intervention, of impartiality, of *laissez-passer*. This is the neutrality of the state towards religions, a process that results from secularization and that he called "the age of neutralizations and depoliticization" in his famous lecture in Barcelona of 1929 (Schmitt, 1930a, 1929/2014). For this neutralization, "the man of religious ideas should enjoy no greater protection than the atheist, and the nationalist no better rights than the enemy and slanderer of the nation" (1931/2016, p. 112). Characteristic of this conception of neutrality is *depoliticization* as a synonym for the absence of political decisions. The second conception of neutrality defines the state as a technical medium, a bureaucratic and administrative apparatus. The third conception of negative neutrality is equality of opportunity in the formation of political will. Schmitt says that this conception contains the liberal idea of equality, later expressed in Article 76 of the Weimar Constitution. This neutrality gives all political parties equal opportunities to achieve parliamentary majorities, even if they could reform the constitution to move to a Soviet republic or a monarchy. The fourth conception is neutrality in the sense of parity, that is, as the admission of all groups and tendencies on equal terms and with equal consideration. Schmitt cites the freedom of science in Article 142 of the Weimar Constitution, where it is presupposed that all scientific tendencies are given equal consideration when professorships are filled. This neutrality is synonymous with the idea of equal opportunity in a state that sees itself as agnostic and relativistic.

In contrast to the negative conceptions of neutralization, the positive conceptions of neutrality refers to the *neutral power* making a decision. The first positive conception is neutrality in the objective and applicable sense of a norm. This is the neutrality of a judge

when he decides on the basis of an accepted norm. Schmitt says that this neutrality proves the judge's independence from the will of the state, although the judge's decision is a legal and not a political decision. The second conception is the neutrality of the expert, that is, that he is not self-interested because he does not represent the interests of one of the parties of the pluralistic state. This neutrality is inherent to the mediator and the referee. The third conception is neutrality as an expression of a unity and a whole that encompasses the opposing groups. This is precisely Schmitt's idea of the Reichspräsident as a *neutral power*. It is "the neutrality implicit in the political resolution of interstate disputes, in the face of the disintegration and fragmentation of the state into parties and special interests, when the resolution imposes the interest of the political whole" (1931/2016, p. 115). The fourth conception of neutrality is that of the external individual, i.e., the one who, as a third party, formulates a decision in a given case and thus determines a political unity. This is the case of the imperial protector vis-à-vis the states subject to his protectorate, which is neutral with respect to their internal political antagonisms. Schmitt says this is the case of the British Empire vis-à-vis the religious conflicts in India and also the case of Pontius Pilate himself (*quid est veritas?*) vis-à-vis the religious struggles of the Jews.

For Schmitt, the Reichspräsident is a *neutral power* in the positive sense because he can distinguish between friend and enemy and thus make political decisions. The contrast between the concepts of *neutral power* and *neutralization/depoliticization* is also expressed in the 1932 edition of *Der Begriff des Politischen* (1932/2007).

The rejection of *neutralization/depoliticization* is related to Schnitt's criticism of political liberalism and parliamentary government. He says that "liberalism's negation of state and the political, its neutralizations, depoliticalizations, and declarations of freedom" are polemically "directed against a specific state and its political power" (1932/2007, p. 61). Schmitt's central idea is that the concept of the state presupposes the concept of the political, which is the distinction between friend and enemy. To contextualize this concept of the political, he contrasts it with the process of neutralization that the theory of the state underwent from 18th century absolutism to the 19th century liberal state (1932/2007, pp. 22–23). The appendix to *Der Begriff des Politischen* contains his lecture in Barcelona on the era of neutralizations (1930a, 1929/2014). Here Schmitt distinguishes the concept of *neutral power* with that of neutralization/depoliticization: "In the nineteenth century, first the monarch and then the state became a neutral power, initiating a chapter in the history of political theology in the liberal doctrines of the *pouvoir neutre* and the *stato neutrale*" (1932/2007, p. 90). According to Vinx, Schmitt "had put the president into the position of a

neutral power above party politics that was to form a counterweight against parliament" (2015, p. 11). His Reichspräsident as a *neutral power* is thus not *sovereign,* but a power that opposes the negative *neutralization* of the parliamentary government of the political parties:

> Differences of opinion and conflicts between those who exercise rights of political decision and of influence cannot in general be decided in judicial form, except where open violations of the constitution are to be punished. They are either resolved, from above, by a stronger political force, that is by a higher third that stands above the differing opinions – such a power, however, would not be a guardian of the constitution, but rather a sovereign ruler of the state – or they are arbitrated or settled by an authority that is not superior to but that stands alongside the conflicting parties, and hence by a neutral third. That is the purpose of a neutral power, of a *pouvoir neutre et intermédiaire*, which is placed at the side and not above the other constitutional powers, but which is endowed with peculiar competences and opportunities of influence (2015, pp. 150–151).

This passage leads us to Schmitt's idea of *neutral power* in the context of the concept of constitutional monarchy. In *Verfassungslehre,* Schmitt explains that the political role of the Reichspräsident was similar to that of the constitutional monarch in French constitutionalism.

Using Louis-Philippe's *Monarchie de Juillet* (1830-1848) as an example, Schmitt says that the constitutional monarchy rests on the fact that "the monarchical principle is restricted by the separation of powers" and the monarch "represents the political unity, while a popular assembly (the parliament) stands opposite him as a second representative" (1928/2008, p. 313). For Schmitt, in monarchical France (1830) and Belgium (1831), "the monarch remains the chief of the executive branch" but his political leadership "is dependent on the agreement with the parliamentary majority" (1928/2008, p. 314). This design represents a "form of legality under a bourgeois *Rechtsstaat* and of a form of liberalism that moderated the exercise of the monarchical authority" (1928/2008, p. 314). Thus, "the essence of the constitutional monarchy lies in the fact that the constitutional monarch still has genuine power, and that his personal will is still somewhat valid and not subsumed in the parliament" (1928/2008, p. 314). Then Schmitt presents his idea of the Weimar president as "the republican version of the monarch of the parliamentary monarchy" because he "must be provided with particular grants of authority (for example, dissolution of parliament), so that the government in regard to parliament is balanced out to an indeterminate degree of independence" (1928/2008, p. 316). Schmitt concludes that the *neutral power* of the Reichspräsident in the Weimar Constitution resembles the liberal design of the French constitutional monarchy:

> The Weimar Constitution adopted this system, and it introduced into the constitution elements of a presidential system alongside such a pure parliamentary one. (...) How much the office of the President is analogous to that of a monarchical chief of the executive is revealed in the institution of equivalent authorities and in the assumption of a comprehensive position. As in other cases, there are elements of a principle of political form that are rendered relative by reducing them into means of organization. These elements of political form are bound up with the principle of the bourgeois Rechtsstaat and opposing elements of political form and are applied to a mixture typical of the bourgeois Rechtsstaat constitution (Schmitt, 1928/2008, p. 317).

But this portrayal of the Reichspräsident in *Verfassungslehre* undergoes a counter-revolutionary radicalization in *Der Hüter der Verfassung*. In this book, Schmitt says that the neutral power of the head of state stands beside and not above the other constitutional powers and is also endowed with special powers and possibilities of influence. When Schmitt defines the Reichspräsident's neutral power in this way, he locates it not only as a "moderating" or "arbitrating" power, but above all as a guardian of the constitution. Thus, Schmitt's conception of guardianship contrasts with Constant's original idea of the constitutional monarch as a *pouvoir neutre*. Schmitt now speaks about two kinds of presidential powers, which I call *passive* and *active*. This differentiation is often overlooked, especially in studies that follow the reading of Cristi (1997, p. 191), who reduces Schmitt's monarchical principle to the emergency powers of Art. 48 of the Constitution.

Passive power is conceived by Schmitt (2015, p. 157) as Constant's design of the French constitutional monarch, i.e., as a preserving power (*pouvoir preservateur*) and mediator in the face of the internal conflicts of the state: "The head of state himself is bound in all things to the countersignature of the ministers, and that one can consequently say of the head of state: *il règne et ne gouverne pas*" (2015, p. 154). The distinction between the French terms *régner* and *gouverner*, which for Schmitt disappeared in 19th century German theories of the state, leads to the differentiation between the terms *auctoritas* and *potestas* in Roman law (Schmitt, 1928/2008, p. 459). This conceptual distinction emphasizes that the powers of the Reichspräsident are not "in a continuously commanding and rule-making activity" (2015, p. 156). For Schmitt, the active power of the Reichspräsident arises exclusively in a time of crisis, i.e. in view of the state of emergency: "The neutral power is active only in a state of emergency, since it is not to compete with the other powers with a view to expanding its own influence, and since it must normally, according to the nature of its business, be discreet and unobtrusive" (2015, p. 156). The Reichspräsident is a neutral power that protects the 'positive constitution' through the emergency powers in Art. 48 of the Weimar Constitution. Although

Schmitt was inspired by Constant's idea of the *pouvoir neutre*, his Reichspräsident goes in the opposite direction of the French liberal idea of the constitutional monarch.

It would be a mistake to say that Schmitt's idea of the Reichspräsident corresponds exactly to that of Constant's idea of the constitutional monarch as *pouvoir neutre*. In contrast to Schmitt's reading, the original idea of the *pouvoir neutre* knows no *active power* of the head of state, but only a *passive power* inspired in the English constitutional monarchy.

The original idea of neutral power is incompatible with the idea of a dictatorship with emergency powers. In the literature, Constant's idea is interestingly compared to the ideas of Kelsen, Schmitt, and the president in the *Grundgesetz* (1949) (Baume, 2012; Rolland 1, 2008; Stein, 2008). But it is often forgotten that Constant developed his idea in opposition to the concept of Roman dictatorship. His king is a *pouvoir neutre* in the sense of a head of state independent of the legislative, executive, and judicial branches (1815, p. 34). Schmitt is correct in saying that Constant claims that the king is a preserving power that does not actively rule (*sans être hostile*). However, Schmitt forgets that Constant takes the Roman dictatorship as the best example of what a neutral power should not be: "Quand la même somme d'autorité s'est trouvée réunie au pouvoir exécutif, il y a eu despotisme. De-là l'usurpation qui résulta de la dictature à Rome" (1815, p. 38). For Constant, the history of Roman dictatorship teaches us that it is necessary to have a *pouvoir neutre*. He points out that the constitutional monarch is basically an intermediary between ministers and should never take an *active* role in the formation of political decisions. Thus, Constant's idea of *pouvoir neutre* was deformed by Schmitt, who granted dictatorial powers to the Reichspräsident with the emergency powers based on Art. 48 of the Weimar Constitution.

Schmitt insists so much on these emergency powers of the Reichspräsident because he sees them as *active powers* to protect his concept of the 'positive constitution'. When Schmitt speaks of the protection of the constitution by the Reichspräsident, he does not refer to constitutional norms, but to his *existential* conception of the constitution as the decision/will of the constituent power (Schmitt, 1928/2008, Chapter 3). In other words, Schmitt's Reichspräsident is a *neutral power* in the sense that he is a guardian of the will of the people. This goes beyond Constant, but brings us closer to Sieyès's king in the French Revolution.

b. The Head of State as Protector of the Will of the Constituent Power

Since the constitutional debates of the French Revolution, the idea was introduced that the people have in the head of state the protector of their will. This is one of the most important variants of the concept of *popular autocracy* and also the premise behind Schmitt's idea of the Reichspräsident as guardian of the will of the constituent power.

The central idea I want to point out in this section is that Schmitt's Reichspräsident is more akin to Sieyès's idea of the king in the French Revolution. There is an extensive literature on the similarities and differences between Sieyès and Schmitt in their conceptions of constituent power (Breuer, 1984; Colón-Ríos, 2020; Fasel, 2022; Rubinelli, 2020a; Thiele, 2003; Verdugo, 2023). However, the similarities in their ideas of the head of state have not yet been explored. It is true that Sieyès never thought of emergency powers and did not consider the constitutional monarch as a *commissary dictator*. However, Sieyès and Schmitt share the notion of the head of state as the true protector of the will of the constituent power within the limits of the existing constitution. Like Schmitt, Sieyès refers to the head of state as a 'guardian' (1999c, p. 439) and in his speech on the royal veto grants him the right to reconvene the *pouvoir constituant* and a constituent assembly when he perceives a threat to the will of the people (1789/1989a, p. 23). Similarly, Schmitt's Reichspräsident can exercise emergency powers and establish a *commissary dictatorship* if there is a threat to the constitution, which is understood to be the will of the people. This counter-revolutionary approach distinguishes Schmitt's idea from other theorists of the head of state, such as Redslob and Weber. In the following, I first explain Schmitt's idea of the Reichspräsident as protector of the will of the people and then analyze its relationship to Sieyès's king.

To understand Schmitt's idea of the Reichspräsident as guardian of the will of the people, we should first recall the distinction between the concepts of *sovereignty* and *sovereign dictatorship*. The key to understanding this distinction is that the *sovereign dictatorship* is the executor of a *mandate* or *commission* from the people to create a new constitution, while the *sovereign* in a state of exception has all the powers of the state, including 'constituent powers', but no *mandate* (Schmitt, 1921/2014, pp. 125–127). For Schmitt, this is of great importance in understanding the difference between a military dictator with 'sovereign powers', such as Oliver Cromwell in the Puritan Revolution, and the sovereign dictatorship of the National Assembly of 1789, based on Sieyès's idea of constituent power. I explained in the previous chapter that Schmitt used the Cromwell case to point out that there is a big difference between dictatorships legitimized on religious-

traditional grounds and on rational-modern grounds. For this reason, Schmitt says, "God is a commissioner different from the bearer of this *pouvoir constituant*" because God's dispensation and providence "for Cromwell had the same meaning as in Bossuet's philosophy of history" (1921/2014, p. 121). For Schmitt, Cromwell as dictator with 'sovereign powers' is "something different from the *acte impératif* (imperative act), which Boutmy defines as the exercise of the *pouvoir constituant*" (1921/2014, p. 121). In other words, Cromwell's military dictatorship was *sovereign*, but not a *sovereign dictatorship*.

Only a dictatorship with a *mandate* or *commission* from the people to create a new constitutional order is a *sovereign dictatorship*. On the contrary, a dictatorship bound by the limits of the existing constitution is always a *commissary dictatorship*, as Machiavelli's Roman dictator and Bodin's theory of commissars explain. Schmitt (1921/2014, Chapter 4) associates the mandate of the *pouvoir constituant* with the delegation of *plenitudo potestatis* by constituent assemblies such as that of France in 1789. The term 'sovereign dictatorship' did not exist and was not written anywhere in the French Revolution (De Wilde, 2021, pp. 149–151), but for Schmitt this is precisely the idea behind the revolutionary dictatorship of the Jacobins. In *Politische Theologie* (1922/2005, Chapter 1), on the other hand, the German jurist defines *sovereignty* as the *suprema potestas* that decides in a state of exception, that can suspend the constitution, that can restore the political order. His concept of sovereignty draws on Bodin's idea of *supremas majestas* in the context of the Wars of Religion. Thus, Bodin's absolute monarch is *sovereign*, but not a sovereign dictator or commissioner of the constituent power. Colón-Ríos (2020, pp. 239–248) rightly noted this implicit distinction between *sovereignty* and *sovereign dictatorship* in Schmitt's work. In *Politische Theologie* (1922/2005, p. 11), Schmitt distinguishes the constitutional emergency powers (Art. 48) of the Reichspräsident from the powers of the Bourbon monarch of 1815, thus solidifying the distinction between the *sovereign*, the *sovereign dictator*, and the *commissary dictator*.

The Reichspräsident is neither *sovereign* nor *sovereign dictator*, but a *commissary dictator* with democratic legitimacy, acting within the limits of the Weimar Constitution. This reading first appeared in the book *Die Diktatur* (Schmitt, 1921/2014, pp. 175–177, 1921/2015, pp. 197–200). His lecture in Jena in 1924 elaborates on this idea, but emphasizes the commissarial powers of the Reichspräsident as "residue" of the *sovereign dictatorship* of the Weimar National Assembly (Schmitt, 1921/2014, p. 207). Schmitt's reading generated a debate among the professors of the *Vereinigung der Deutschen Staatsrechtslehrer* (Anschütz et al., 1924/2013, pp. 137–139). Article 48, paragraph 2, of the Weimar Constitution states: "In case public safety is seriously threatened or disturbed, the President of the Reich may take

the measures necessary to reestablish law and order, if necessary using armed force" (Vinx, 2015b, p. 43). For Vinx, the Reichspräsident "may suspend the civil rights described in articles 114, 115, 117, 118, 123, 124, and 154, partially or entirely" (2015b, p. 43). There is already an immense international literature on the history of the origin of Article 48 (De Wilde, 2010; L. Richter, 1998), its significance in Schmitt's writings on emergency powers (Kelly, 2016, pp. 232–236; Kennedy, 2011, pp. 287–292; McCormick, 1997, pp. 175–181), and the importance this discussion had on the political role Schmitt played in legitimizing the state of emergency in the final years of the Weimar Republic (Croce & Salvatore, 2023a, pp. 8–12; Kelsen & Schmitt, 2015, pp. 1–6; Scheuerman, 2016, pp. 553–560).

However, the relationship between the Reichspräsident's *commissary dictatorship* and Sieyès's idea of constituent power in Schmitt's work has not been clearly analyzed in the international literature. To this end, it must first be clarified to which concept of the constitution Schmitt refers in the case of the Reichspräsident as guardian of the constitution.

In his *Verfassungslehre*, Schmitt consolidated his idea that only a constitution based on Sieyès's idea of constituent power is legitimate: "The legitimacy of the Weimar Constitution rests on the German people's constituent power" (1928/2008, p. 136). Moreover, Schmitt affirms that the democratic legitimacy of the constitution is based on the same principle: "Democratic legitimacy, by contrast, rests on the idea that the state is the political unity of a people. The people are the subject of every definition of the state; the state is the political status of a people" (1928/2008, p. 138). Vinx (2013, pp. 104–114) is right when he criticizes this Schmittian approach as a reaction to the legal positivism of Kelsen in order to defend a "strong" conception of popular sovereignty. When Vinx speaks of "strong popular sovereignty," he is referring to those who believe that it is not enough to have a constitutional system of rights and citizen participation that has its origins in a democratic past. Rather, this approach believes that "to enjoy genuine self-determination, the people, as constituent power above all law, must always remain the sovereign judge of whether this is indeed the case" (2013, p. 103). Vinx (2013, p. 104) points out that Schmitt was not the first to formulate the legitimacy of the constitution in this way, because this can also be found in Sieyès's work. This view of the democratic legitimacy of the constitution has also persisted to this day (Arato, 2017b, pp. 1–41; Colón-Ríos, 2012, pp. 102–125; Kalyvas, 2018).

When Schmitt speaks of the protection of the constitution by the Reichspräsident, he does not refer to constitutional norms, but to his *existential* conception of the constitution as the decision/will of the constituent power (Schmitt, 1928/2008, Chapter 3). In *Verfassungslehre*, he explains different conceptions of the term 'constitution' and attributes to

himself the concept of constitution as the *form of existence* of the political order of the estate (1928/2008, Chapter 1). The modern written constitution, after the American and French Revolutions, is an expression of the will of the people. Schmitt calls this the 'positive constitution' (1928/2008, Chapter 3), which already includes his *existential* conception of political unity. Schmitt says that "the people are the bearer of the constituent power and, as such, grant themselves their constitution" (1928/2008, p. 255). Vinx (2015b) has rightly emphasized that it is above all the 'positive' concept of the constitution that is discussed in Schmitt's concept of guardianship. Schmitt says: "The view that the president of the Reich is the guardian of the constitution, moreover, alone conforms to the democratic principle on which the constitution is based" (2015, p. 172). Thus, the president "stands in the centre of a whole system of party-political neutrality and independence that is built on a plebiscitary basis" (2015, p. 171). The proof that Schmitt associates the Reichspräsident with the protection of the constituent will lies in his explicit reference to the guardianship of the 'positive content' of the Weimar Constitution (Schmitt, 1928/2008, p. 77, 1928/2017, p. 23):

> The good order of the state (*Staatsordnung*) of the current German Reich depends on him, to the same extent to which the tendencies of the pluralistic system make a normal functioning of the legislative state difficult or even impossible. We should remember this positive content of the Weimar Constitution [*dieses positiven inhaltes der Weimarer Verfassung*], and of its system of constitutional laws, before we install a court of justice as the guardian of the constitution, in order to decide highly political questions and conflicts, and before we burden the judiciary with, and endanger it by, such politicizations. According to the available content of the Weimar Constitution, a guardian of the constitution already exists, namely the president of *Reich* (Kelsen & Schmitt, 2015, p. 171; Schmitt, 1931/2016, p. 158).

In Preuß' design of the Weimar Constitution, Schmitt (1931/2016, pp. 181–182) sees the Reichspräsident as a plebiscitary power with the *mandate* to protect the will of the people. Schmitt's idea of the head of state goes beyond Redslob's conception of the English king as a guarantor of a balance of powers. Schmitt's president as the representative of the people is inspired in part by Weber's idea of democratic plebiscitary leadership. In the final section of *Der Hüter der Verfassung*, however, Schmitt radicalizes Weber's proposal (1919/1994a) by saying that in the Weimar Constitution the head of state exercises leadership that is directly tied to the will of the people. This idea leads Schmitt to contrast *legitimate political leadership* (the *neutral power* of the plebiscitary president) and *legislative power* (the *neutralizing/depoliticized* parliament) (Schmitt, 1932/2004, pp. 67–68). It should be recalled that Schmitt's notion of the democratic legitimacy of the president is related to his very particular conception of democracy. For him, democracy is "a state form that corresponds to

the principle of identity (in particular, the self-identity of the concretely present people as a political unity)" (1928/2008, p. 255). Democracy is tied to the *homogeneity* and self-identification of the people, not to the social contract, because "that is the strongest and most logically consistent expression of democratic thinking" (1928/2008, p. 260). For this reason, Schmitt locates the Reichspräsident as the most important democratic and plebiscitary power in the Weimar Constitution with the *mandate* to protect the will of the people.

In his 1929 article on the guardian of the constitution, Schmitt had presented the Reichspräsident much more clearly as the protector of his concept of the 'positive constitution' (1928/2008, Chapter 3). Explicitly, the German jurist states that the position of the Reichspräsident in the Weimar Constitution can only be understood as a power constituted by the order created by the will of the constituent power. He thus makes it clear that the sole bearer of the constituent power is the German people, not the Reichspräsident:

> In my *Verfassungslehre*, I have opposed such tendencies [of the legislative state of political parties] to the system of a democratic constitutional state with a positive concept of constitution. If one holds to the fact that the Weimar Constitution signifies a political decision of the unified German people as the bearer of the constituent power [*Träger der verfassunggebenden Gewalt*] and that the German Reich is a constitutional democracy by virtue of this decision, then the question of the guardian of the constitution can be answered differently than by fictitious legal formalities. The position of the guardian of the constitution is now, according to the positive concept of the Weimar Constitution (Schmitt, 1929, p. 212).

To protect the constitution understood as the will of the constituent power, Schmitt points out that the Reichspräsident has *passive* and *active* powers. Passive powers are what Schmitt calls "static and permanent," such as "the election for seven years, difficulty of recall, independence from changing parliamentary majorities" (2015, p. 171). The president also has other important passive powers such as "the powers under article 45 and 46 of the constitution of the Reich, the dissolution of the Reichstag under article 25 and the initiation of a popular referendum under article 73 of the constitution of the Reich, the preparation and promulgation of statutes under article 70" (2015, p. 171). Here, Schmitt takes up Mirabeau's terminology about the king as protector of the republic, who appeals to the people to dissolve the parliament: "The president of the Reich is elected by the whole German people, and his political competences as against the legislative institutions (in particular the dissolution of the Reichstag and the initiation of a popular referendum) are, in substance, nothing but an '*appel au peuple*'" (2015, p. 172). However, most importantly, the Reichspräsident has an *active power* that works with Art. 48 on emergency powers to protect the 'positive constitution'.

Despite the commissary character of the Reichspräsident, Schmitt opens the controversy when he later emphasizes the legislative powers of this commissary dictatorship. In *Legalität und Legitimität* (1932/2004), Schmitt radicalizes his counter-revolutionary idea of guardianship and acknowledges the president executive and legislative powers: "The practice of the President and the Reich government, though contrary to the wording of the Weimar Constitution, brought about an additional, third extraordinary lawmaker in German state life in the last decade: specifically, the President's decree powers under Article 48" (Schmitt, 1932/2004, p. 67). Unfortunately, these passages have caused confusion in the literature on Schmitt's idea of the Reichspräsident for decades. The problem stems from a confusion of terms that appear in the texts but have not been properly analyzed. Since Schmitt says in *Legalität und Legitimität* that the president is now a dictator with "legislative powers," he becomes associated with the idea of the *dictatorial legislator* that Schmitt introduces in *Die Diktatur* (1921/2014, pp. 111–112). By associating him with the dictatorial legislator, the president is defined as a *sovereign dictator*. This train of thought is behind the international literature that has confused Schmitt's concepts of *sovereign dictatorship* and the Reichspräsident. By defining him as a kind of sovereign dictator, the Reichspräsident is seen as the new bearer or embodiment of constituent power (Cristi, 1998a, p. 70; Kelly, 2003, p. 182; Rubinelli, 2020a, pp. 133, 135), similar to Theodor Mommsen's idea of a 'constituent dictator' in Roman law history (Nippel, 2011; Pasquino, 2021).

The possibility that Schmitt's Reichspräsident could be a new sovereign dictator continues to cause debate in the literature today. Rubinelli (2020a, pp. 109–118) has consolidated the reading that Schmitt's Reichspräsident is the new embodiment of the will of the constituent power. In a recent article, Croce and Salvatore (2023b) pointed out that this is a "controversial point." The authors note that Schmitt recognized in his 1924 lecture in Jena that there is no place for a sovereign dictatorship in a constitutional system. Schmitt's Reichspräsident is subordinate to the existing constitution. This, however, "does not rule out the possibility of renewed exercises of sovereign dictatorship" because "its exercise always remains a latent possibility as long as political community persists" (2023b, p. 12). Thus, the authors conclude that the sovereign dictatorship is incompatible with the existence of the constitutional order because its exercise creates a new constitutional order. This reading explains the core of the problem very well. Schmitt's idea of the Reichspräsident cannot be either a *sovereign dictator* or a new embodiment of the constituent power because the head of state has no *mandate* from the people to create a new constitutional order. In the previous chapter, I explained that the characteristic element of Schmitt's theory of constituent power is

that the mandate must be *explicitly* expressed. None of this is present in Schmitt's Reichspräsident. The revision of Schmitt's archival material could help clarify this debate.

If Schmitt thought or imagined that the Reichspräsident could be a *sovereign* or potentially a *sovereign dictator*, this should be written down somewhere. However, in none of his writings or personal notes about the Reichspräsident does Schmitt speak of him as the new bearer or embodiment of constituent power. I have examined Schmitt's manuscripts and drafts on Article 48 and on the Reichspräsident from his *Nachlass* and have found no indication that he regards the president as a sovereign dictator (Schmitt, n.d.-a, 1930b, 1931a, 1931b). In *Legalität und Legimität*, the executive and legislative powers of the Reichspräsident could lead us to think of the president as a dictator with 'sovereign powers' like Cromwell. But Schmitt's personal notes consistently portray the Reichspräsident as a protector of the will of the people expressed in the Weimar Constitution. Moreover, there is no explicit *acclamation* (a revolution or constitutional plebiscite) that makes the president the commissioner of the constituent power. Unfortunately, since the Reichspräsident can suspend basic rights in a state of emergency, he is wrongly associated with Schmitt's decisionist idea of sovereignty in *Politische Theologie*. As soon as the Reichspräsident is associated with the Schmitt's idea of the *sovereign*, he is also confused with the embodiment of constituent power (Cristi, 1998a, p. 70; Kelly, 2003, p. 182; Rubinelli, 2020a, pp. 133, 135). This misinterpretation also claims that the Reichspräsident, as the new bearer of constituent power in the Weimar Republic, represented a monarchical principle (Cristi, 1997, p. 191).

The idea of the Reichspräsident as a *non sovereign* dictator leads us to the relationship Schmitt establishes between the concepts of monarchy and constituent power. Certainly this is one of the least explored topics in the literature on Schmitt's and Sieyès's concepts of constituent power. Cristi (1998b, p. 183) is one of the few who have briefly addressed this topic, claiming that Schmitt conceived of constituent power in the Weimar Republic from the monarchical principle. His reading is flawed, however, because it affirms that Schmitt's Reichspräsident is a new *sovereign* similar to the Bourbon monarch (Cristi, 1998b, p. 183). In truth, this confusion is also due to Schmitt's assertion that a monarch can also be the bearer of constituent power. This idea is found in the eighth chapter of *Verfassungslehre* (1928/2008, p. 129). He asserts that in the Bourbon Restoration, the bearer (*Träger*) of the constituent power passes from the people to the king. Schmitt, however, does not make clear that during the Monarchical Restoration a different conception of the term coined by Sieyès emerged: the constituent power as a synonym for the *sovereign* or, more precisely, the bearer of all state

power. In other words, for Schmitt the Bourbon monarch is the new bearer of constituent power in the sense that he is *sovereign* and holds the entire state power in his hands:

> During the monarchical restoration, 1815–1830, the king becomes the bearer of the constituent power. By virtue of the "monarchical principle," the plenitude of state power remains with the king, even if he binds himself to the consultation of the estates in regard to the exercise of certain rights in limited scope. The theory of a constituent power of the king had been presented occasionally and without success in the National Constituent Assembly of 1789 (Redslob, p. 69). During the restoration, however, it became theoretically necessary to oppose a constituent power of the king to that of the people, which was established as a clear thesis of the French Revolution (Schmitt, 1928/2008, p. 129).

For Schmitt, the Bourbon monarch is the bearer of constituent power because he can create a constitution as a *sovereign* who holds the entire state power in his hands. Colón-Ríos is one of the few who recognized this monarchical conception of the constituent power when he quoted Napoleon I saying on May 15, 1804, "I am the constituent power" (2020, p. 75). The 19th century French politician Guizot also uses this monarchical conception when he says, "I have seen, in my life time, three constituent powers: in the Year VIII, Napoleon; in 1814, Louis XVIII; in 1830, the Chamber of Deputies" (Colón-Ríos, 2020, p. 174). Donoso Cortés held the same monarchical conception of constituent power, for in times of disorder and turmoil, the "true sovereign was for him the constituent power, which would act through the sole hands of 'a strong and intelligent man' charged with the task of bringing society back to order" (Colón-Ríos, 2020, p. 5). For this reason, the French scholarship has found in the Monarchical Restoration the origin of the distinction between the concepts of 'popular sovereignty' and 'national sovereignty' (Bacot, 1985, pp. 119–145). But as I will explain in the next chapter, it will be none other as the fascist jurist Roger Bonnard (1942, pp. 14–16) in Vichy France who systematically distinguishes between Sieyès's original idea of constituent power and the new monarchical conception of constituent power that emerged in the Bourbon Restoration. The most important thing now is that Schmitt recognizes the monarch as a potential bearer of the constituent power. This is related to his view of the relationship between the constitutional monarchy and the constituent power in the French Revolution.

I come here to my core idea, which connects my reading of Sieyès's idea of the king in the French Revolution and Schmitt's Reichspräsident in the Weimar Republic. There has already been extensive literature for decades highlighting the differences between Sieyès's and Schmitt's concepts of constituent power (Breuer, 1984; Colón-Ríos, 2020; Fasel, 2022; Rubinelli, 2020a; Thiele, 2003). However, there is still a lack of discussion on the similarities

of their ideas about the relationship between the head of state and the constituent power. I will discuss how they see the head of state as the protector of the will of the people.

The relevance of the relationship between monarchy and constituent power lies in the fact that Schmitt sees the concept of the Reichspräsident as inspired by the design of the executive branch that emerged from the constitutional monarchies in France (1830) and Belgium (1831). Chapter twenty-two of *Verfassungslehre* analyzes the monarchical form of government. Schmitt (1928/2008, pp. 308–309) describes absolute monarchy as sovereign and based on traditional religious legitimacy. The Bourbon Restoration (1815-1830) is depicted by Schmitt (1928/2008, p. 129) with a king as *sovereign* and as the bearer of constituent power. In contrast, the *Monarchie de Juillet* (1830-1848), which more closely resembles Sieyès's king in the French Revolution, is not a bearer of constituent power. This constitutional monarch is an executive body subordinate to the constitution. I have explained how Schmitt describes the powers of the Reichspräsident in the Weimar Constitution, which emerged from this last tradition of the French constitutional monarchy: "How much the office of the President is analogous to that of a monarchical chief of the executive is revealed in the institution of equivalent authorities and in the assumption of a comprehensive position" (Schmitt, 1928/2008, p. 317). For Schmitt, the French constitutional monarch of 1830-1848 is thus not the bearer of constituent power, but a representative of the people in the executive:

> The democratic principle (of the self identity of the people present at the time) was balanced with the principle of representation, and yet the danger that the principle of representation would establish itself absolutely eliminated the possibility that two representatives, monarch and popular assembly, would stand opposite one another and be reconciled to one another (Schmitt, 1928/2008, p. 315).

This passage leads us to the similarities between Sieyès's and Schmitt's conceptions of the head of state as the protector of the will of the constituent power. For them, the head of state (king or president) is charged with protecting the constitution, which is understood as the will of the people. I have found five main points that Sieyès and Schmitt have in common regarding this protection of the constitutional order. First, they both assume that the people are the sole bearers of the constituent power and have two representatives of their will in the constitution: the head of state and the parliament. Second, they grant the head of state powers to protect the constitutional order, which are directly tied to the concept of constituent power. Third, both assume that the head of state is a brake on the corruption of the republic and is above party interests. Fourth, both Sieyès and Schmitt assume that the head of state expresses the unity of the people, so that the protection of the will of the people is best provided by the

person who embodies the unity of the people. Finally, Sieyès and Schmitt refer to the head of state as the "guardian" and understand this to mean the protector of the political order created by the people. Before explaining all these similarities, I will explain the evidence available in Schmitt's personal archive on the subject of the king in the French Revolution.

Schmitt's *Nachlass* has a folder of his notes and study materials on the French Revolution (Schmitt, n.d.-c). This folder contains several sheets on the concepts of *nation*, *representation*, and *king* in the constitutional debates of 1789-1791. Unfortunately, I have not been able to verify whether these materials were written by Schmitt himself, as the draft notes do not match his handwriting. According to Mehring (personal communication, March 21, 2023), these manuscripts may have been written by Bernhard Braubach, who was Schmitt's doctoral student in the 1920s and also worked on topics related to the French Revolution (Mehring, 2012, pp. 162–163). But I have found that this material also includes Schmitt's personal notes on Loewenstein's work on the National Constituent Assembly of 1789 (Loewenstein, 1919/1922; Schmitt, n.d.-c). Here I have found complete transcripts of Mounier's and Mirabeau's speeches on the royal veto. However, the transcript of important sections of Sieyès's speech on the royal veto (1789/1989a) stands out, showing that Schmitt was well acquainted with the debates on the relationship between monarchy and constituent power in the French Revolution. At the end of these notes is an essay of nearly ten pages that analyzes the question of the monarch and his relationship to the constituent power. Although I cannot prove that these notes were written by Schmitt himself, this material is evidence that he was familiar with Sieyès's idea of the king in the French Revolution.

Schmitt's study materials on the French Revolution brings us to the first point of similarity between Sieyès's and Schmitt's ideas about the head of state. Both authors agree that the sole bearer of the constituent power is the people, but the head of state is one of the representatives of their will. As we saw in the first chapter, the fact that Sieyès (2003, p. 137) was a supporter of monarchy is no surprise to anyone, since he explicitly expressed this position in his debate with Thomas Paine on the Constitution of 1791. In his speech on the royal veto, Sieyès (1789/1989a) recognized the monarch as *Chef de la nation* and *premier citoyen*. For the ex-*abbé*, then, the people had two representatives of their will: the king and the legislature. Although the head of state was not determined by elections, Sieyès believed that the legitimacy of the king rested on the will of the people. Following Redslob's work (1912), Schmitt also affirms that the people have two representatives of their will when he describes the relationship between monarchy and constituent power in the National Constituent Assembly of 1789. For him it is clear that Sieyès identifies the *nation* and not the

king as the bearer of constituent power. However, he points out that Sieyès's idea of the constitutional order, created by the constituent power, is clearly a constitutional monarchy:

> Sieyès bound the antidemocratic theory of the representation of the people's will through the National Constituent Assembly with the democratic theory of the constituent power of the people, which directed itself against the existing absolute monarchy. (...) Nonetheless, democracy was not at issue in 1789. It was, rather, a constitution of a liberal, bourgeois Rechtsstaat. The constitution of 1791 was typical of a constitutional monarchy. The "nation" had two representatives, king and legislative body (popular assembly). The issue of who represented the nation by the proclamation of the constitution, the National Assembly or the king, was a clear question of power and already showed the distinctive, characteristic intermediary position of the liberal bourgeoisie. (...) Of course, the king could also be representative of the nation, but his representative capacity in regard to the exercise of the constituent power of the people was called into question. The attempts to provide the king influence on the formation of the constitution as representative or interpreter of the people's will in the constituent assembly were unsuccessful (Schmitt, 1928/2008, pp. 128–29).

This passage is consistent with Schmitt's personal notes on the French Revolution. Although these manuscripts may not have been written by him, one passage shows that Schmitt was familiar with Sieyès's idea of the king as the representative of the people: "Sieyès identifies the king with the nation, but it should be noted that he equates the terms nation and people. For Sieyès, the king represents the majesty of the nation" (Schmitt, n.d.-c). This quotation is important for Schmitt's conception of the position of the Reichspräsident in the Weimar Constitution. Sieyès and Schmitt recognize the head of state as a representative who emanates from the constituent power, thus they define him as an authority who must protect the constitutional order created by the people. Whether by convening a constituent assembly or by using emergency powers, the head of state (king or president) is charged with protecting the will of the people. This leads us to the second point of similarity.

For Sieyès and Schmitt, protecting the will of the people is a *mandate* to the head of state. In his speech on the royal veto, Sieyès (1789/1989a) assumed that the National Constituent Assembly of 1789 established that the unelected king had a *mandate* to protect the will of the people by convening the constituent power and calling a constituent assembly when he saw that there was an extreme conflict between the powers of the state. The conflict poses a threat to the political order created by the constituent power. Sieyès rejected Mounier's idea of the king's absolute veto and Mirabeau's idea of the king's call to dissolve parliament and call new parliamentary elections. Only the people could decide their own fate, and the king was a legitimate protector of the people, who can reconvene the *pouvoir constituant*. For this reason, in the manuscripts of Sieyès (1999b, p. 421) about the king, it is

clear that he wanted a strong executive as a guarantee of freedom against the corruption of the ministers and the army chief. Similarly, Schmitt's Reichspräsident has the *mandate* to protect the will of the constituent power in the Weimar Republic in the event of a threat to the political order. For Schmitt (1931/2016), the people, through their representatives in the Weimar Constituent Assembly, gave the Reichspräsident the power to protect the 'positive constitution' through the emergency powers of Article 48 of the Weimar Constitution. Interestingly, Schmitt's conclusions in *Legalität und Legitimität* refer to Sieyès's monarchical ideas to define the head of state as a plebiscitary protector of the people:

> Seen in terms of constitutional theory, however, the strongest impulse behind the previously noted tendencies toward *auctoritas* lies in the situation itself and stems directly from the fact that plebiscitary legitimacy is at present the single last remaining accepted system of justification. (...) Here, again, the formula of the great constitutional designer, Sieyès, holds true: authority from above, confidence from below. Plebiscitary legitimacy requires a government or some other authoritarian organ in which one can have confidence that it will pose the correct question in the proper way and not misuse the great power that lies in the posing of the question (Schmitt, 1932/2004, p. 90).

This paragraph about the head of state as representative and protector of the will of the people brings us to the third point of commonality between Sieyès and Schmitt. For both, the head of state is a brake against the corruption of the republic and a power that stands above partisan interests. When Sieyès speaks of the corruption of the republic in his manuscripts, he means how the private interests of representatives can corrupt the will of the people as expressed in its constitution. For Sieyès, "men are subject to the passion for prevailing as well as to steal" (1999b, p. 421), so it is necessary to rein in these private interests. Sieyès says that the king curbs "the ambition of the boldest demagogues" (1999c, p. 435). From this, Sieyès concludes, "we want a prince to save us from the danger/misfortune of having a master" (1999b, p. 421). Schmitt makes the same diagnosis regarding the private interests that guide political parties in the "legislative state." In his essay on parliamentarism (1923/2017), he had already criticized party interests and the corruption of the principles of modern parliamentarism, drawing a contrast between the concepts of liberalism and democracy. In *Der Hüter der Verfassung*, Schmitt (2015, p. 151) conceptualizes the head of state as a *neutral power*, i.e., the authority that stands above party politics and acts both to mediate and to preserve the 'positive constitution'. This conception is related to Sieyès's and Schmitt's notion that the head of state represents the unity of the people.

The fourth commonality between Sieyès and Schmitt is that they see the head of state as representing the unity of the nation. In his manuscripts, Sieyès defines the king as "the representative of social unity [*l'unité social*]" (1999c, p. 435). He also wonders, "What did the Constitution do? It has charged the prince with representing the majesty of the nation" (1999b, p. 421). Since the king is "a representative of the people/nation," Sieyès thinks that "the king is united with the people in interest" (1999b, p. 419). The same idea is in his speech on the royal veto: "The prince, the head of the nation, can only be one with the nation… the king can never be separated, even in idea, from the nation whose entire majesty he represents" (Sieyès, 1789/1989a, p. 4). Despite this historical evidence the connection between Schmitt's idea of the Reichspräsident and Sieyès's idea of representing the unity of the nation has been criticized. For Rubinelli, "Schmitt reproduced Sieyès's criticism of legislative fragmentation in parliament to justify the extension of the powers attributed to the Reich president" (2020a, p. 138). Because Schmitt associates the unity of the nation with the head of state (a plebiscitary dictator), Rubinelli says that he transforms the office of the president into what Sieyès feared: "an all-powerful figure who could claim the exclusive capacity to represent the nation" (2020a, p. 138). Rubinelli's reading, however, overlooks that Sieyès saw the king as representing the unity of the nation. Thus, Sieyès, like Schmitt, viewed the head of state as the "guardian" of the constitutional order created by the will of the people.

Finally, the most important common point between Sieyès and Schmitt is that they define the head of state as the "guardian" of the will of the people. This point has been completely neglected in the literature. I have already argued that Schmitt's concept of guardianship does not refer to the protection of constitutional laws, but to the protection of the 'positive constitution', understood as the will of the people. In his manuscripts, Sieyès defines the king as the "guardian of primacy and equality" (*le gardien de la primatie et de l'égalité*) (1999b, p. 421, 1999c, p. 435). By primacy, Sieyès refers to the material content of the constitutional order. That is, he refers to the will of the people as the basis of the constitution. Since Sieyès's king is the guardian of this material content, the authority of the head of state as guardian is emphasized, and then it is said that this representation of the primacy of the representative government (*primatie représentée*) has been entrusted to him by the delegation of the people. Sieyès concludes that the king stands as the guardian of the will of the people as "our true chief" (1999c, p. 439). This view of guardianship by Sieyès is consistent with his speech on the royal veto: "When the nation expresses its will (*vœu*), the king expresses it with the nation. In every respect he is the Head, in every respect he presides, but all these acts presuppose that he is present in your midst" (1789/1989a, p. 4).

Nevertheless, one important point of difference in Sieyès's and Schmitt's conception of the head of state that seems contradictory at first glance is democratic legitimacy. For Schmitt, the democratic authority of the Reichspräsident places him as a plebiscitary leader in the Weimar constitution. In *Der Hüter der Verfassung*, Schmitt (2015, pp. 168–173) points out that this plebiscitary leadership contrasts with the "legislative state." In *Legalität und Legitimität*, Schmitt states the plebiscitary legitimacy as the basis of presidential dictatorship:

> In view of the President's practice of emergency decree, the German state appears in its present, concrete constitutional reality as a combination of administrative and jurisdiction states, which finds its type of final justification in the foundation and in the context of plebiscitary-democratic legitimacy. The meaning of the plebiscitary expression of will is, however, not norm establishment, but decision through one will, as the word ''referendum,'' or popular decision, aptly expresses (Schmitt, 1932/2004, p. 89).

From this context, it is important to read Schmitt's personal notes on the king in the French Revolution (Schmitt, n.d.-c). Here it is pointed out that the king was understood as the embodiment of the nation. And that for Sieyès this meant that the king had a representative authority that expressed the will of the people. Then it is pointed out that for Mounier and Mirabeau the king was also an 'eternal' representative of the nation. But then the famous thought of Pierre-Louis Roederer is mentioned that one cannot be called 'representative' of the nation without having been elected by the people. This thought, which appears in Schmitt's personal notes, brings us back to Sieyès's idea of the king. Since Sieyès's speech on the royal veto (1789/1989a) refers to a king who was not democratically elected, although he represented the unity of the people, one might think that this authority is not comparable to Schmitt's Reichspräsident. However, Sieyès's manuscripts (1999c, pp. 435–436) show the drafts of his constitutional proposal for the republican election of the king by lottery, although in a very confusing way. For Sieyès, the head of state had to be a democratically elected authority. To this end, Sieyès rehearsed an election with a procedure that combined the drawing of lots and the ratification of the senate and the provinces. Sieyès never published this constitutional proposal for the republican election of the king. Not even at the time when he was a supporter of Bonapartism. Had this happened, Sieyès would undoubtedly have been the first to anticipate Schmitt's plebiscitary idea of the guardian of the constitution.

The ideas of Sieyès and Schmitt about the head of state as the protector of the constituent will are so congenial that I think that if Redslob was the 'German Mounier' and Weber the 'German Mirabeau', we must regard Schmitt as the 'German Sieyès'. Unfortunately, the intellectual similarity of Sieyès's and Schmitt's idea of the head of state

has been overlooked for decades. Thiele (2003) has made the most important attempt to show the use and misuse of Sieyès's ideas in Schmitt's works. However, when Thiele (2003, pp. 457–459) analyzes Sieyès's speech on the royal veto (1789/1989a), he says nothing about the openly monarchist position of Sieyès's speeches and letters (e.g., his debate with Thomas Paine in 1791). Thiele thus overlooks the theoretical connection with Schmitt's Reichspräsident and concludes by claiming that Schmitt's reception of Sieyès only serves to legitimize his theory of dictatorship (2003, pp. 510–512). In the international literature, Rubinelli has reinforced this reading by saying that notwithstanding the similarities between them, "neither the intellectual premises nor the institutional consequences of Schmitt's reasoning are consistent with Sieyès's thought and intentions" (2020a, p. 138). The assumption here is that Schmitt simply instrumentalized Sieyès's ideas for his authoritarian goals in the Weimar Republic. The problem with these interpretations is that they attempt to portray Sieyès's idea of constituent power as an anti-monarchical idea. As I explained, this approach is mistaken from a historical and political-theoretical point of view.

The idea that the head of state has the mandate to protect the will of the people represents one of the most important variants of the concept of *popular autocracy*. Sieyès's king and Schmitt's Reichspräsident have no mandate to create a new constitutional order, so they are neither *sovereign* nor *sovereign dictator*, nor bearer or embodiment of the constituent power. For Sieyès and Schmitt, the head of state is a protector of the constitutional order, understood as an expression of the will of the constituent power.

Sieyès's king and Schmitt's Reichspräsident are guardians of the constitutional order created by the constituent power, which clearly leads to an autocratic conception of representation. The literature has found this connection indirectly by comparing Hobbes' and Sieyès's theories of representation. However, it is Schmitt who most clearly espouses the idea of a *popular autocracy*, advocating the dictatorship of the president and his emergency powers as an expression of a plebiscitary representation of the people. Schmitt's idea would not be possible without Sieyès's idea of the king in the French Revolution. In his speech on the royal veto (1789/1989), Sieyès recognized the difficulties of parliament in representing the unity of the constituent will. For Sieyès, Fasel argues, parliamentary representation as an *imperative mandate* "forced representatives to defend the particularistic interests of specific constituencies, rather than the common interest of the nation" (2022, p. 1118). This is basically Schmitt's critique of the "pluralistic" tendencies of parliamentarism and its inability to express the unity of the people. Sieyès's and Schmitt's concept of the head of state has an

advantage over parliament when it comes to representing the unity of the people, because both present the ‘guardian’ as a single person (king or president).

Despite his fascination with the relationship between the concepts of the Reichspräsident and Sieyès’s idea of constituent power, Schmitt abandons Sieyès’s ideas after joining the National Socialist Party, although he retains his idea of guardianship. After 1933, Schmitt continued to think of the guardian of the *völkische* constitution. I will explain the continuities and breaks in Schmitt’s conception of guardianship under National Socialism.

c. The Idea of Guardianship in National Socialism

The study of the continuities and ruptures that Schmitt's ideas had between the Weimar Republic and the National Socialist state has a long tradition in the literature (Gross, 2000, pp. 31–59; Hofmann, 2010, pp. 168–188; Maus, 1997). Mehring's work (2021) represents the greatest attempt in our day to show the intellectual continuity of Schmitt's counterrevolutionary ideas between the beginning and the end of the Weimar Republic. Similarly, Vinx and Zeitlin (2021) have shown that there is a continuity in Schmitt's *decisionism* between his early legal writings and his works in the Weimar Republic. In contrast to this continuity approach, the studies of Croce, Salvatore, and Goldoni (2021b, 2023a, 2023b) represent the most important attempt to demonstrate that Schmitt (1933, 1934b) moved away from *decisionism* from the 1930s onward and adopted an institutionalist view of law as a "concrete order" (*konkretes Ordnungsdenken*) inspired by his readings of Romano (1918/2018) and Hauriou (1925/1990). However, the continuity of his idea of the guardian of the constitution will have not yet been examined. Schmitt's propagandistic writings on Hitler and National Socialism do not have the solidity that his writings in Weimar had. Even though they are propagandistic works, his National Socialist writings have, in my opinion, important historical value, not only for understanding Schmitt's moral perversion, but also for the reception of his fascist ideas in Francoist Spain and Vichy France. In the following, I show that Schmitt retained the idea of the guardian of the constitution after 1933, but switched from the Reichspräsident to the National Socialist Party (NSDAP). First, I summarize the arguments about the alleged break in Schmitt's ideas after 1933.

First, it must be made clear that Schmitt stopped thinking about protecting the Weimar Constitution in 1933 and simply adopted the National Socialist definition of the *völkische Verfassung*. Schmitt was no longer just a university professor and intellectual of the counterrevolution, but also a propagandist and ideologue of the fascist state led by Adolf Hitler. In this context, Schmitt embraced the National Socialist theory of the constitution. One of the jurists who best theorized the National Socialist conception of the constitution was Ernst-Rudolf Huber (1935; 1937), who was also a disciple of Schmitt (Mehring, 2015). For Huber (1935), the Enabling Act of 1933 definitively destroyed the Weimar Constitution, so that it no longer makes sense to speak of its validity. When Huber speaks of the constitution, he means the political order that expresses the unity of the German people. Huber (1935, p. 17) points out that the Weimar Constitution was an expression of the ideology of the bourgeoisie and liberalism in Germany. His National Socialist conception of the constitution

is not prescriptive, but descriptive of the political situation in 1933. Huber points out that the National Socialist constitution has three principles: the unity of the German nation, the "totality" of the state, and the National Socialist movement. Interestingly, Huber refers to the National Socialist movement as the "guardian" of the "German idea of the state" and the "bearer of statehood" (*Hüter des Staatsgedankens und Träger der Staatlichkeit*) (1935, p. 22). Huber (1935, p. 24) concludes that the National Socialist constitution is an expression of the state order led by Hitler, which is why he refers to it as "the Führer's political order."

This *völkische Verfassung* was Schmitt's concept of the constitution after 1933. Thus, he made important changes to his theory of the Weimar Constitution. These changes were obviously due to his new role as one of the ideologists of the National Socialist state. In May 1933 Schmitt joined the NSDAP, in July he was appointed to the Prussian State Council, and in October of the same year he received the prestigious chair of public law at the University of Berlin. His most important attempt at a theory of the National Socialist state is found in his book *Staat, Bewegung, Volk* (1933, 1933/2001). Schmitt abandoned Sieyès's idea of constituent power and developed a different concept of the relationship between the people and the head of state. His book is divided into four chapters: the constitutional situation of 1933, the triadic structure of political unity, the liberal state and public service, and leadership (*Führertum*) and racial identity (*Artgleichheit*) as the foundations of National Socialist law. On the very first page, Schmitt points out that the Weimar Constitution lost its validity after Hitler's seizure of power and the Enabling Act of March 24, 1933 (*Ermächtigungsgesetz*) (1933/2001, p. 3). Schmitt contends that the Weimar Constitution's [negative] neutrality, which led to its suicide, was because it could not recognise enemies of the state (*Staatsfeind*) such as the Communist Party (1933/2001, pp. 3–4). His political justification of the National Socialist state moves away from Sieyès's idea of constituent power because "the new world of the National Socialist law cannot be understood in any other way, and even less, find justification or a basis in the concepts or the forms of the Weimar system" (1933/2001, p. 4).

One of the major changes Schmitt makes in his theory of the National Socialist state is the absence of the terms 'sovereignty' and 'dictatorship'. Paradoxically, all his perverse theoretical efforts are aimed at showing that Adolf Hitler is neither *sovereign*, nor the bearer of constituent power, nor a *commissarial* or *sovereign dictator*. Let us explain this change.

Schmitt's theory of the triad of political unity is based on the notion of Hitler as the leader (*Führer*) of the new German state. The political triad defines the state as the politically static side, the National Socialist movement as the dynamic political element, and the people as the apolitical side "growing under the protection and in the shade of the political decisions"

(1933/2001, p. 12). Schmitt points out that the problem of the "lack of leadership" of the Reichspräsident (the head of state) in Weimar was overcome with the figure of Hitler as Reich Chancellor (the head of government). In his National Socialist writings, Schmitt criticizes the Reichspräsident in Weimar for being a head of state that "governs but does not rule" (1933/2001, p. 9), that is, for maintaining the liberal/parliamentary dualism between *régner* and *gouverner*, between *auctoritas* and *potestas*. In contrast, Hitler as Reich Chancellor had a position "not comparable with to the position of any of the preceding chancellors, either in relation to the Reichspräsident," for he is "something more than and different from a 'simple determination of directives,' according to article 56 of the Weimar Constitution" (1933/2001, p. 9). In the fourth chapter of *Staat, Bewegung, Volk,* Schmitt summarizes his idea of the Führer by stating that to lead "is not to command, to *dictate*, to govern bureaucratically from the centre," nor is it comparable to the Roman Catholic conception of the shepherd leading his flock (1933/2001, pp. 46–47). Moreover, Schmitt (1933/2001, p. 47) expands his notion of *democratic homogeneity*, as an *identity* between rulers and ruled. Here there is an important adaptation when he defines the new National Socialist leadership as the *racial identity* between the Führer and the people.

The hypothetical departure from the decisionist approach that Schmitt developed in Weimar would consist in turning to a "concrete-order thinking" (*konkretes Ordnungsdenken*) (Schmitt, 1934b, 1934/2004). This approach would be based on Schmitt's distancing from *decisionism* in his introduction to the second edition of *Politische Theologie* of 1933 (1922/2015, pp. 7–9). The theory found great resonance in German law in the 1930s, especially among Schmitt's disciples such as Ernst-Rudolf Huber and other National Socialist jurists of the so-called Kiel School (*Kieler Schule*) (Neumann, 2015, pp. 372–374). In *Über die drei Arten rechtswissenschaftlichen Denkens* (1934b), Schmitt attempts to situate his new theory of law neither on persons nor on their decisions, as is the case with the decisionist thought he advocates in *Politische Theologie* (1922/2005). In contrast to decisionism, Schmitt now defends concrete-order as the understanding of law centered on institutions, social groups, and associations. The studies of Croce and Salvatore (2021b, 2023a, 2023b) have shown how this orientation towards the theory of concrete order is inspired by the institutional theory of the famous jurists Santi Romano (1918/2018) and Maurice Hauriou (1925/1990), and later undergoes an important development in the works of Costantino Mortati in Italy. So far I have summarized the arguments that note a break in Schmitt's decisionism after 1933.

The most innovative reading, however, showing the continuity of Schmitt's decisionism between his early legal writings and his theory of concrete order, has been

developed by Vinx and Zeitlin (2021). The novelty of this juridical reading lies in the proposed continuity of Schmitt's reading of Sieyès's idea of constituent power as a conservative theory of the protection and restoration of the political order. Thanks to the translation of *Gesetz und Urteil* (1912) and *Der Wert des Staates* (1914), Vinx and Zeitlin have recognized that the idea Schmitt defends throughout his career is the "acts of sovereignty that restore a condition of normality and thus secure the legitimate applicability of statutory norms" (2021, p. 29). Thus, the authors affirm that Schmitt's main argument is that "a successful exercise of constituent power homogenizes society, and thus creates the conditions for the determinate (and therefore legitimate) applicability of positive law" (2021, p. 27). This pattern of argumentation is maintained in Schmitt's works even after the fall of the Weimar Republic: "The claim that the positive constitution is subject to constituent power opened the door, rather, for a justification of the *Machtergreifung* that was entirely consistent with the constitutional theory Schmitt had developed in Weimar" (2021, p. 31). Vinx and Zeitlin point out that although Schmitt denies that the National Socialist revolution was an exercise of the constituent power, he "argues that constituent power, so understood, nevertheless serves the task of the realization of law, since it produces the social conditions under which positive laws become applicable in the first place" (2021, p. 32).

The juridical reading of Vinx and Zeitlin (2021) aims to show that it is a mistake to assume that Schmitt moved away from his decisionism and his idea of constituent power after 1933: "The introduction of the term 'concrete order' was evidently little more than an attempt to rembrandt the condition of social normality or homogeneity that Schmitt had always taken to be a precondition of the legitimate applicability of positive law" (2021, p. 32). Between 1933 and 1936, Schmitt saw in Hitler the sovereign power that had "re-established a condition of normality capable of undergirding stable legitimate legality" (2021, p. 32). The authors say that Schmitt's "concrete order" was used in adjudicative practice in Nazi Germany, so "Schmitt's idea of the realization of law does entail that those who are (or are defined as) enemies of a society's 'concrete order', as affirmed by constituent power, must not be permitted to hold legal office or to participate in legal practice" (2021, p. 33). This distinction of the enemies of the state would maintain the homogeneity that is "the indispensable prerequisite of legal determinacy and thus of the legitimate applicability of positive norms" (2021, p. 33). Vinx and Zeitlin conclude that "once Schmitt had chosen to accept the legitimacy of the *Machtergreifung* and to describe it as an exercise of constituent power, his call for an expulsion of Jewish influence from German law was all but compelled by his account of the conditions of the possibility of legitimate legal order" (2021, p. 33).

In the following, I would like to contribute to the debate initiated by Croce and Salvatore as well as Vinx and Zeitlin by analyzing the continuity of Schmitt's idea of the guardian of the constitution in his National Socialist writings. My study does not aim to resolve the debate about the continuity and ruptures of Schmitt's ideas in 1933. My aim is to show that Schmitt's idea of guardianship still exists when he says in *Staat, Bewegung, Volk* that he continues to use the concept of the state in the traditional sense of "the whole political unity of a people" (1933/2001, p. 12). This is precisely the concept associated with his *existential* idea of the 'positive constitution', i.e., the political order created by the will of the constituent power (Schmitt, 1928/2008, Chapter 3). That is why in his role as ideologue of the National Socialist state one can recognize important continuities with his conception of the Reichspräsident as guardian of the constitution. Schmitt presents the National Socialist state as the overcoming of the liberal doctrine of the division of state powers. His idea of the Reichspräsident had already announced the project of strengthening the powers of the executive by its democratic origin, by its position as a *neutral power* above the political parties, and by its emergency powers based on Article 48. Thanks to the publication of most of his National Socialist articles (Schmitt, 2021a), we now have a more accurate picture of the continuity of his idea of guardianship from 1933 onwards.

After March 1933, the first important mention of Schmitt's idea of guardianship is in his writing about the "Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich" (April 7, 1933). After the failure of the Von Schleicher Cabinet between December 3, 1932, and January 28, 1933, Hitler was appointed Reich Chancellor by Paul von Hindenburg on January 30, 1933 (the so-called *Machtergreifung*). After the Reichstag fire and the Reichstag Fire Decree issued by von Hindenburg (February 28, 1933), which suspended individual rights, the Enabling Act (*Ermächtigungsgesetz*) was passed in the Reichstag on March 23, 1933. The Act gave Hitler absolute powers to enact and enforce laws without control by parliament or the Reichspräsident, and even to enact laws not contained in the Constitution, thus destroying the balance of powers and destroying the Weimar Republic. The Enabling Act was based on the emergency powers of Article 48 of the Constitution. In view of these political changes, Schmitt readjusted his conception of guardianship. Now he says that the National Socialist state will be led by Reich Chancellor Hitler and Reichspräsident von Hindenburg. Nevertheless, he removes the idea of the Reichspräsident as the guardian of the constitution and defines him simply as the "guardian of tradition:"

> In the present reorganization the imperial power is carried by the Reichspräsident and the Reich Chancellor; by the Reichspräsident as the guardian of the historical context

> and of an authority based on tradition; by the Reich Chancellor as the leader of the German movement, which succeeded in breaking through to the German Revolution and to the reorganization of the Reich (2021a, p. 13).

This passage shows how Schmitt attempted to strengthen Hitler's leadership vis-à-vis the guardianship of Reichspräsident von Hindenburg in order to leave him as a quasi figurehead of the state after the Enabling Act of March 24, 1933. In his article on the constitutional situation in Germany of October 5, 1933, in which he calls Hitler's seizure of power a 'legal revolution', Schmitt states that the Reich Chancellor is the sole political leader of the people, but that this preserves the rights of the Reichspräsident. However, he then says that "the anomalous situation of the last years of the Weimar system, in which the Reichspräsident was forced to step outside the special nature of his high office and act as a substitute for political leadership, no longer exists" (2021a, p. 71). He continues, "It was only when the Reichspräsident appointed the leader of the National Socialist movement, Adolf Hitler, as Reich Chancellor on January 30, 1933, that the German Reich once again became a political entity and the German state found the strength to destroy Marxism, which was hostile to the state" (2021a, p. 75). Schmitt presents Hitler as the new protector of law, understood as the political order of the people. It has gone unnoticed that his propagandist article *Der Führer schützt das Recht* (August 1, 1934) is formulated from this idea of protecting the political order. The text begins with Hitler denouncing "the internal contradictions of the Weimar system," which "destroyed itself in this neutral legality and exposed itself to its own enemies" (2021a, p. 200). However, Schmitt never points to Hitler as the new guardian of the constitution, as he attributes this role to the NSDAP.

As one of the ideologists of the National Socialist state, Schmitt preserves the essence of his idea of the guardian of the constitution (understood as the political order of the state). The clearest place where he introduces his new National Socialist idea of guardianship is in his statement on the Reichsparteitag, the most important propaganda event of the National Socialist Party since 1923. Appreciating the title of the Reichsparteitag of September 1935, Schmitt claims that Hitler was the people itself and his laws "sind seit Jahrhunderten die erste deutsche Verfassung der Freiheit" (2021a, p. 282). In this new context, the new guardian of the constitution, which now distinguishes between friend and enemy, i.e., protects the political order led by Hitler, has passed from the Reichspräsident to the NSDAP:

> Another constitutional decision was made at the Reichsparteitag der Freiheit. In the event that the present settlement of the situation of the Jews did not lead to the desired result, the Führer mentioned the possibility of a reconsideration and held out the

> prospect that the solution of this question would then be transferred to the party by law. This is a serious warning. Thus the National Socialist German Workers' Party is declared to be the guardian of the völkisch sanctuary, the guardian of the constitution. The foundations of our völkisch order are fixed: the German people with its Führer as head of state and supreme judge of the nation; the order of the National Socialist movement as guardian of our constitution; the German Wehrmacht with the leader as supreme commander (Schmitt, 2021a, p. 283).

This idea of guardianship is in turn complemented by his notion of *neutral powe*r and the friend-enemy distinction explained in Weimar. In 1936, Schmitt pointed out that in order to distinguish the specifically *political*, one must look at the political decision produced by the new political leadership of Hitler (*entscheidungsfähige politische Führung*). He takes up here with his criticism of the Weimar Constitution with his distinction between *negative* and *positive* conceptions of neutrality. The *negative conception* refers to the liberal state of changing party coalitions, in which each party has equal rights before the state and the law, regardless of content and origin, i.e., without distinction between friend and enemy. The *positive conception*, on the other hand, refers to the *neutral power* that stands above the plurality of parties (*überpolitische Haltung*) and whose decision represents both the unity and the will of the people. In the Weimar Constitution, Schmitt says, "Das war die Auffassung der Reichswehr selbst, insbesondere auch ihres Oberbefehlshabers, des Reichspräsidenten von Hindenburg" (2021a, p. 406). Schmitt sees an overcoming of this discussion in the National Socialist state: "Im nationalsozialistischen Führerstaat ist der pluralistische Parteienstaat überwunden und die Einheit des politischen Willens hergestellt. Die in der NSDAP organisierte Bewegung ist alleiniger Träger der politischen Führung" (2021a, p. 406).

Schmitt concludes with the same argument that supported his Weimar idea of the Reichspräsident as a *neutral power* protecting the will of the constituent power: "Eine echte 'Entpolitisierung' und einen absolut unpolitischen Zustand hätte nur der erreicht, der grundsätzlich Freund und Feind nicht mehr unterscheiden wollte" (2021a, p. 406). In short, in these writings, one can see not only Schmitt's moral perversion, but also the continuity of his conception of the guardianship of the constitution understood as the political order.

3. Conclusions

The mandate of a sovereign dictator is to create a new constitutional order. Schmitt shows this in his conception of two variants of the concept of popular autocracy: the dictatorship of the constituent assembly in the French Revolution and the Bonapartist dictatorship in the plebiscites of 1851 and 1852. In both cases, the mandate from the people for the exercise of the *pouvoir constituant* was *explicitly* expressed. In contrast, for Schmitt, the Reichspräsident's constitutional mandate is to protect the 'positive content' of the Weimar Constitution, that is, the constitution as the decision/will of the people.

Even if Schmitt's idea of the Reichspräsident is not a sovereign dictatorship, it represents one of the most important variants of the concept of *popular autocracy*. His conception of the Reichspräsident is not that of the bearer but that of the protector of the constituent power. Schmitt's autocratic theory is based on the distinction between the concepts of *sovereignty* and *sovereign dictatorship*. I have explained how this discussion arose in the debate that the Weimar National Assembly opened on the powers of the head of state. Redslob espoused the idea of the head of state inspired by his reading of Montesquieu and the debates on the powers of the king in the French Revolution. His liberal idea was that of a head of state who guarantees the balance of state powers. In contrast, Weber's idea of plebiscitary and charismatic leadership by the Reichspräsident represented the project of strengthening the executive. Weber anticipated Schmitt's idea of the Reichspräsident by viewing him as the representative of the unity and will of the people. However, Schmitt radicalized Weber's idea of executive power and built it on Sieyès's ideas of constituent power. Schmitt was the 'German Sieyès' because his idea of the president is theoretically connected with Sieyès's idea of the king's right to protect the constituent power. Schmitt's idea of the guardian of the constitution is not the protection of constitutional laws, but the protection of the 'positive content' of the constitution, i.e., the decision/will of the constituent power. At this point, I have resolved a decades-long confusion in the literature about Schmitt's Reichspräsident as the new "bearer" or "embodiment" of constituent power.

On the other hand, I have shown that Schmitt retained his idea of the "guardian of the constitution" in his National Socialist writings. Despite the similarities, I have not conceptualized Schmitt's National Socialist theory as a popular autocracy for one important reason. At this stage, Schmitt abandons the terms 'sovereignty' and 'dictatorship' used in his works during the Weimar Republic, so it is difficult to say whether he considered Hitler a 'sovereign' or a 'sovereign dictator'. His description of Hitler as a *Führer* in *Staat, Bewegung,*

Volk suggests that, without explicitly saying so, he defines him as a new kind of 'autocrat' or 'sovereign'. It is a de facto power that destroys the Weimar Constitution and establishes a new kind of legitimacy. Schmitt defines Hitler as a new 'legislator', but he does not define him as a 'sovereign dictator'. His legitimation of Hitler seems to be a 'fascist autocracy', but actually this would require a new study of the concept of political legitimation in National Socialism, since Schmitt's reference to Sieyès's idea of constituent power disappears at this stage. Thus, his notion of the Reichspräsident as the "guardian of the constitution" also disappears, as this passes to the NSDAP. After the Enabling Act of March 23, 1933, Schmitt understood the guardianship of the NSDAP as the protection of the *völkische Verfassung*. It is precisely this transfer of power from the Reichstag to Adolf Hitler that leads me to the discussion of the autocratic idea of constituent power in Vichy France.

Schmitt legitimized the idea of the Enabling Act by comparing it to the idea of delegation of power in Sieyès and the French Third Republic in an article published in 1936 entitled '*Legislative Delegationen*' (2021a, pp. 386–402). Schmitt (2021a, p. 390) says that the works of French eminent jurists such as Duguit, Esmein, and Carré de Malberg provide a useful distinction between the concepts of 'delegation' and 'authorization' (*habilitation*). Schmitt unintentionally anticipates the new autocratic conception of constituent power that will emerge in Europe: the transfer of constituent power from parliament to the head of state (Philippe Pétain) in the French Constitutional Law of 1940. This form of autocratic transfer of power was not theorized by Schmitt, but by the eminent fascist jurist Roger Bonnard and his distinction between the concepts of *original* and *instituted* constituent power. Bonnard's ideas take us to French public law at the beginning of the 20th century, where in the context of the French Third Republic an intellectual movement developed around the idea of constituent power, independent of Schmitt's ideas. This is the universe of constituent power in the conception of French legal positivism and the problem of the delegation of the constituent power from a parliamentary government to an autocratic state in Vichy France.

Third Section: The Intellectual Development

Chapter 5: The Legal Positivist Tradition of Constituent Power in the French Third Republic

> The state is not a legal person; the state is not a sovereign person (...) The search for the best government is chimerical (Léon Duguit, *Le Mandat de droit public et la Théorie juridique de l'organe*, 1902)

> There are theories once supported which must be discarded. In the first place, this is that of Rousseau's social contract, which is now universally abandoned (Maurice Hauriou, *Précis de Droit Constitutionnel*, 1923)

Introduction

In recent years, an international literature has emerged that addresses the question of where the limits of the exercise of constituent power lie and how it should be understood in a truly democratic and constitutional dimension (Colón-Ríos, 2020; Fasel, 2022; Verdugo, 2023). This intellectual movement developed in parallel with the attempt to combine Sieyès's and Schmitt's interpretations of constituent power with Mommsen's conception of constituent power (Kelly, 2016, pp. 224–226; Pasquino, 2021, p. 269; Rubinelli, 2020a, pp. 107–108, 115). This discussion is not new, however, for it reached its peak among the theorists of parliamentary government in the French Third Republic. The aim of this chapter is to show that between the end of the 19th and the beginning of the 20th century, a new positivist conception of constituent power was developed in France, which played a fundamental role at the time and continues to reverberate in discussions of the notion of constituent power today (Le Pillouer, 2003, 2017). This is the theory of constituent power, developed by Léon Duguit, Maurice Hauriou, and Raymond Carré de Malberg in response to the use and abuse of the concept in the history of the French Revolution and Bonapartism in the 19th century. I will first explain the process of neutralization of the concept of constituent power in the 19th century and then explain why this is related to French legal positivism in the Third Republic.

Given its troubled political history, French constitutionalism stands out for its versatility and innovation. In contrast to Schmitt's separation between *sovereignty* and *constituent power*, the French constitutionalists hold that constituent power is only a "constitutional function." Although Sieyès's original idea of constituent power is considered incompatible with parliamentary government, these concepts were considered fully

compatible in the French Third Republic. In more recent literature, this connection is also made when the English political order is defined as a case of "constituent power as parliamentary sovereignty" (Colón-Ríos, 2014, pp. 308–313; Greene, 2020, pp. 1170–1174). However, the parliamentarian concept of constituent power is used under a completely different conception than that of 1789. Constituent power is understood as a "constitutional function" exercised by a political body. A 'constitution' is not understood as the "will of the people" but as a plurality of constitutional laws. Parliament has both ordinary legislative and constituent functions. Thus, under parliamentarism, there is no distinction between a legislative and a constituent body, since both functions are performed by one and the same political body. Sieyès (1789/1989a, pp. 20–21) had already anticipated this conception in his critique of English parliamentarism when he pointed out that in England there is no distinction between legislative and constituent power. In particular, in Carré de Malberg's theory of the state (1922), the *pouvoir constituant* is merely a special constitutional function to reform the 'constitution' (=constitutional laws). This approach was accompanied by a process of neutralization of the concept of constituent power.

The neutralization of the revolutionary and potentially autocratic character of constituent power was sought through the defense of a parliamentary government. The constitutions of the Second and Third Republics show the neutralization of Sieyès's idea of constituent power as a mandate. Article 1 of the Constitution of 1848, written in the context of the European revolutions, states that sovereignty lies not in the 'nation' but in "the universality of the French citizens" (*Constitution de 1848, IIe République*, n.d.) Article 11 then states that the exercise of constituent power must be approved by a three-fourths majority of the deputies. Thus, instead of a sovereign constituent assembly, a "revisionary assembly" (*L'Assemblée de révision*) was established to 'reform' the constitution. The constitutional laws of February 25, 1875, also reflect this anti-revolutionary idea. The term 'constitution' was understood in the Third Republic as a "multitude of individual laws" (Schmitt, 1928/2008, p. 72). Article 8 states that "deliberations on the revision of the constitutional laws, in whole (*tout*) or in part, must be taken by an absolute majority of the members of the National Assembly" (*Constitution de 1875, IIIe République*, n.d.). Since the Third Republic was a parliamentary government, a complete reform of the constitutional laws was possible within the procedures of the ordinary legislature. However, on August 14, 1884, a new constitutional law was enacted stating that "the republican form of government cannot be the subject of a proposal for revision" (*Constitution de 1875, IIIe République*, n.d.). Constituent power was

thus simply another notion for the "*révision totale*" (Quiriny, 2015) of the constitutional laws of the French parliamentary government.

The process of neutralization of the concept of constituent power in the 19th century went hand in hand with the emergence of a positivist legal approach to this concept. As we know, legal positivism is an intellectual movement that has its roots in the philosophies of Hobbes and Hume, but experienced its most significant development in the 19th century with Jeremy Bentham (1748-1832) and John Austin (1790-1859). This approach starts from the assumption that "the existence and content of law depend on social facts, not on its merits" (Green & Adams, 2019). The word positive derives from *positus*, a Latin verb meaning "to place" or "set down," and is associated with the "Separation Thesis" in contemporary legal theory (Dyzenhaus, 2004). There is a wide and complex debate about the different faces of legal positivism (T. Spaak & Mindus, 2021; Waluchow, 1998), which I will not discuss here. Despite the gross simplification, a distinction is made between *exclusive legal positivism*, in which law cannot depend on moral considerations, and *integrative legal positivism*, which claims the opposite (Waluchow, 1998, p. 394). It is generally agreed that the positivist legal tradition found its manifesto in the 20th century in H.L.A. Hart's work "Positivism and the Separation of Law and Moral" (Dyzenhaus, 2004; Hart, 1958; Waluchow, 1998).

In 19th century France, however, legal positivism went hand in hand with the development of the social sciences. Of course, French positivism had different faces, which is evident in the 1860s in philosophical and historical works such as Hippolyte Taine's *Le positivisme anglais : étude sur Stuart Mill* (1864) and the polemical Ernest Renan's *Vie de Jésus* (1863). Despite its heterogeneity (Troper, 2021), the cornerstone of French positivism is its critique of metaphysics and Catholicism (Richard, 2018). The idea of positive philosophy was already present in the 18th century in the writings of Condorcet and Germaine de Staël, who sought to reduce the social tensions caused by politics and morality in the revolutions through a "positive science" (Pickering, 2019, p. 342). In the19th century, these thinkers influenced Henri de Saint-Simon (1760-1825), who believed that positive philosophy, unlike the Enlightenment, could play a constructive and harmonious role for society. Saint-Simon had followers of his ideas, the most important of whom was Auguste Comte (1798-1857) (Pickering, 2019, p. 342).

Auguste Comte's *Cours de Philosophie Positive*, a series of lectures he delivered between 1826 and 1829 and published in six volumes after the 1830s, had a remarkable impact on French and English social science throughout the 19th century (Bryant, 1985, Chapter 2). Comte distinguishes three stages of development: theological, metaphysical, and

modern science, in which disciplines such as biology, astronomy, physics, and chemistry dominate (Hayek, 1952, p. 170; Pickering, 2019, p. 344). In addition, Comte called for the biological method to be extended to the study of social life, which is why he named this new science "sociology" in 1839. Comte was received more slowly in France than in England, where his concept of social science influenced John Stuart Mill (Welch, 2011, p. 192). Although he was criticized by French Catholics and conservatives (Richard, 2018), his positive philosophy influenced Third Republic politicians such as Léon Gambetta and Jules Ferry, as well as positivist scholars such as Émile Littré (Eros, 1955, p. 260; Welch, 2011, p. 194).

After the Second Empire (1852-1870) and the Franco-Prussian War (1870-1871), positivism gained prominence in France for the study of politics and constitutional law. Both political science as a higher education field and Durkheim's "social fact" (*fait social*) as a new sociological method emerged. The founding of the *École libre des sciences politiques* (now *Sciences Po*) in 1871 represented an attempt to study law and politics from a positivist perspective in French higher education (Favre, 1989, p. 83; Heilbron, 2004, p. 156). The emergence of political science, however, led to a dispute between Émile Boutmy (1835-1906), the founder of the *École libre des sciences politiques*, and Claude Bufnoir (1832-1898), a renowned Roman law professor, over the appropriation of this new field within French legal studies. For Boutmy, political science was an independent scientific approach based primarily on the historical method, that is, on the analysis of the history of the modern state, the parliamentary system, diplomacy, and economic issues. In contrast to Boutmy, Bufnoir pointed out that political science was not as consolidated as jurisprudence, so lawyers could bring political science courses into the study of economics and public law (Favre, 1989, pp. 86–90).

In the 1890s, Durkheim's idea of *fait social* represented a critique of and dialogue with the positive philosophy of Comte and the principles of Herbert Spencer on the causes of the division of labor. Durkheim (1895, pp. 465–466) says his theory of the social fact was already contained in his book *De la division du travail social* (1893). Durkheim sees social facts as "ways of acting and thinking, widely diffused in society, existing outside individual consciousnesses and exerting constraint upon them" (Gisbert, 1959, p. 354). Importantly for my research, Durkheim (1895, p. 474) indicates that public law (*droit public*) is the scientific approach to the study of state organization through a sociological approach. This definition had a tremendous impact among the jurists of the Third Republic. For Durkheim, a scientific method implies a rejection of metaphysical language; therefore, he affirms that political

institutions must be studied as observable social facts. Durkheim studies the state as a sui generis ensemble of different state servants, classified according to their different functions and technical tasks, much like the social division of labor in capitalist society (Birnbaum, 1976, p. 252). Very important for Durkheim's works is social solidarity, because in all societies there is some form of cooperation and cohesion between the individual and society, and a distinction can be made between mechanical and organic solidarity and their relationship to social rules.

I developed this brief explanation of the French positivist tradition to introduce the Third Republic political theorists. Duguit and Hauriou were mainly influenced by the sociological perspective developed by Durkheim for the study of the state and its institutions. The concept of constituent power as a "constituent function" (*fonction constituante*) is understood from this positive dimension, as a social and historical fact. It is a descriptive conception of constituent power, which was deprived of all its revolutionary and metaphysical nature in the French Revolution. The French positivists, especially Carré de Malberg, saw this approach as a solution for integrating the philosophies of Rousseau and Sieyès institutionally into the parliamentary system of government and thus conceiving of it as positive. My study is divided into three sections. In the first section, I explain how, in the 19th century, the original conception of Sieyès collided with the new positivist conception found in Theodor Mommsen's work on Roman law. I then explain the positivist reading of the state by Duguit and Hauriou and their critique of Rousseau's and Sieyès's conceptions of sovereignty. Finally, I explain how a positivist conception of the constituent power emerges here, to which a "special constitutional function" is attributed for reforming the constitutional laws of parliamentary government.

1. Two Conceptions of Constituent Power

I have explained in the first chapter that Sieyès's idea of constituent power was the political theory that gave constitutional form to the French Revolution. As Israel (2013, p. 770) has explained, no other author better expressed the humor, revolutionary phraseology, and political philosophy that emerged at the time. However, the history of constituent power in 19th-century France is fundamentally different, because it is characterized by a general distrust, fear, and rejection of sovereign power. In particular, the experience of the Louis Napoleon plebiscites of 1851 and 1852 was a trauma for liberal and progressive intellectuals at the end of the 19th century. Sieyès's idea of constituent power as a mandate from the people was linked to the Bonapartist dictatorship with its motto of '*appel au peuple*' (Hauriou, 1916, pp. 680–681; Laboulaye, 1871, p. 808). The rejection of any kind of popular autocracy led French intellectuals to contrast two conceptions of constituent power. The first conception focuses on Sieyès's idea of constituent power as a theory of the mandate from the people to create a new constitution. It is a concept associated with revolution, absolute power, and Bonapartism.

The rejection of this first conception of constituent power shaped the 19th-century new conception of constituent power. In his important work on constituent power in the 19th century, Rubinelli outlined how the idea of the nation's sovereign power was weakened even in the constitutions of the French Revolution, where "the third article of the *Déclaration des droits de l'homme et du citoyen* proclaimed that sovereignty rested with the nation," while "the seventeenth article of the Constitution of 1795 declared that it applied to all citizens" (2020a, p. 76). France's troubled political history in the first half of the 19th century was marked by significant regime changes leading to the Bourbon Restoration (1814-1930), the July Monarchy (1830-1848), and the Second Republic (1848-1852). In this context, Rubinelli notes, "lawyers, politicians, and intellectuals worried about the inconsistent attribution of sovereignty and its possible consequences," and "the spectre of Rousseau's theory of sovereignty and its use during the Terror daunted post-revolutionary reflections on political authority" (2020a, p. 77). However, towards the end of the 19th century, the idea of constituent power was conceived as Theodor Mommsent's legal positivist idea of constituent power as a function of a state organ to create a constitution. I will explain how this second conception developed in the attempt to neutralize the first conception of constituent power and its autocratic and revolutionary derivatives.

a. Sovereign Power and Revolution

For leading liberal thinkers of the 19th century, the concept of constituent power was a problematic revolutionary legacy (Jaume, 2008; Rubinelli, 2020a, Chapter 2). François Guizot (1787-1874) and Benjamin Constant (1767-1830) rejected sovereign power and thus the exercise of the *pouvoir constituant* as potential threats to liberty (Rubinelli, 2020a, p. 78). Guizot affirms that constituent power is sovereign and absolute, but also a "poison that had mingled with all goods and with all expectations" (Kalyvas, 2018, p. 103). Constant argues that "the sovereignty of the people is not unlimited, but lies within the limits set by justice and the rights of the individual" (1815, p. 28). This rejection of sovereign power also includes a critique of the 'tyranny of the majority'. In his *Democracy in America*, Tocqueville (1835-1940/2012, Chapter 15) says that he recognizes the "seed of tyranny" when the right and means of absolute power rest with a people or a king, an aristocracy or a democracy, a monarchy or a republic. Thus, as Jaume affirms, "the notion of constituent power represented one of the unresolved issues of the revolutionary epoch" (2008, p. 76). Nevertheless, this negative perception of the concept of constituent power is not monolithic in France. Rubinelli (2020a, pp. 80–81) explains how other 19th century intellectuals such as Lanjuinais, Laferrière, and Berriat-Saint-Prix used the word 'sovereignty', but against the possible abuse of power by the king and the French parliament.

One of the most important philosophical convictions in the tradition of 19th century French liberalism is the rejection of Rousseau's theory of sovereignty and Sieyès's idea of constituent power. This rejection was based primarily on the study of history. In response to the metaphysical nature of the political philosophies of d'Holbach and Rousseau (Israel, 2013, Chapter 30), thinking about concepts such as 'liberty' and 'sovereignty' from a historical perspective was a cornerstone of French liberalism and constitutionalism.

This approach finds a lively echo in Benjamin Constant (Hoffmann, 1982). In the last three decades, there has been a "Constant revival," as the French intellectual is considered a liberal thinker of the first order (Rosenblatt, 2004; Selinger, 2019, p. 115). Constant was a parliamentary actor and political theorist whose views on the English parliament were of outstanding importance in shaping post-Napoleonic parliamentary politics in France (Selinger, 2019, p. 117). Constant's most important work was *De la liberté des Anciens comparée à celle des Modernes* (1819). For him, the ancients, by which he means the Greeks, "recognized the complete submission of the individual to the authority of the community (l'ensemble) as compatible with collective freedom" (2017, p. 294). While the moderns,

referring to the Americans, English, and French, define liberty as "the right to be subject only to the laws and not to be arrested, detained, killed, or mistreated in any way by the arbitrary will of one or more individuals" (2017, p. 294). Constant points out that the lack of distinction between these two conceptions of liberty has led to confusion, which is evident in the French theory of popular sovereignty. Constant criticizes Rousseau from a historical perspective, saying that he "transferred to our modern age a measure of social power, of collective sovereignty, belonging to other centuries, whereby this sublime genius, animated by the purest love of liberty, nevertheless provided deadly pretexts for more than one kind of tyranny" (2017, p. 301).

For Constant's liberal approach, any unlimited power is an arbitrary power. It is fascinating to observe the disagreement between Madame de Staël and Constant over Rousseau and the French Revolution. De Staël was one of the great polymaths of the Enlightenment who wrote a panegyric on Rousseau in 1788 (Lotterie, 2003). In her *Considérations sur les principaux événements de la Révolution française* (1818), she acknowledges the importance of the political changes brought about by the National Constituent Assembly, such as the abolition of the privileges of the aristocracy. However, she also acknowledges the excesses and mistakes due to the fanatical character of the revolutionaries. Constant, on the other hand, has a consistently negative opinion of the revolution and Rousseau, whom he calls the "plus terrible auxiliaire de tous les genres de despotisme" (1815, p. 18). In the first chapter of his famous *Principes politiques*, Constant (1815, p. 16) criticizes the idea of popular sovereignty, noting that the flaw in this doctrine is that it is based on unlimited power. Any unlimited power is despotic. Interestingly, Constant locates the idea of a mirror of despotic power between Hobbes and Rousseau. For Constant (1815, p. 21), a leading exponent of French liberalism, the only difference between the English philosopher and the Genevan is that in the former absolute power is concentrated in a monarch, while in the latter it is concentrated in the people.

Undoubtedly, the politician and parliamentary theorist François Guizot also expressed Constant's liberal spirit against popular sovereignty and constituent power (Craiutu, 2002, p. 484). Guizot was an outstanding writer on the history of France and Europe. He was particularly interested in the history of the ancient Roman state, which is reflected in his edition of the 1812 translation of Edward Gibbon's *Decline and Fall of the Roman Empire*. In his *Histoire de la civilisation en Europe* (1828), Guizot (1839) praises 'sovereignty', but not the modern conception of Rousseau, but the 'sovereign administration' of the Roman city government. Like Constant, Guizot rejected Rousseau's theory of sovereignty and the idea of

the divine right of kings. This liberal French politician ironically said that he had witnessed the emergence and extinction of constituent power three times: Bonaparte in 1799, Louis XVIII in 1814, and the Chamber of Deputies in July 1830 (Jaume, 2008, p. 77). Schmitt (1923/2017, p. 43) rightly points out that Guizot represented the parliamentary tradition of debate and counter-argumentation as a means of establishing truth. In 1830 Guizot explicitly said that constituent power was a "poison" and danger to liberty (Kalyvas, 2018, p. 103).

Alexis de Tocqueville, the most famous French liberal thinker of the 19th century, cannot escape this rejection of the revolutionary concept of popular sovereignty. In the fourth chapter of his *Democracy in America* (1835), Tocqueville presents his study of popular sovereignty in the United States of America. His view has been called 'sociological' because he points out that popular sovereignty in America is not a metaphysical idea, but is "recognised by the mores and promulgated by laws" (1835-1940/2012, p. 92). Later, Tocqueville analyzed the foundations of the French Revolution, much like Constant, who considered Rousseau's theory of sovereignty to be an abstract and metaphysical philosophy. In his book *The Old Regime and the Revolution* (1856), Tocqueville states that the Revolution of 1789 was a "religious revolution" because "it took an abstract view of the citizen, outside any particular society, just as religions treated man in general, independent of country and time" (1856/2011, p. 21). In contrast to the French case, Tocqueville saw the American case as a more realistic application of popular sovereignty. The American people, according to Tocqueville, "participate in the composition of the laws by the choice of the legislators, in their application by the election of the agents of executive power," so "they govern themselves" (1835-1940/2012, pp. 96–97).

The French liberal spirit, opposed to popular sovereignty and revolution, also reached post-Napoleonic Spain (Colón-Ríos, 2020, Chapter 7). One of the most important figures of this historical approach was Juan Donoso Cortés. As Colón-Ríos (2020, p. 175) rightly notes, Donoso Cortés was called "Guizotín" ("little Guizot") by his contemporaries. In his youth, he was a liberal Catholic thinker who later converted to an advocate of dictatorship in the face of the 1848 revolutions (Herrera, 1995, pp. 23–34). He fell into oblivion in the late 19th century, but became known again in the 20th century through the study of his *Speech on Dictatorship* (*Discurso sobre la Dictadura*) (1849) and his ideas on political theology and counterrevolution by Carl Schmitt (1922/2015, chapter 4). Between late 1836 and early 1837, Donoso Cortés (1836-1837/1946) delivered his *Lessons on Political Law* (*Lecciones de Derecho político*), in which he explained his rejection of Rousseau's theory of sovereignty.

Donoso Cortés blames Rousseau's theory of sovereignty for the revolutionary excesses. He begins by analyzing Roman history because it represents the modern attempt to synthesize individual autonomy and the "law of unity" (1836-1837/1946, p. 228). The Spanish politican advocates the idea of harmony between these two principles in a representative government (*Gobierno representativo*). Nevertheless, he pessimistically describes how the fall of the Roman Empire created a vacuum of political legitimacy in Europe from which emerged the power of popes and the principle of divine right of absolute monarchs. In his view, the history we know as the "democratic enlightenment" (Israel, 2013) is an expression of the conflict between this principle of divine right and popular sovereignty. Donoso Cortés (1836-1837/1946, p. 230) points out that the modern idea of popular sovereignty originated in the English Revolution. However, Rousseau was the prophet of this doctrine and responsible for it becoming political practice in the French Revolution (1836-1837/1946, pp. 230–231). Donoso Cortés concludes that the conflict between popular sovereignty and the divine right of kings has harmful consequences in the long run, because "a sea of blood separates them, and this sea of blood bears witness to the fate of the societies that embrace it" (1836-1837/1946, p. 232).

In 19th century France, after the collapse of the Second Empire and Bonapartism, a liberal historical approach to constituent power developed, expressed in an important text by Édouard Laboulaye (1811-1883) on constituent power. Laboulaye was a prominent liberal intellectual and politician of the early Third Republic known for his research on the history of the United States of America, a country with which he is closely associated for conceiving the gift of the Statue of Liberty (Sawyer, 2013, p. 740). Laboulaye was elected as a deputy to the National Assembly of 1871, which was convened after the Paris Commune. It was in this context that he published his article "*Du Pouvoir Constituant*" (Laboulaye, 1871), in which he explained and critiqued the nature of this idea in French intellectual history.

Laboulaye (1871) first examines English and American constitutional history and notes that Sieyès's idea of constituent power is not found in these very countries. He points out that in the French monarchy there was no written constitution, so that the king, who was the sole sovereign, was also "*le seul législateur*." In contrast to the Ancien Régime, constituent power means that the people are the only legislators. Laboulaye says that Sieyès claimed to be the inventor of the term *pouvoir constituant*, but that Lafayette, in a note, pointed out that the Americans had already introduced Sieyès's concept in 1788 in the conventions of constitutional reform, so the idea of constituent power was not a French invention. Laboulaye (1871, p. 809) points out, however, that Lafayette's assertion is not

accurate, since the core of the doctrine of Sieyès and the revolutionaries is not constitutional reform but the fusion of the legislative and constituent powers in the constituent assembly. Thus, Laboulaye argues that in the United States of America a convention is a pacifist convocation of an ordinary legislature, while in France there has not been a constituent assembly that was not revolutionary since 1789.

Constituent power in France, according to Laboulaye, is based on an error and a sophism. The error consists in Sieyès's idea of delegation of sovereignty that I explained in the first chapter. While the sophism of constituent power is based on the identity of representatives and represented, confusing agents with principals. Laboulaye points out that this revolutionary conception of constituent power is the opposite of Lafayette's idea, since the formation of a "national will" in France is subject to the arbitrariness of a minority. Laboulaye claims that in France "Sieyès triumphed over Lafayette and, by confusing the constitutional and legislative powers, confused and lost everything" (1871, p. 799). He adds that from this history of error and sophistry resulted all the failures and miseries of France (*toutes nos fautes et toutes nos misères*) (1871, p. 810). For Laboulaye, the French revolutionaries considered themselves the people under a delegation that the people would have given them, and so they decided that the National Constituent Assembly had the rights of sovereignty (1871, p. 810). Laboulaye concludes his text with a rejection of revolutionary constituent power, saying that popular sovereignty is not a utopia but a political reality in the American and Swiss constitutional traditions, in contrast to the use of the concept of constituent power in French history.

French liberalism consolidated the critique of Rousseau's theory of sovereignty and exposed Sieyès's idea of constituent power as an error and sophism toward the end of the 19th century. Two dissertations on the concept of constituent power, forgotten in the current literature, show how Laboulaye's historical approach led to a remarkable reception of the rejection of constituent power as an account of sovereignty. For Fonteneau (1900), the only difference between the English and French traditions is that, in Sieyès's conception, a *pouvoir constituant* must be exercised by a revolutionary constituent assembly such as that of 1789. Perny's study is much more limited but more profound, focusing on the conception of constituent power in the July monarchy. Perny (1901) begins with an analysis of the historical context in France in the 1830s and then describes the political positions of the republican, legitimist, imperialist, and Orleanist parties in the drafting of the 1830 charter. Apart from the different analyses of these dissertations, the main point is that 19th-century French liberalism established a tradition of rejecting the *pouvoir constituant* from a historical approach. Sieyès's

idea of constituent power was understood as a dangerous, false idea, related to the history of crises and popular autocracy in France. Given the unlimited power of the constituent power, French intellectuals and constitutionalists of the late 19th century preferred to think of the *pouvoir constituant* from a much more institutional, conservative and liberal concept.

Before concluding this brief description of constituent power as an account of sovereign power and revolution in the 19th century, I should mention how this perspective informs much of the discussion today. Virtually the entire debate has been absorbed into this French historical tradition. Colón-Ríos (2020, Chapter 7) developed the same approach in his study of the history of constituent power in Spain in Melchor de Jovellanos and Donoso Cortés. Rubinelli's work (2020a, Chapter 2) on the history of constituent power in 19th-century France also addresses the relationship between constituent power, sovereign power, and revolution. A brief review of recent publications on constituent power shows that the concept continues to be influenced by this historical conception of constituent power as sovereign power, both in the field of constitutional law (Doyle, 2019; Fasel, 2022; Greene, 2020; Verdugo, 2023; Wittrock, 2020), intellectual history (Arvidsson et al., 2020; Bofill, 2021; Daly, 2021; Frost, 2021), and international politics (Habermas, 2017; Patberg, 2020). A debate among leading scholars on constituent power in various case studies reflects this inevitable trend in international scholarship as well (Colón-Ríos et al., 2021). In France, however, a different tradition of constituent power developed in the late 19th century that is less known and studied: the legal positivist conception of constituent power in Theodor Mommsen's work on Roman law.

b. Mommsen and the Constituent Function in Roman Law

I have shown how the French liberal tradition advanced critiques of popular sovereignty and constituent power, with these concepts still associated with Rousseau, Sieyès, the French Revolution, and the Jacobin Terror. In the 1890s, however, Mommsen's works on *Roman History* (1854) and Roman Public Law (1887, (1887/1984)), which had been translated into French in 1863 and 1892, respectively, became indispensable references for works on French legal history such as those of Adhémar Esmein (1886) and Paul Viollet (1890), two important constitutional lawyers of the Third Republic. Before Mommsen's work on the history of Roman public law, no comparable research was known in Germany, which is why one can speak of a great innovation in legal history (Klenner, 2003, pp. 114–115). When Mommsen uses the term 'constituent power', he does not mean Sieyès's idea in 1789, but the concept of extraordinary legislative power, which was known in the German legal tradition (Schönberger, 1997, p. 50). From Montesquieu to Guizot, Roman legal history has always been an important reference point for French law. For this reason, when French jurists of the late 19th century discovered Mommsen's work, they recognised that Sieyès's idea of constituent power could be seen as a special function of legislation that had lost its revolutionary character. Mommsen's approach presents the constituent powers (*constituierende Gewalten*) of the Roman state thus:

> The Roman state was compelled, more rarely than other states of antiquity worthy of the name, to resort to a resource, which is always an evil [*Unheil*], and often a worse evil than that which is sought to be cured, to the creation of supreme magistrates [In German: *Einsetzung von Oberbeamten*; In French: *création magistrats supérieurs*], invested with the power, not of applying, but of altering the constitution of the community [*Die Verfassung der Gemeinde*]. But in Rome also there were supreme constituent powers [In German: *constituierende höchste Gewalten*; In French: *pouvoirs suprêmes constituants*] (T. Mommsen, 1874/1952, p. 702, 1887/1984, p. 425).

In Mommsen's reading, constituent power is a constitutional concept, not a revolutionary political concept. In his definition of the term, everything is based on law. The central element of his analysis is that the constituent powers are a constitutional function of an extraordinary magistracy (a constitutional authority) in ancient Rome (in German: *Die constituierende Magistratur als Oberamt*; in French: *fonctions générales de la magistrature supérieure*) (1874/1952, p. 710, 1887/1984, p. 449). Moreover, Mommsen's approach established a systematic inquiry that distinguished between constituent and constituted powers

within the theory of the Roman state. In contrast to the revolutionary view of Sieyès, Mommsen points out that "no extraordinary magistracy is born without a "special law" (*Spezialgesetz*), the constituent magistrates less than all others" (1887/1984, p. 434). Further, he says that "the electing people, or, if one prefers, the magistrate who conducts the election, is bound for the act of election by the law that organizes that election" (1887/1984, p. 434). For Mommsen, then, the exercise of constituent powers in Rome is tied to constitutional authorization by a law or by an authority (*magistrature*) (1887/1984, p. 435). Even a pre-existing magistracy establishes "constituent dictatorships" (*dictatures constituantes*) in Roman public law (1887/1984, p. 435).

Mommsen (1874/1952, pp. 702–708) explains the constitutional nature of the constituent powers in Roman law history. He explains that the *decemviri consulari imperio legibus scribundis* (Decemvirs Writing the Laws with Consular Imperium), introduced by the law Terentilia for the year 303 and then again for the year 304, as exercising the constituent power. The dictatorship *legibus scribendis et rei publicæ constituendæ* (Dictator for the drafting of laws and the reorganisation of the state) of the Valeria law of 672, which referred to Sulla, and the dictatorship which seems to have been generally similar, although regulated differently in terms of duration which the laws of 705, then 706, the *triumvirate rei publicæ constituendæ* (Three men with consular authority in the organization of the state), endowed with proconsular powers such as the dictator Caesar had had, and consisting of Lepidus, Mark Antony, and Caesar, came into being on 27. November 711 by virtue of the law of November 27, 711, by virtue of the Lex Titia, and continued to exist after the expiration of its first term on December 31, 716. All the examples given by Mommsen thus aim to illustrate the exercise of constituent power as a special constitutional legislation in Rome history.

A purely legal foundation of Sieyès's concept of constituent power emerges when Mommsen understands it in Rome as an extraordinary legislative function (*Spezialgesetz*). Sieyès's concept of the mandate from the people (as pre constitutional entity) to create a new constitution has disappeared in Mommsen's definition. As Rubinelli (2020a, p. 107) points out, Mommsen's work was a success with scholars and intellectuals, who recognised the similarities between the Roman idea and the interpretation of the constituent power in the 18th century. However, French jurists interpreted Mommsen's history of Roman law as a way to find the forgotten 'legal essence' of the constituent power. In the 1920s, Hauriou asserted that "Mommsen has made a detailed study of the extraordinary constituent powers of which the Roman Republic periodically made use, and he finds that all the constituent powers were created by the laws" (1929, p. 256). A constituent power based on a legal foundation contrasts

with revolution. The French translation of Mommsen's work takes up Sieyès's concept by translating the Roman constituent powers constitutionally as les pouvoirs constituant extraordinaires. Since here the function of the constituent powers is based on law, Mommsen's approach influenced the studies of French jurists of the late 19th and early 20th centuries by understanding Sieyès's idea of *pouvoir constituant* from this perspective of Roman public law.

I have already argued that the long-term historical constituent power often draws on ancient Greek and Roman legal history. In the early 20th century, even before the seminal German work of Zweig (1909), which is cited as a reference point in the early 20th century (Rubinelli, 2020a, pp. 107–108), C. Roy (1893), a legal scholar at the University of Poitiers, wrote a dissertation on the *longue durée* history of constituent power that is still forgotten in the literature. Roy's central idea is that Sieyès's idea of *pouvoir constituant* emerged only shortly before the French Revolution, while the "constituent function" (*fonction constituante*) in Mommsen's sense existed in antiquity. Roy (1893) describes Greek legal history, which he illustrates with Solon's constituent legislation; he then analyzes Roman history, where he states that "the king is a delegate of the Roman people" and that "the legal limit of his power, as Mommsen says, consists in the principle that the king must enforce the law and may not change it" (1893, p. 15). Roy (1893, p. 13) points out, however, that in antiquity there is no regulated *pouvoir constituant* that is the subject (sovereign) of a recognized principle of public law:

> The idea of constituent power preceded the French Revolution by only a few years; one looks in vain for traces of it in antiquity or in the Middle Ages. Antiquity, from which essential constitutions sprang and political writers of great value emerged, did not establish the theory of constituent power. However, it is undeniable that the constituent function [*fonction constituante*] existed even then. Those who created the ancient constitutions undoubtedly exercised the functions that today are reserved for the constituent power. They acted unconsciously, for no political writer of antiquity made the distinction that exists in our time. Neither Socrates, nor Plato, nor Aristotle, despite his attempt to separate the powers, nor Cicero even conceived the theory of the constituent power as we have understood it for a century. In fact, the constituent power was often exercised by a single man commissioned by his countrymen, or by someone who took it upon himself to give a country laws that were ratified by all the citizens, usually by popular vote (Roy, 1893, pp. 9–10).

Although Sieyès's idea of *pouvoir constituant* did not exist in antiquity, Roy (1893) suggests that it can be understood with Mommsen's approach as a conflation of the "constituent function" (*fonction constituante*) with Rousseau's theory of sovereignty in the French Revolution. The works of Fonteneau (1900) and Perny (1901) also speak of the

"constituent function" in French constitutional history. Roy (1893) notes that there was no conception of a modern constitution in medieval history, so that "under the French monarchy no written constitution, that is, no *pouvoir constituant* was organized and defined" (1893, p. 21). He adds that the Estates-General (*États-Généraux*), assembled since the 14th century, could not be said to exercise the constituent power, but that the king was the only one who held the "constituent function" (1893, pp. 22–23). Roy points out that since Montesquieu theorized the separation of powers, Rousseau is "the direct precursor of the theory of constituent power, which is a necessary and inevitable consequence of popular sovereignty" (1893, p. 23). Although Rousseau did not use the term constituent power, he "proclaimed that the right to change the constitution of a country is an immutable right, belonging to a nation at all times" (1893, p. 24).

Roy (1893, pp. 25–27) turns to an examination of the emergence of constituent power in the French Revolution, where he discusses the essential sequence of the historical approach of 19th century French liberalism: American Revolution, Lafayette, Sieyès. He affirms that "our whole theory of constituent power is based, as Laboulaye says, on an error and a sophism: the error is the delegation of sovereignty," while the sophism is "the identity of the people and their representatives" (1893, p. 49). Roy's long-term historical approach also ends with a rejection of Sieyès's idea of constituent power. He does, however, introduce a theme that anticipates the reading that French legal positivism will more clearly develop in the early 20th century: a non-revolutionary constituent power. Roy (1893, p. 62) points out that one of the most effective forms of exercising constituent power is the "reform assembly" (*assemblée constituante de révision*), based on the 1848 constitution. The difference between this model and Sieyès's idea of the *pouvoir constituant* is that the members of the "reform assembly" know that their powers are limited and that their work ends with the drafting of a new constitution. Roy thus anticipates the abolition of revolutionary constituent power in the French positivist tradition.

The dissertation of Roy (1893) shows how different were the views on the concept of constituent power at the end of the 19th century. While Sieyès understands the constituent power as a mandate from the people (a pre-constitutional entity) to create a new constitutional order, Mommsen speaks of a "function" within the framework of a constitutional procedure. Prior to Zweig's seminal work (1909), there was already a Mommsenian reading of constituent power as a constitutional function in France. The distinction between Sieyès's idea of *pouvoir constituant* and Mommsen's *fonction constituante* seems rather technical, but it is

important to show the precise historical connection between Sieyès, Mommsen and Schmitt analyzed by Rubinelli (2020a, p. 107) and Pasquino (2021). In the 1890s, French Third Republic jurists developed a positivist reading that differed from the political theories of Sieyès and Schmitt. Constituent power was understood as Mommsen's idea of constituent function, which was then integrated into a theory of organs modeled on Jellinek's theory of the state. This reading was consolidated in the 1920s in the French tradition of legal positivism, especially in Carré de Malberg (1922). Zweig (1909, p. 2) was also a proponent of this Mommsenian reading when he combined the constituent function with Jellinek's positivist approach. Zweig (1909, p. 5) speaks of constituent power not in the sense of Sieyès's conception in the French Revolution, but in the sense of the Mommsen's idea of the constituent function within the *Allgemeine Staatslehre*.

Mommsen's conception of the *pouvoir constituant* as a special constitutional function was the hegemonic theory of constituent power among theorists of parliamentary government in the French Third Republic. For the French positivist tradition of the late 19th century, Mommsen's conception of the constituent function helps neutralize the revolutionary character of Sieyès's idea of constituent power in the French Revolution. Fonteneau (1900, p. 9), for example, argues that the concept of constituent power has two legal meanings: the constituent function and the body entrusted with the constituent function. He then sees how both are exercised by the French parliament. Zweig (1909) argued that the idea of the constituent function is the original meaning of the constituent power because it evolved into a constituent organ (a constituent assembly) in the French Revolution. In contrast to Mommsen's approach, Schmitt (1928/2017; 1921) takes up Sieyès's idea of the constituent power as a mandate from the people in his concept of *sovereign dictatorship*. The readings of Sieyès and Schmitt were not acceptable to the prominent positivist jurists of the Third French Republic, such as Duguit, Hauriou, and Carré de Malberg, who defined the constituent power as a legal concept.

2. The French Tradition of Legal Positivism

The concept of constituent power had two historical conceptions in the late 19th century: "sovereign power and revolution" and "constituent function" in Roman public law. This historical division underlines the importance of the evolution from a rejection to an 'institutional absorption' of the constituent power in France. There seems to be no general definition in the literature to explain this development. Colón-Ríos uses the term "rejection" to refer to the rejection of "the existence of an extra-legal constituent power or, perhaps more accurately, deprive it of some of its main features" (2020, p. 161). Rubinelli affirms that "the association of constituent power and sovereignty was definitively and authoritatively sanctioned" by Carré de Malberg (2020a, p. 99). In this chapter, I use the term rejection to refer to the rejection of Sieyès's idea of constituent power as a mandate from the people, as this theory is seen as sophism and potentially tyrannical. Institutional absorption, on the other hand, proposes a 'positivization' of the ideas of Rousseau and Sieyès in the form of constitutional laws in the French Third Republic. Kriele introduced this perspective by noting that in the French Constitution of 1791, "popular sovereignty is transferred to be exercised, unconditionally transferred, and completely absorbed by constitutional bodies" (2003, p. 130).

Similar to Schmitt's distinction between the concepts of *sovereignty* and *sovereign dictatorship*, the French positivists believed that such a distinction was possible. The reasons for such a distinction, however, are quite different. Duguit and Hauriou question the concept of sovereignty because they consider it a metaphysical rather than a juridical concept. Thus, the *pouvoir constituant* is not sovereign because there is no sovereignty. The French tradition of legal positivism introduces a purely positive conception of the constituent power. Despite being considered one of the leading European legal schools of the last century, French legal positivism continues to be overlooked in the current literature on constituent power (Arvidsson et al., 2020; J. Colón-Ríos, 2020; Frost, 2021; Rubinelli, 2020). Very little is known about how French jurists attempted to institutionalize 18th-century political philosophy and revolutionary political theory within the framework of a positivist theory of the state. My study sheds new light on how important French jurists and political theorists of the Third Republic such as Léon Duguit, Maurice Hauriou, and Raymond Carré de Malberg defined the concept of constituent power in dialogue with German state theory and French social sciences.

a. Léon Duguit and the Positivist Theory of the State

Léon Duguit (1859-1928) became known as a political theorist and jurist who significantly influenced the positivist conception of French constitutional law. In Latin America, Duguit became famous for inspiring the plea for the right to resist tyranny in Fidel Castro's "History Will Absolve Me" (1953) in the wake of the Cuban Revolution (Matilla, 2020, p. 77). Duguit was one of the most representative jurists of the Third Republic, an era in history that enjoyed seventy years of liberal and secular politics, rich expressions of cultural diversity, and democratic institutions, despite political instability and the "Dreyfus Affair" (Hanson, 2010). Duguit built his career in Bordeaux, so he remained disconnected from the intellectual milieu in Paris. However, he traveled internationally to scientific conferences and was friends with Durkheim. Duguit was remarkably influenced by Durkheim's idea of the *fait social* and his views on solidarity and the social division of labor. Despite his provincialism, Duguit was praised by many scholars, such as Harold Laski, who considered Duguit the leading political theorist of his time and whose influence on his generation resembled that of Montesquieu's *De l'esprit des lois* in the 18th century (H. S. Jones, 2002, p. 149).

Criticism of the concept of sovereignty is the key to Duguit's thought. Laski's allusion to Duguit is fundamental to understanding his position within early 20th century European law. Criticism of the sovereign state was in vogue in France and England before the First World War. The legal theorist and historian Frederic Maitland inspired a group of British political writers known as the "Pluralists," "who at the turn of the century envisioned democratic alternatives to the coercive, centralized state in the context of industrial society" (Siegelberg, 2020, p. 99). The pluralist group included J. N. Figgis, G. D. H. Cole, Harold Laski, and Ernest Baker. They were intellectuals who rejected the concept of the sovereign state and therefore were critical of Hobbes' theory of the personality of the state (Skinner, 2017; Vatter, 2020, p. 51). Laski and Duguit were part of this pluralist movement and criticized German state theory, especially Jellinek's theory of sovereignty. After World War I and the Russian and German revolutions, however, the pluralists were criticized by Hans Kelsen and Carl Schmitt for the decisive role of the sovereign state in postwar politics and law (Siegelberg, 2020, p. 162; Vatter, 2020, p. 53).

Duguit's theory of the state was influenced by French positivism and his critical engagement with German *Staatslehre*. Duguit criticizes the *Staatslehre* in the context of the significant reception of German thought in France at the beginning of the century and especially in the work of Carré de Malberg (Jouanjan, 2005). In the tradition of Comte,

Duguit advocated the elimination of all metaphysical content in state theory, so he defended the analysis of the state as an observable *social fact*. One of Duguit's most important contributions is his critique of what he calls "subjective law" (*droit subjectif*), a "concept of legal effects arising from the intrinsic quality of a will" (H. S. Jones, 2002, p. 162). The critique of subjective law is found in his book *L'etat, le droit objectif et la loi positive* (1901) and was a response to Jellinek's *System der subjektiven öffentlichen Rechte* (1892). In the 19th century, German legal positivism pointed out that the state resembles a "legal person" (*Rechtsperson*) with a sovereign will (Schönberger, 1997, pp. 33–37). For Duguit (1911/1928, pp. 426–427), subjective law emerges from Roman law and scholasticism and then remains in the natural law philosophy of the democratic Enlightenment (Israel, 2013). Duguit sees a theoretical continuity of the subjective law tradition between natural law philosophy in the French Revolution, especially in Rousseau's *volonté générale*, and the German concept of "state personality" in the 19th century.

Duguit develops a genealogy of Rousseau's theory of sovereignty. For him, the question of the legitimacy of political power did not arise with the Greeks such as Plato or Aristotle. Duguit (1911/1921, pp. 424-429) says that this question arose only with medieval scholastic theology, which argued that power itself comes from God, but that concrete power comes from the people, who direct power according to their ends. Aquinas denounced that power that is not directed toward the good of the people is tyrannical and must be overthrown. This was also voiced by Huguenot political theorists in 16th century France (*Monarchomachs*), who also theorized tyrannicide and the people's right to resist. In the second Spanish scholasticism, Francisco Suárez analyzed the inalienable character of the power of the people in their contract with the prince. In England, Locke developed the theory of government whose central elements are popular consent and natural rights. However, Duguit (1911/1928, p. 432) notes that both Hobbes and Rousseau, in order to establish a social contract, presuppose a "legal personality" of the collective that has a will distinct from the individuals that compose it. The collective will can be illustrated by the following passages from *Leviathan* and *Contrat Social*:

> The only way to erect such a common power, as may be able to defend them from the invasion of foreigners (...) is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will (*Leviathan*, Chap. XVII).

> At once, in place of the individual personality of each contracting party, this act of association creates a moral and collective body, (...) and receiving from this act its

> unity, its common identity (*moi commun*), its life and its will (*Contrat Social*, B. I, Chap. VI).

This political and legal theory of a "sovereign" collective will is not acceptable to French legal positivism. Duguit (1909, pp. 214–217) sees in it a conception of "subjective law" and a metaphysical notion that echoes Sieyès's concept of the nation and the Revolution of 1848. This conception of sovereignty always presupposes the unlimited power of a juridical person, whether an individual as in *Leviathan* or a collective such as the *volonté générale* imposed on others. Duguit (1911/1928, p. 432) points out that Rousseau's idea of the *volonté générale* is based on the subjection of the individual to the collective and the false assumption of the "legal personality" of the will of the people. Furthermore, he claims that the theory of sovereignty cannot be scientifically proven because Rousseau's concept of *moi commun* cannot even be constructed from the sum of universal suffrage votes. For Duguit (1911/1928, p. 62), a *volonté générale* is false because sociologically and psychologically there is no collective consciousness or will of a thousand people who want the same thing, determined by the same goal. Duguit points out that modern sociology has recognised the *social fact* of a collective consciousness, but that this does not mean that one can conclude from it the emergence of Rousseau's general will, so that "the formulation of the existence of this alleged collective will is an arbitrary, completely extra-scientific statement" (1911/1928, p. 14).

Whereas for Laboulaye (1871) the idea of constituent power is based on sophistry and error, for Duguit (1911/1928, p. 58) the theory of a *volonté générale* of the people is a "metaphysical notion" (*notion métaphysique*) underlying the political institutions of French republicanism. He opposes such notions because, in his opinion, they lead to dangerous consequences as they are means of annihilating individual freedom through its complete absorption in a supposed collective will (1911/1928, p. 59). He argues that, sociologically, there is an effective interdependence between people that is the result of the exchange of services and needs (in Durkheim's terms, *division du travail social*). Individuals live in society through mutual action (1911/1928, p. 60). However, Duguit points out that this does not mean that a "group will" (*volonté du groupe*) exists, that the collective is a "real person," and that it has a different will than individuals. He affirms that one cannot speak scientifically, but only metaphorically, of a personality of the nation (*nation-personne*) or a "national will" (1911/1928, p. 61). Nevertheless, Duguit (1911/1928, p. 12) does not deny the existence of the French nation (*La nation est donc une réalité*), but considers that it is not characterized by

a collective will, but by belonging to a state with a territory, a people, and a social organization.

Duguit opened a new horizon for the discussion of the concept of sovereignty in France. Duguit (1911/1928, p. 444) notes that the German jurists of the late 19th century developed a theory of the state that differed from the French tradition. The pioneer of this German tradition was Gerber in his work *Grundzüge des deutschen Staatsrechts* (1865), which culminated in Jellinek's *Allgemeine Staatslehre* (1899/1922). The German state is a sovereign power that can create objective law according to its own will (1911/1928, p. 463). In France, according to Duguit, the nation is the bearer of sovereignty, whereas in Germany the state itself is the bearer of sovereignty, and it is a whole, an indivisible subject based on the Hegelian philosophy of *An-Sich* and *Fuer-Sich* (1911/1928, p. 444; Schönberger, 1997, p. 237). The state possesses the subjective elements inseparable from it, such as the nation, the territory, the government; therefore, in German *Staatslehre*, only the state is the legal subject of sovereignty and political power (*Herrschaft*) (Schönberger, 1997, pp. 52–54). Duguit (1911/1928, p. 460) argues that there is only one relationship between the sovereign state and the legal subjects: the subordination of the "organs to the state." In other words, "the state in Germany is an organized juridical person of which the prince and even the nation are only organs" (1911/1928, p. 461).

The elimination of the concept of sovereignty from the theory of the French Third Republic is Duguit's core idea in order to push back the influence of the ideas of Hobbes, Rousseau and the German *Staatslehre*. Duguit (1911/1928, p. 438) says that Saint-Simon and Comte had already outlined the critique of the metaphysical and theological nature of the divine right of kings and popular sovereignty that positive theory rejects (Quiriny, 2022). If no collective has a will, it is neither a juridical person nor a sovereign; then there is no sovereign power in the theory of the state. The historical approaches developed by French liberal thinkers such as Constant, Guizot, and Tocqueville in the 19th century rejected Rousseau's theory of sovereignty and Sieyès' idea of constituent power. Duguit's approach, on the other hand, is to abolish any kind of sovereignty within the theory of French parliamentary government. For Duguit (1911/1928, p. 490), Jellinek's theory of self-limitation of the state is naive because the state cannot establish a legal theory for its unlimited power. Dieter Grimm is correct when he says that for Duguit "only a law deriving its ground of validity from the will of no one could impose itself on all wills and thus solve the problem of the rule of men over men" (1973, p. 46).

Against the theory of sovereignty, Duguit advocates an objective theory of law (*droit objectif*) (Baron, 2020). He presents the state as an administrator of public services (Travers, 2019). He recognizes that French state theory is based on the sovereign nation, which goes back to Rousseau's concept of the *volonté générale*. However, Duguit replaces this concept with a sociological approach to law, which leads him to the view that man is a social animal organized according to a principle of social interdependence and solidarity (1911/1921, p. 12). Duguit points out that there is no opposition between individual and collective interests because the state is understood as a social necessity and interdependence between individuals. The state as a "social fact" (Durkheim) is an organization composed of *gouvernants*, which sociologically is a group of state servants based on the principles of social division of labor and *solidarité*. To overcome theories of sovereignty, Duguit argues for a non-sovereign theory of law in which "objective social reality, rather than the will of the state, is the source of law" so that "the state is subject to the law in the same way as private individuals" (H. S. Jones, 2002, p. 164).

The result of this French positivist theory is a non-sovereign theory of the state. For Duguit, the state is an organization that emerges from the necessity of social organization and the social division of labor. Thus, Duguit's core idea is that the state realizes law through public administration and social solidarity. Later, in Austria, Kelsen will criticize Durkheim's conception of law as relativizing the power of ideas and norms in a materialist and positivist perspective (Terrier, 2017, p. 314). In Germany, Schmitt will likewise criticize Durkheim's and Duguit's sociological conceptions of law as destroying the central role of the sovereign state in politics (Terrier, 2017, p. 323). Duguit (1911/1928, p. 495), on the other hand, claims to represent a "realist" conception of the state that gets rid of all metaphysical foundations. He sees the French Third Republic as a form of organization of the various interests of society. Duguit (1911/1928, p. 507) finds in the syndicalist movement an example of how the interests of different social classes are structured for a better management of public services. Similarly, governors are public servants who execute the law and are therefore obliged to ensure the development of culture and material, spiritual and moral progress (1911/1928, p. 520).

b. Maurice Hauriou and the Theory of Institution

Duguit's positivist theory of the state was innovative, but it also went too far and ultimately destroyed any prescriptive conception of constitutional law in his understanding of the state in the French Third Republic. The idea of a sovereign power, be it the people or the state, was removed from his political theory of parliamentary government. Duguit had set out to develop a new theory of the state that would distinguish the traditions of "objective law" (inspired by Durkheim's sociology of law) and "subjective law" (inspired by Rousseau's idea of volonté générale and the ideas of the German *Staatslehre*). His proposal, however, was received with skepticism. Maurice Hauriou (1856-1929), professor at the University of Toulouse, agreed with Duguit that the state is subordinate to the rule of law. But Hauriou is deeply skeptical that this should be done by incorporating a positivist sociological approach to constitutional theory, as this would lead to a relativization of the importance of the state. Hauriou (1989, pp. 97–102) states an antagonism between constitutional law and sociology, since the former is neither an exact science nor a social determinism, but asks questions about social relations and individual responsibilities. The debate between Duguit and Hauriou shows that French legal positivism was neither monolithic nor similar to the English legal positivism of Bentham and Austin, as Hauriou's conception of law is informed by his institutional theory (*théorie de l'institution*), the political philosophy of Henri Bergson, and his Catholicism.

Hauriou's institutional theory is a response to Duguit's sociological approach and attempts to synthesize the traditions of "objective" and "subjective law" in French legal positivism. However, Hauriou is also a connoisseur of Durkheimian sociology, which also emphasizes the study of institutions. In contrast to the work of Duguit, Hauriou's ideas have attracted renewed international interest in recent years as they relate to Schmitt's institutional ideas during his Nazi years (Croce & Goldoni, 2020; Croce & Salvatore, 2021a). It is important to keep in mind that Hauriou's legal theory is part of a European tradition of legal positivism that had its most important work in Italy in *L'ordinamento giuridico* (1918) by Santi Romano (1875-1947). In Germany, Schmitt (1934b) instrumentalized Hauriou's institutional theory as the basis for his theory of concrete order thinking (konkretes Ordnungsdenken) and the *Führerstaat* in National Socialism. After World War II the juridical-institutionalist approach was further developed by Roman Schnur (1927-1996) in Germany and Costantino Mortati (1891-1985) in Italy. Hauriou's work is extensive and diverse, as he wrote on administrative law, constitutional law, and legal philosophy. However,

his essay on the *Théorie de l'Institution* (1925, (1925/1990)) was his most influential work. He had already anticipated his institutionalist theory in the sixth edition of his book *Précis de Droit administratif* (1907), but then developed his theory further in *Principes de Droit Public* and *Précis de Droit constitutionnel*.

Hauriou (1925/1990, p. 90) begins his *Théorie de l'Institution* (1925, (1925/1990)) by claiming that his theory is a reaction to the two competing traditions of positive law that sought to cancel each other out toward the end of the 19th century: "subjective law," going back to Rousseau's idea of *volonté générale* and German *Staatslehre*, and "objective law," proposed by Duguit. For Hauriou, these theories overlooked the importance of institutions as the basis of positive law. In law, institutions represent a category of "duration" and "continuity." Hauriou (1925/1990, p. 97) argues that institutions consist of three features. First, of a "directing idea for a work or enterprise" (*idée d'œuvre ou d'entreprise*) to be carried out in a social milieu or group. Second, the emergence of a structuring power (*pouvoir de gouvernement organisé*) that determines the steps to be taken to achieve this goal. Third, the broad acceptance of the guiding idea (*manifestations de communion*) within the association around the desired goal (Croce & Goldoni, 2020, p. 66). Hauriou (1925/1990, p. 97) also points out that institutions are born, live, and die, and that they are divided into two types: "personified institutions" (*institutions-personnes*) and "non-personified institutions" (*institutions-choses*). The state, according to Hauriou, is a "personified institution."

Hauriou's conception of the state is an attempt at synthesis between an idealist philosophical conception and a sociological conception of institution building. For Hauriou, "the directing idea for a work or enterprise" to be realized is the central component of the institutionalist theory of the French state. Hauriou affirms that "the idea of the state is something other than the goal [*le but*] of the state and the function of the state" (1925/1990, p. 98). The idea is the object and the cause of the institution. Moreover, the idea has an objective and concrete reality. Because of this philosophical approach, Hauriou's theory of institutions has been associated with Platonism because it assumes the reality of ideas (Leontowitsch, 1936, p. 365). The Argentine jurist Arturo Sampay (1965, p. 33) recognises elements of natural law and scholasticism in Hauriou's conception of the "directing idea" and its teleological realization. When Hauriou speaks of the idea of the state, he means an idea that has a concrete existence. He says that the state cannot be conceived without a population, just as a trade union does not exist without members or a corporation without shareholders (1925/1990, p. 102). The goal of the state is an idea outside of the state, while the "directing

idea" of institutional theory is inside the state. Thus, the idea represents a plan, an inner guideline for the state:

> When we say that the idea of the state is that of a protectorate of national civil society, the idea of the protectorate evokes the idea of a specific organization and a specific programme of action. When we speak of the goal of the state, we would say that it is the protection of national civil society, which would only evoke the idea of an outcome. The difference between the action programme and the result corresponds to the difference between the directing idea and the goal. (...) The idea of the state goes beyond the idea of the functions of the state. The function is only the part of the enterprise that is already realized or determined. (...) The area of the function is that of the administration and the determined outflow of public services (Hauriou, 1925/1990, p. 99).

The "directing idea" leads to the formation of a structuring power (*pouvoir de gouvernement organisé*) that determines the steps that must be taken to realize the idea (Croce & Goldoni, 2020, p. 66; Hauriou, 1925/1990, p. 102). The idea of the state implies a group of actors (*citizens*) who are carriers (*le porteur*) of the idea. They are also the subject of the idea of the state. The word "subject" has an important meaning for Hauriou because it implies the responsibility and the rights of the citizens towards the idea. Hauriou (1925/1990, p. 103) explains that there are two principles for the organization: the separation of powers and the representative system. The powers are the executive, the legislative and the judicial, with their respective organs and functions. The representative system means accepting that an organ makes decisions and that these should be considered the decisions of all its members. However, it also requires the subordination of the individual will to the guiding idea to be achieved. Hauriou (1925/1990, p. 104) illustrates this with the submission of military leaders to civilian power, obeying not because of constitutional laws but because they believe in a civilian regime and an idea of peace. For Hauriou, then, the formation of a power of order is essentially based on voluntary submission and commitment to the idea of the state to be realized.

Institutional theory presupposes consent as the basis of political legitimacy, but this kind of legitimacy is less abstract and more concrete for Hauriou than the theories of constituent power and popular sovereignty of the 18th century. For Hauriou, institutional realization of the idea requires broad acceptance of the guiding idea (*manifestations de communion*) within the association around the aim they pursue (Croce & Goldoni, 2020, p. 66; Hauriou, 1925/1990, p. 105). Hauriou illustrates this with the great popular movements that usually accompany new political and social institutions. In Durkheim's words, this phenomenon leads to the emergence of a collective consciousness with which an opinion is

formed in the social environment. This process leads to the internalization, incorporation, and personification of the idea (Hauriou, 1925/1990, p. 107). Personification creates objective individuality. The idea of personification goes back to Léon Michoud's *Théorie de la personnalité morale* (1906). This influential early 20th century work was an attempt to reconcile French positivism with the 19th century German theory of the personality of the state. The idea of government creates a concrete institution that establishes a visible agreement between groups and governing bodies. For Hauriou, as Croce and Goldoni noted, the state is "the institution of institutions" and "the quintessential form of institution as well as the highest and most perfect social formation" (2020, p. 66).

It is important to note that Hauriou's institutional theory had a significant impact on Carl Schmitt's political and constitutional theory (Croce & Goldoni, 2020, pp. 121–124). Schmitt recognises how the debate between Duguit and Hauriou pits a sociological theory of rules (*règle de droit*) against an institutional theory. In his essay *Über die drei Arten des rechtswissenschaftlichen Denken* (1934b), Schmitt instrumentalizes Hauriou's approach during the Nazi era. He argues that the French word "*institution*" cannot be correctly translated into German because it can be confused with normativism (*Rechts-Ordnung*). He therefore opts for the translation *théorie de l'institution* as *konkretes Ordnungsdenken*. For Schmitt, concrete order thinking resolves the antagonism between natural law and positive law because the norm or rule does not create the concrete order (Böckenförde, 1971). Schmitt (1934b, p. 13, 1934/2004, p. 48) says that his concept of law is not the rule but the *nomos*, a concrete institutional order:

> The doctrine of the institution, which Maurice Hauriou (1856-1929) had developed during the period 1896-1926, contained the first systematic attempt of a restoration of a concrete-order thinking since the dominance of juristic positivism. Santi Romano's previously mentioned very significant theory of *Ordinamento giuridico* was already influenced by this work. Hauriou, long-standing *Doyen* on the law faculty at Toulouse, was the famous antagonist of his famous positivist colleague in Bordeaux, Léon Duguit (1859-1928). One can try to introduce the opposition of these great jurists with the pithy catchwords: metaphysics versus positivism, pluralism versus monism, *institution* versus *règle de droit*. But that point itself provides the best way to recognize to what extent the antitheses of the liberal nineteenth century have today become obsolete (Schmitt, 1934b, pp. 54–55, 1934/2004, pp. 86–87).

This notion of law as a "concrete order" finds various applications in Schmitt's work. At the time of National Socialism, Schmitt (1935) asserts that the *Führerstaat* is a "concrete order" that unites the NSDAP and the German people. Following Hauriou, Schmitt (1933) states that the triad "state-movement-people" has the *Führerprinzip* as its guiding idea.

Schmitt (1941c) also transferred this conception to international law through the idea of *Großraumordnung*, an "international concrete-order" of great spaces and powers. In other words, "das Völkerrecht ist als *jus gentium*, als ein Recht der Völker, zunächst eine personal, d.h. von der Volks- und Staatsangehörigkeit her bestimmte, konkrete Ordnung"' (1941c, p. 11). The coexistence of peoples formed at the same time a territorially concrete spatial order. In the postwar period, Schmitt will take up this idea again in *Der Nomos der Erde* (1950). The connection between Hauriou and Schmitt has led to a literature that locates him as a jurist who thinks politics and law from institutions and concrete order (Croce, 2011; Croce & Goldoni, 2020; Günther, 2011).

French legal positivism, represented by the different approaches of Duguit and Hauriou, ushered in a new era in French constitutional theory, and thus in the theory of constituent power. The debate is also a direct critique of Carré de Malberg's (1922) importation of German state theory into France. So far, I have analyzed the French positivist conception of the state and its critique of Rousseau's theory of sovereignty and German *Staatslehre* as "subjective law" traditions. Now I can explain how this legal positivist tradition defines the concept of constituent power. In the 19th century, the study of sovereignty focused on the emergence of constituent power in the English and American Revolutions and was also supported by the study of ancient Roman legal history. The innovation of French legal positivism in the early 20th century is a new scientific approach based on the lexicon of "functions" and "organs" of the state. The distinction between functions, organs, and powers of the state is the basis of the French positivist concept of constituent power. However, this institutionalist and positivist perspective also ushered in its later decline, as the positivist approach killed off Sieyès's original idea of constituent power by defining it as a "constitutional function" (*fonction constituante*) of parliamentary government in the French Third Republic.

3. Positivist Constituent Power

The translation of Mommsen's study of Roman public law (1887/1984) opened a new horizon for the study of constituent power in France. When French jurists discovered Mommsen, they realized that they could conceive of the constituent power as a function (rather than a power), as a "special legislation" (*législation spéciale*). While it is paradoxical that Sieyès's idea of constituent power led to a positivist conception of constitutional reform in parliamentary government, this issue must be considered in context. In 1789, constituent power was synonymous with revolution, while in the 1920s it was an anti-revolutionary and positivist concept that endured turbulent times. Parliamentary government in France survived World War I, and constitutional theorists wanted French democracy to survive. It was a time of economic crisis, revolution, and social upheaval, but France managed to avoid revolution and popular autocracy. While Fascism emerged in Italy in the 1920s, French state theorists, notably Carré de Malberg, consolidated the concept of constituent power as a "special function" exercised by parliament. The distinction between constituent power and "constituent function" solidified after the Bolshevik and German revolutions in a critical dialogue with German *Staatslehre*. All these milestones led to a new critical reflection on the *pouvoir constituant*, triggered by the constitutional theories of Duguit, Hauriou and Carré de Malberg.

The reception of Sieyès's idea of constituent power among the positivist theorists of the Third Republic is still controversial (Laquièze, 2008). Bastid (1939/1970, p. 591) said that Carré de Malberg's interpretation impoverished Sieyès's ideas and was fanaticism for positive law. However, the intellectuals of the French theory of parliamentary government succeeded in eliminating the revolutionary and sovereign character of Sieyès's idea of *pouvoir constituant* as a mandate from the people. The positivist conceptions of Duguit, Hauriou and Carré de Malberg eliminated the potentially arbitrary character of a "sovereign constituent power." They separated sovereignty (=constituent power in 1789) from Mommsen's conception of "constituent function." This last concept was adopted by the parliamentary government, so that there was no longer any hierarchy between the constituent and legislative functions. As a result, the constituent power was synonymous with any legislation that creates or amends the constitutional laws of the state. To understand this approach, we need to see why the positivist constituent power claims that the separation of powers is not a separation of functions.

a. Separation of Powers and Separation of Functions

The positivist theory of constituent power is based on a fundamental principle: *separation of powers* does not mean *separation of functions*. Among French positivist jurists, notably Duguit (1911/1928) and Hauriou (1893), there is a passion for understanding the anatomy of the state as a reflection of Durkheim's theory of the social division of labor in capitalist society. The concept of function is central. Durkheim (1960, p. 49) began his work on *De la Division du Travail* (1893) by noting that the term function has two meanings: "A system of living movements, abstracted from their consequences" and "the relation of correspondence which exists between those movements and certain needs of the organism." To speak of function in the division of labor, then, is to ask "to what need it corresponds" (1960, p. 49). Thus, Durkheim says, "we speak of the function of digestion, of respiration," and "respiration has for its function the introduction of necessary gasses into the tissues of an animal for the sustainment of life" (1960, p. 49). Durkheim clarifies that function in this sense is not "goal" or "object" but "role" because it implies a sense of correspondence. Just as Durkheim says that the concept of function consists in the social division of labor, French legal positivism defines the concept of "function" as something in the organic "life" of the state. In Hauriou's words:

> The division of labor leads over time to a clear distinction of functions, just as it leads to a distinction of services. One is the consequence of the other, because public functions provide public services. It follows that a particular function becomes a kind of thing that has its own existence independent of the official. The civil servant leaves, the function remains [*la fonction demeure*] (Hauriou, 1893, p. 271).

The distinction between *separation of powers* and *separation of functions* aims to legitimize the idea that parliament can assume functions that go beyond ordinary legislation, such as the constituent legislation. French legal positivism distinguishes between functions and organs within the state. There are legislative, administrative, and judicial functions (Carré De Malberg, 1920, p. 259; Duguit, 1911/1928, p. 156). Duguit's central criticism (1911/1928, p. 155) is that it is a mistake to determine the various legal functions of the state according to which organ performs a particular function. Duguit (1911/1928, p. 157) says that the French state has two essential functions: the legislative and the executive. By separating the concepts of function and organ, French legal positivism opens a new horizon for constituent power, because what we know as the legislature does not mean that it has a monopoly on the legislative function, but that the executive can also play a legislative role. The "constituent

function" (*fonction constituante*) in Mommsen's sense is thus not a monopoly of Sieyès's idea of the exercise of the *pouvoir constituant* in a constituent assembly, but can also be exercised by the representative body, the parliament. Thus, the parliamentary government of 1875 can exercise the constituent function, understood as constituent power (Carré de Malberg, 1922, p. 568).

To better illustrate this topic, I will explain the analysis of French legal positivism using the theory of separation of powers in Montesquieu and the Constitution of 1791. The separation between functions and organs starts from the analysis of the theory of separation of powers, a classical theory of the state originating from Aristotle, Polybius, and Cicero (Bondy, 1967, p. 12; Vile, 1967, p. 21). In the 17th century, this political theory became a rationalist philosophy, which understood it as a means of harmony and balance between the powers of the state. The theory of the separation of powers expresses the activity of the bourgeoisie and commerce in the 16th century. It is a "balance of imports and exports as the trade balance; in the theory of the balance of egoistic and altruistic impulses in the moral philosophy of Shaftesbury; and the theory of balance stemming from attraction and repulsion in Newton's theory of gravity" (Schmitt, 1928/2008, p. 221). However, it was not until Montesquieu, "who thought that he had discovered it working in the British constitution, had stated the theory that it began to have an important influence on governmental practice" (Humphrey, 1945, p. 332).

Locke sets forth his theory of the separation of powers in his *Second Treatise of Government* (2016), distinguishing between the legislative, executive, and federal powers. Montesquieu, on the other hand, recognises in *De l'esprit des lois* (1748) that the legislature, the body that passes laws, is actually composed of two distinct chambers: The lower chamber represents the people, and the upper chamber represents the nobility. Montesquieu also leaves the executive power to the king, who sees to the execution of the laws and also regulates intergovernmental relations. In Montesquieu's political theory, the judiciary remains the body that dispenses justice independent of political power. French legal positivism seeks to understand the division of powers as a social fact and as a division du travail. For this reason, Duguit (1907, p. 320) and Carré de Malberg (1922, p. 21) take up the chapter on the Constitution de l'Angleterre *(De l'esprit des lois*, book XI, chapter VI) and emphasize that Montesquieu never mentions the term "separation of powers," but conceptualizes that the executive, legislative, and judicial branches are separate powers but cooperative functions.

This separation between "functions" and "powers" aims to emphasize the functions of parliamentary government. Legal positivism's criticism of Sieyès and the Constitution of

1791 is that Montesquieu does not understand the separation of powers as a separation of functions. For Duguit (1907, p. 317) and Carré de Malberg (1922, p. 40), the Constitution of 1791 confused separation of powers with separation of functions because the legislative, judicial, and executive branches were conceived as autonomous and noncooperative powers. Thus, Duguit (1907, p. 318) argues that the political theories of Locke and Montesquieu were not the basis for this revolutionary constitutional design (1789-1791). For Duguit (1907, p. 318), they mainly describe how the English constitution had differentiated the functions and organs of the state. Duguit rightly notes that for Locke the legislative power is always supreme: "There must be several organs of government, but sovereignty resides in only one, to which all the others are subordinate, or sometimes in two organs united by close co-operation" (1907, p. 318). The distinction between powers and functions is the crucial element of the French positivist approach to the separation of powers in the English parliamentary tradition.

For French legal positivism, the analysis of the separation of powers as the division of functions in parliamentary government is better rooted in Montesquieu's comments on the *Constitution de l'Angleterre* (Carré de Malberg, 1922, p. 29). This positivist reading emphasizes that Montesquieu never uses the term "*séparation des pouvoirs*" because, although he recognises three functions of the state (executive, legislative, and judicial), he does not understand them as a division or exercise of sovereignty (Carré de Malberg, 1922, p. 21; Duguit, 1907, p. 319). In contrast to Locke, Montesquieu defines the executive as a power that cooperates with the legislature, so that the executive has veto power over the actions of the legislature. If the executive did not have the right to stop the legislature's interventions, the legislature would become despotic. As Humphrey (1945, p. 332) explains, Montesquieu even concedes that the nobles should have the right to be judged by the part of the legislature that they form, and that the legislature should serve as a tribunal for deciding cases in which a strict application of the law would be too severe. Montesquieu describes how the executive and legislative branches work together in the English constitutional tradition:

> But, if the legislative power, in a free state, has no right to stay the executive, it has a right, and ought to have the means, of examining in what manner its laws have been executed. (...) Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative. These three powers should naturally form a state of repose or inaction: but, as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert (*De l'esprit des lois*, XI, VI).

Contrasting Montesquieu's explanation with the constitutional theory of the French Revolution, Duguit (1907, p. 321) argues that the Constitution of 1791 was poorly conceived by conflating the separation of powers with the separation of functions. I have explained in the first chapter that Sieyès's idea of *delegation of sovereignty* is the essential character of the Constitution of 1791. Duguit's critique to this design can be seen as a positivist criticism of the entire Sieyèsian constitutional tradition. The separation of powers had existed since the 16th article of the Declaration of Rights of 1789: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all" (*Declaration of the Rights of Man - 1789*, n.d.). Then the title III of the Constitution of 1791 states that "sovereignty is one, indivisible, inalienable, and imprescriptible. It appertains to the nation; no section of the people, nor any individual, may assume the exercise thereof" (*Constitution de 1791*, n.d.). Moreover, "the nation, from which alone all powers emanate, may exercise such powers only by delegation," and "the representatives are the legislative body and the king" (*Constitution de 1791*, n.d.). Thus, legislative power is delegated to the National Assembly and executive power to the king, and judicial power is delegated to judges elected by the people.

Duguit (1907, p. 321) and Carré de Malberg (1922, p. 32) argue that neither Montesquieu nor Locke nor the American Constitution really established these separatist principles of constitutional design. The true meaning of the separation of powers is a "collaboration of representative bodies, a division of functions [*répartition des fonctions*]" (1907, pp. 324–325). According to Duguit, "when the title III of the Constitution of 1791 states that all powers emanate from the nation and are exercised by delegation, the authors of the Constitution "could only mean the following: parliament, the king, and the judiciary are each vested with one of the elements of sovereignty" (1907, p. 322). Thus, parliament was to have all legislative power and only the legislative function, the king was to have executive power and only the executive function, and the judiciary was to have all that corresponded to the judicial function. All organs were to be isolated and independent, without the possibility of cooperating with other organs, as in America or England. The power of the king is also an essential part of the nation. Duguit (1911/1928, p. 544) points out that the royal veto theorized by Sieyès is a power held by the king as the direct representative of the nation, so this power cannot be considered a form of legislative cooperation as in Montesquieu's *Constitution de l'Angleterre*.

> The powers [in the Constitution of 1791] are conceived as the very elements of the will of the state, which together constitute sovereignty. Powers are not organs. Organs

> are individuals and groups of individuals entrusted with the exercise of some or all of the sovereignty. The organs are parliament, which represents the legislative will of sovereignty; the king, the head of state, which represents the executive will of sovereignty; the judiciary, which represents the judicial will of sovereignty. The powers are the constituent elements of the sovereign national will, insofar as it is divided. Since the national will is sovereign, each of the elements that compose it is sovereign, each of the elements of sovereignty is delegated to a power by representation, and each power performs a different function. Finally, a power is a partial element of sovereignty that is incorporated into a body that performs a corresponding function (Duguit, 1907, pp. 321–322).

The positivist reading of the separation of powers as a cooperation of functions is very innovative because it legitimizes the idea of parliament in the French Third Republic as the bearer of various executive, legislative, and even constituent functions. However, Duguit's approach was not fully accepted by Carré de Malberg. Duguit (1907, p. 324) believes that the logical consequence of the Constitution of 1791 is that every state power is driven by the inevitable tendency to declare itself sovereign and destroy the other organs. This opened the door to conflicts, coups d'état, and the absorption of all powers in one organ depending on the circumstances, as happened in 1792-1793 and 1851-1852. For Duguit (1907, p. 324), the Constitution of 1791 destroys Rousseau's theory of sovereignty and Montesquieu's theory of separation of functions. In contrast, Carré de Malberg (1922, p. 49) believes that the Constitution of 1791 conceives of the separation of powers in the sense of Montesquieu, since the powers are considered equal. However, in Montesquieu and in the Constitution of 1791, the legislative branch always takes precedence over the executive branch because of the functions it performs. Thus, Carré de Malberg (1922, p. 49) points out that Montesquieu's theory of the separation of powers does not consist in the division of functions, but primarily in the primacy of the legislative branch. Carré de Malberg has a differentiated reading because he says that Montesquieu's theory represents a separation of powers with vertical separation of functions.

French legal positivism made an important contribution to the concept of constituent power by conceiving it as a "special function" within parliamentary government. It is an interpretation of Sieyès that is inspired by the political thought of Montesquieu. Carré de Malberg (1922, p. 516) points out that only in Sieyès is it directly expressed that there is a constituent power (the nation) from which all constituted powers emanate. However, before Sietes, it was "necessary for Montesquieu to arrive at the idea of a primitive and superior authority" that "stands above its various agencies and establishes between them the division of powers" (1922, p. 515). Thus, according to Carré de Malberg, it can be said that "the theory of the separation of powers paved the way [*ouvrait la voie*] for the theory of

constituent power" (1922, p. 515). He sees that the concept of constituent power is consistent with Montesquieu's idea that the legislature is elected "*pour représenter le peuple*," which implies popular sovereignty. This is the rational basis on which "Sieyès builds his doctrine of the separation of the constituent power" (1922, p. 516). By distinguishing powers from functions, French legal positivism transformed the concept of constituent power into a constituent function.

The concept of separation of powers is central to the discussion of the concept of constituent power. Duguit's and Carré de Malberg's readings of Montesquieu's political thought inevitably leads us to this discussion, revived by Rubinelli (2020a), of the vertical separation between constituent and constituted power. Rubinelli (2020a, p. 59) criticizes Tuck's reading (2016) of Sieyès's idea of constituent power from separation of powers theory because it attributes to a particular power (the *pouvoir constituant*) the power to draft a new constitution. For Rubinelli (2020a, p. 59), this reading is wrong because the separation of powers is between equal powers, while the separation proposed by Sieyès is a vertical separation of powers in which the constituent power has the highest hierarchy and is superior to all other powers of the state. "The constituted order, with the separation of legislative, executive and judiciary inside it, is inferior to the constituent power and depends on it. This vertical separation, in my view, is what makes constituent power fundamental" (2020a, p. 59). In contrast to this contemporary discussion, the innovation of the French legal positivists is that they consider that the constituent power does not necessarily have a hierarchy in relation to the other powers, since it is a "special function" that can be delegated to another political body, such as the parliament.

b. Constituent Power as a Function and Organ of the Representative State

The legal positivist theory of constituent power is the basis for legitimizing the 'constituent powers' of parliament in the French Third Republic. The positivist perspective on Montesquieu and the English Constitution, which analyzes the separation of powers as a separation of functions, introduces a new conception of constituent power. French legal positivism begins to conceive of Sieyès's idea of constituent power as Mommsen's idea of a "special function," a "special legislation" in the life of the representative state. If the constituent power is conceived as a function without a revolutionary character, the difference between Sieyès's original idea, which emerged in 1789, and the constituent function, which is exercised today through the procedures established in the constitution, simply disappears. The constituent function neutralizes the revolutionary and potentially arbitrary character of the constituent power, because as a function, as a simple procedure of constitutional reform or constitution-making, the *original constituent power* of 1789 is the same as the exercise of the constituent function of the National Assembly. Now the parliament is the bearer of the *derived constituent power* (the constituent function). The theory of vertical separation between constituent and constituted power established by Sieyès is also blurred in French legal positivism. Goezler (1997) has explained this new reading in an excellent way as follows:

> There is no difference between the *original constituent power* and the *derived constituent power* in terms of their function. They perform the same function: to enact constitutional norms. From its function, the derived constituent power is the equivalent of the original constituent power. This is because it can revise the constitution established by the original constituent power. There is no difference in legal force between the rule originally established by the original constituent power and the rule subsequently established by the derived constituent power. Both have the same force of law [*même valeur juridique*] as rules in the same constitution (Gözler, 1997, p. 28).

The definition of Sieyès's idea of constituent power as a constituent function is common to French legal positivism. However, there are some important differences in the way this constituent function should be understood in French constitutional history. There were two positivist conceptions of the exercise of constituent power: the theory of the "institutional foundation" of the republic (Hauriou) and the theory of an "organ of the sovereign state" (Carré de Malberg). Duguit did not develop a theory of constituent power, but he outlined his approach in his study of the history of the separation of powers in France (Duguit, 1893). He is, however, credited with the assertion that constituent power is "the

central problem of French public law" (Carré de Malberg, 1922, p. 483). Duguit affirms that the history of popular representation was well established by Mommsen and his study of the extraordinary functions in Roman law:

> This representation of the people by their magistrates appears particularly clearly at the time of the establishment of the Principate, which Mommsen characterizes as follows: "Like the early republic, the Principate is based on popular sovereignty. The powers of the state exercise no right of their own; they all exercise the rights of the people by representation; the prince himself is nothing but a magistrate" (Duguit, 1911/1928, p. 640).

Nevertheless, Duguit (1911/1928, pp. 640–647) contrasts Mommsen's positivist idea of representation in Roman law with the political theory of representation of the French Revolution and Sieyès. As I explained in the first chapter, Duguit emphasizes that the constituent power is essentially a "representative mandate" of an unorganized and pre-state constitutional entity: the nation. The idea of a will of the people outside and before the state is the basis of the French Revolution's theory of representation:

> Reduced to its simple elements, the French theory of representation boils down to this: there is a general will, a will of the nation, distinct from the individual will; this will is sovereign; it is necessary to secure its exact expression as far as possible. The aim of this will, if it exists, is to ensure the preservation of all the constituent elements of the nation. These elements are not only individuals, but also groups. The representation of the national will can therefore be ensured only if all the constituent elements of the nation are included in the representative body: the individuals and the groups (Duguit, 1911/1928, p. 754).

The legal positivist reading of the concept of constituent power is a reaction to this Sieyèsian conception of the nation. The constituent power is now understood as a function, but this function is not understood as a *delegation of sovereignty* in the sense of Sieyès's idea in 1789. As I explained, Duguit has pointed out that the theory of popular sovereignty and German "subjective law" presuppose an anti-scientific and metaphysical conception of law. Duguit says: "If the concept of delegation is to be rejected, it is because it presupposes a personality of the represented element" (1911/1928, p. 550). Similarly, Hauriou points out that the theory of delegation is the political theory of the French Revolution, the fiction of "pretending that the constituent power resides in the nation and delegating it by a special operation to a special body, usually a constituent assembly, in order to adopt a constitution" (1916, p. 640). Moreover, Hauriou says that it is wrong to assume that the nation is "unorganized," so that the unorganized and "non-constituted nation" has the power to

constitute and organize itself. For Hauriou, Sieyès's conception of constituent power is discredited with historical facts in France, as it is the theory behind the exercised of the Napoleonic plebiscites (1916, p. 640).

The positivist conception of constituent power is also an explicit reaction to popular autocracy, understood as Bonapartist dictatorship. Even before Schmitt's concept of *sovereign dictatorship* in the Weimar Republic, Hauriou criticized the connection between Sieyès's idea of constituent power and the rise of 19th century Bonapartism. Hauriou (1916, p. 678) says that constituent power as a *delegation of sovereignty* in the French Revolution was discredited by the history of Napoleonic plebiscites. He explains that since Sieyès, the constituent power has been conceived as a power separate from the legislative power, emanating from the nation by special and direct delegation (1916, p. 679). However, "the doctrine of the delegation of constituent power has proved to be a dangerous instrument of dictatorship through a plebiscitary referendum and an appeal to the people [*l'appel au peuple*]" (1916, p. 680). Hauriou refers here to the case of Louis Bonaparte in 1851, where the initiative to revise the constitution was activated by a plebiscite under the argument of a supposed mandate from the people. Thus, Louis Napoleon will "again put to the vote by plebiscite the constitution he has drawn up, and by this skilful pretext the delegation of national sovereignty will lead to a dictatorial constitution" (1916, p. 681). Hauriou believes that the Sieyèsian tradition allows this exercise of constituent power in a dictatorial manner and against the parliamentary government.

To prevent a possible exercise of constituent power that could lead to popular autocracy, French legal positivism assumes that the nation is already *constituted* in the institutions of the state. As with Durkheim, the concept of function refers to a "correspondence," a "role," a task delegated to a part of the *division du travail* within the state. According to this legal-sociological approach, the nation and its constituent power are not in a "state of nature," or in *natura naturans*, but are already institutionally organized in the organs of the state. In other words, the nation has become *positive* or institutionalized in the state:

> The theory of the delegation of constituent power [of 1789] has fallen into disrepute. Today, it is generally considered that the constituent power belongs to the ordinary organs of government, at most with the obligation to comply with certain forms; that is, that the nation is constituted [*la nation est constituée*] by its organs of government, far from being constituent [*soit constituante*], or, more precisely, that it is constituted [*se constitué*] by its organs of government, which are involved in the life process of the corporative institution [*vie de l'institution corporative*] (Hauriou, 1916, p. 640).

This positivist idea of the "constituted nation" from Hauriou's institutional perspective implies a form of organization within a representative state, so that his theory is based on the idea that the function of constituent power is to create the constitution (=plurality of constitutional laws) within the procedures of institutions. For the French positivist conception, the constitution is a "statute of the corporate state and its members" enacted in the name of the nation (Carré de Malberg, 1922, p. 573; Hauriou, 1929, p. 246). Thus, Hauriou (1929, p. 246) says that the constituent power is simply a "legislative founding process" (*óperation de fondation*) exercised by a organ (such as a constituent assembly, but also parliament) according to a "special procedure" (*procédure spéciale*). He calls it "special" because it is a constitutional provision that provides for procedures different from those used in the creation of ordinary laws. Thus, according to Hauriou (1929, p. 247), constitutional laws in the French Third Republic are created and amended by the bicameral National Assembly sitting in Versailles according to a special procedure, while ordinary laws are passed by the two chambers sitting separately in Paris. Here Hauriou develops his idea of "supra-legality" (*superlegalité*), since constitutional laws are created by a special procedure in parliament and constitute a higher legal order. Hauriou thus gives the concept of constituent power a legal-parliamentary basis:

> By its legal form, the constitution is adapted to the ordinary laws, while it is superior to them; it constitutes a supra-legality (*superlegalité*), which is still a kind of legality, and this circumstance facilitates the organization of the judicial review of the constitutionality of the ordinary laws, since the contradiction between the texts or principles is presented as a case of conflict of laws (Hauriou, 1929, p. 247).

In the creation of a new constitutional order, however, there is no parliamentary procedure, but a body created specifically for this purpose (a constituent assembly). Hauriou (1925/1990) takes up his institutional theory of the "directing idea for a work or enterprise" (*idée d'œuvre ou d'entreprise*) to explain this constituent body in institutional terms. Hauriou sees in the concept of the constituent power his institutional idea of the "*idée d'œuvre*," that is, the idea for the foundation of the representative state. For Hauriou (1929, p. 248), the positive concept of constituent power is a "legislative founding process" exercised on behalf of the nation. Hauriou (1929, p. 248) points out that the people, of course, do not act directly in an assembly. The people, understood as the electorate, can participate directly through a constitutional referendum, which is a means of participation within a representative state (1929, p. 248). Hauriou says that political liberty is a form of popular participation in the activities of representative institutions, so that the "constituent procedure" (*opération*

constituante) is exercised by representatives elected by the people according to a legal electoral procedure:

> In the drafting or revision of a constitution, either new [parliamentary elections] may be held if the ordinary chambers are to be [the holders of] the constituent power, or, better still, the election of an extraordinary national convention [*convention nationale extraordinaire*], purely constitutional and independent of the ordinary legislative chambers. In this way, elections are held on constitutional questions; the people are directly concerned and have participated through the electoral process in the creation of the government [*l'oeuvre de l'institution gouvernementale*] (Hauriou, 1929, p. 249).

This passage illustrates how the concept of constituent power is understood as a "special function" that can be exercised by both parliament and a constituent assembly. According to Hauriou (1929, p. 249), the latter is an organization in the constitutional tradition that originated at American independence. The idea of a "*assemblée de révision*" was released in France with the National Convention of 1792, which was convened by the legislative assembly, as was the National Assembly, which was convened on March 5, 1848, to adopt the constitution of November 4, 1848. However, there is also a long tradition of partial revisions of the constitution in the parliamentary legislative chambers. According to Hauriou (1929, p. 249), these two forms are mechanisms of total and partial revision of the constitution. In French legal positivism, as we will also see in Carré de Malberg, the meaning of "total" and "partial" is not clearly handled, as the debate on the boundary between total and partial revision is open (Quiriny, 2015; Schmitt, 1928/2008, Chapter 11). Hauriou (1929, p. 251) points out that in North America the activity of constitutional amendments predominates over "total revisions of the constitution," so that the constituent power as an assembly (constitutional convention) is replaced by the "constituent function" of parliament (legislative reform with referendum).

For Hauriou's theory of constituent power, the establishment of the representative state also needs a manifestation of popular support for its political legitimacy. Hauriou borrows from the American Constitutional Convention rather than the National Constituent Assembly of 1789, as he points out that the constituent power is a "founding legislative process," a special legislative power, rather than a *delegation of sovereignty*. For Hauriou (1929, p. 251), this means that the exercise of constituent power is subject to the principle of separation of powers. Constituent power must be separate from the legislative power, and the latter must not absorb the executive power. Hauriou points out that the assemblies of 1848 and 1871-1875 contained both legislative and constituent power. However, Hauriou says that these assemblies are primarily legislative and have the constituent function only as a side

effect. The problem is how the people consent to the drafting of a new constitution. Hauriou (1929, p. 253) argues that the idea of a "juridical act" of founding the representative state implies the vitality of the people as co-founders of the constitution. Hauriou shares the Platonic philosophy of the reality of ideas (Leontowitsch, 1936), which establishes the political legitimacy of the constituent power:

> This decision of the government and this support of the nation are sufficient for the existence of the act of incorporation by law. It follows that the state, as a corporation and juridical person, is not self-founding. It is founded by founders who are, on the one hand, the provisional government and, on the other, the community of the people [*communauté nationale*]; but the founders act with the intention of founding the state and under the action of the idea of the state [*l'action de l'idée de l'Etat*]. (...) The power to found is essentially a power to dispose of the thing by changing its substance. (...) Here the substance of the thing, the state, can be seriously changed. (...) This means that the nation is not only the custodian [*dépositaire*] of the state institutions, but that it is the owner of these institutions, with a kind of *jus abutendi* (Hauriou, 1929, pp. 253–254).

This passage looks technical, but it aims to legitimize the idea that the parliament of the French Third Republic can exercise constituent power, understood as a constituent function. This positivist approach has two main consequences. First, according to Hauriou, constituent power is based on law and on the idea of the creation of institutions: "All countries are oriented toward a system of revision through state mechanisms for the elimination of dangers and perniciousness" (1929, p. 254). From this institutional approach, "the perniciousness of constituent power is reduced to a *minimum*" (1929, p. 254). More importantly, this legal exercise of constituent power is nothing more than "a means to avoid revolution" (*moyen d'éviter une révolution*) (1929, p. 255). Second, Haurious's theory excludes the *sovereign* exercise of constituent power, since the institutional theory speaks of a *juridical* exercise of the constituent function. To illustrate the difference between juridical and sovereign, Hauriou quotes Mommsen's study of constituent power in Roman law. Here he emphasizes that the constituent function can be exercised by the same institutions within the representative state:

> The great advance [*progrès*] over the ancient states is the abolition of the accumulation of executive and constituent power [=constituent function]. In antiquity, constituent power was essentially a magistracy [=an authority] and therefore included the executive power (...) (1929, p. 252). Mommsen has made a careful study (*Droit Public Romain*, book IV) of the extraordinary constituent powers [*pouvoir constituants extraordinaires*] of which the Roman Republic at times made use and finds that all constituent powers were created by the laws [*créés par des lois*] (1929, p. 256).

Hauriou's institutional theory of constituent power practically reduces Sieyès's original idea of 1789 to a "special" legislative function within an organ of the state: the parliament (1875) or constituent assembly (1848). For Hauriou, the point is to neutralize Sieyès's idea of the delegation of sovereignty and to avoid the danger of revolution and popular autocracy (Bonapartist dictatorship). For this reason, Hauriou sees his theory as an overcoming of the idea of constituent power in the French Revolution: "We must have the same abhorrence of the terrible experience of the constituent dictatorship [*dictature constituante*] of the National Convention, which inevitably led to the Reign of Terror, and we must forever guard against entrusting to a constituent body anything other than this special legislative power [*pouvoir législatif spécial*]" (1929, p. 252). Duguit, Hauriou, and Carré de Malberg integrated the constituent power into a positivist theory of the parliamentary government. Carré de Malberg's view, however, differs from that of Hauriou in that his theory of constituent power is entirely in the German tradition of Laband, and Jellinek. While Hauriou believes in the institutional nature of the constituent function, Carré de Malberg understood constituent power as a special function within the sovereign state. The National Assembly of the French Third Republic, which emerged from the constitutional laws of 1871-1875, can naturally assume the constituent function. This gives rise to the French conception of non-sovereign constituent power.

c. Parliament as the Bearer of the Non-Sovereign Constituent Power

The theory of non-sovereign constituent power is the theory of parliamentary government as the bearer of the constituent function. For Hauriou (1929), who admires the United States Constitutional Convention, the constituent function is still identified with a constituent assembly (*assemblée de révision*). This implies the convening of a "*révision totale*" to create a new constitution that restores the republic and avoids revolution. In the French tradition, the limits and scope of the word "*totale*" are still contested (Quiriny, 2015), so much so that Schmitt (1928/2008, p. 147) himself proposed to distinguish the concepts of constitutional reform from the "elimination" and "annihilation" of the constitution. Hauriou idealized the American model to defend the principles of liberty and individual rights in his constitutional revisions (amendments). Carré de Malberg (1922, pp. 552–553), on the other hand, identifies much more with the model of parliamentary government as the bearer of non-sovereign constituent power that emerged from the constitutional laws of 1871-1875. Here, the constituent function is exercised and absorbed by the National Assembly, so that no separate or special body (such as a constituent assembly) exercises the constituent power. Thus, one can speak of a non-sovereign constituent power on the model of English parliamentarism. Carré de Malberg explained this parliamentary theory of constituent power as follows:

> The Constitution of 1875 did not establish the principle that any revision requires the convening of an extraordinary constituent assembly composed of special deputies elected only for the constituent work. Rather, it follows from the above-mentioned Article 8 that the constituent power is currently exercised by the same members who constitute the two Houses at the time of the opening of the revision. Thus, this revision does not presuppose general elections or special mandates for a constituent work [*oeuvre constituante*]. Likewise, the amendments introduced in the constitutional laws by the revision are no longer subject to the condition of ratification by the people for their final adoption. In this twofold respect, it can be said that the perfection of the revision (la perfection de la revision), as well as its initiative, depend, by and large, solely on the parliamentary will [*la volonté parlementaire*]. In this respect, the Constitution of 1875 approximated the English system, in which it is the duty of Parliament to express the national will in all matters (Carré de Malberg, 1922, p. 553).

Carré de Malberg's innovation in this passage is that he attempts to reconcile Mommsen's theory of the "constituent function" with the German theory of sovereignty and parliamentary form of government in the French Third Republic. The concept of constituent

power is a function within the parliamentary government. However, this raises the question of the political legitimacy of the non-sovereign constituent power exercised by parliament.

The solution of Carré de Malberg consists in the theory that only the state is *sovereign*, so constituent power is only a special function of the parliamentary government. From a historical perspective, the National Assembly as the body that exercises the constituent function, is the result of the rejection of Sieyès's idea of constituent power in the 19th century. The concept of constituent power was a delegation of sovereignty. For this reason, for French legal positivism, Sieyès's idea is associated with the French Revolution and the Bonapartist dictatorship. Although Hauriou (1916, 1929) criticizes this tradition of Rousseau and Sieyès as metaphysical and anti-scientific conceptions, he recognizes the necessity of the constituent power as a "special legislative process" for the democratic reform of the French Republic. Carré de Malberg, on the other hand, radicalizes the approach of French legal positivism by importing from Germany the "theory of the organs of state" (Jellinek, 1899/1922; Schönberger, 1997). Carré de Malberg resolves the political legitimacy of constituent power by asserting that only the state is sovereign and the nation is *personified* in the state: "The nation alone, united and personified in the state, is the subject of public power" (1922, p. 484). Carré de Malberg turns on its head the French tradition, going back to the Enlightenment, Rousseau and Sieyès, according to which the sovereign nation is in a state of nature and precedes the state:

> This is the most important juridical fact that jurisprudence must take into account, and it can take it into account only by recognizing that the state, as an expression of the unitary collective, possesses a global individuality [*individualité globale*] different from that of its particular and transitory members, that is, by defining the state as a legal person. Consequently, in statisized societies [*sociétés étatisées*], what the jurists more correctly call the state is the legal entity in which the national collectivity is summarized in the abstract. Or again according to the definition of the French authors: the state is the personification of the nation [*L'Etat est la personnification de la nation*] (Carré De Malberg, 1920, p. 9).

Carré de Malberg's thought is the culmination of the positivist view that the state is legitimate simply because it is a historical and observable fact, in contrast to the contractualist theories that prevailed during the French Revolution. He uses the German theory of the state as a "personification of the nation" to reject the theory of the social contract as the basis of the political legitimacy of the French state (1920, p. 51). He explains that this theory originated in Germany with Althusius, in England with Hobbes and Locke, and found its highest expression in France with Rousseau. He points out, however, that "the doctrine of the social

contract is generally rejected today" (1920, p. 52) because there is no historical evidence for it and because it cannot be proved empirically that a common will emerges from the sum of individual wills (1920, p. 53). Carré de Malberg points out that Rousseau's theory of the social contract and the volonté générale is rejected by legal positivism, so that the state in the positive sense has no legal basis but a historical one: "The emergence of the state is a simple fact that cannot be legally qualified" (1920, p. 62). If the state is a historical fact, "acts of the will of individuals prior to this organization of the state are not to be considered" (1920, p. 64). For Carré de Malberg, then, there is no constituent power in the sense of Rousseau and Sieyès, because the appearance of the state presupposes the factual appearance of a constitution:

> Ultimately, it can be said that the birth of the state occurs at the moment it is endowed with its first constitution. Like the state itself that it gives birth to, this first constitution is a mere fact that escapes any legal qualification: Its foundation is not subject to any legal order that precedes it. Therefore, it is a fundamental error to search indefinitely for the law that underlies states and their constitutions, as some authors have argued (Carré De Malberg, 1920, p. 66).

If the state and the first constitution are a historical fact, Sieyès's tradition is eliminated from legal positivism. The question then arises why Carré de Malberg still speaks of constituent power. As I have argued, legal positivism has transformed the *pouvoir constituant* into Mommsen's concept of constituent function, into a special legislation. Historically, as I explained in the first chapter, the concept of the nation was a political entity before and outside the state. In German state theory, on the other hand, the concept of the nation and the people were organs within the sovereign state (Laquièze, 2007). For German legal positivism and Carré de Malberg, there is no real difference between the creation of the constitution and the reform of the constitution, which takes place in the legislature. Since Gerber and Laband, the function of constitutional revision lies with a single organ of the state: the legislature (Bouveret, 2003, pp. 332–345). The German Constitution of 1871 illustrates this doctrine, as constitutional revision is carried out in the ordinary legislature: "Amendments to the Constitution are made by the legislature" (art. 78). The legislative body is not sovereign, since German state theory conceives of the state as a "juridical person" consisting of organs and functions without the legitimation of an original constitutional power. Following the German approach, Carré de Malberg anchored the constituent function in the representative body within a sovereign state.

Carré de Malberg takes up the problem of constituent power in French public law raised by León Duguit by importing Jellinek's *Allgemeine Staatslehre* into French public law (Beaud, 1994, p. 293). The Strasbourg jurist explains that a corporation is an "individual or a college of individuals [collège d'individus] whose will is fixed by the organic status of the national community as the will of the state" (1922, p. 483). Moreover, "the corporation does not exercise its own power, but the power of the nation possessed by the state [*la puissance de la nation étatisée*]" (1922, p. 483). However, Carré de Malberg emphasizes that the constitution is the channel (*le canal*) through which the state power communicates with the various organs of the state about its exercise (1922, p. 484). Therefore, "in fact and in positive law, every power exercised in the state has its origin in a transmission made for the constitution" (1922, p. 484). The central challenge of his *Théorie de l'organe d'État* lies in the following question: whose task is it to make the constitution itself? The question concerns the idea of a will (*volonté*). This will could be called "*volonté contituante*," in the sense of a generative will of the state exercising a "véritable volonté souveraine, a volonté primaire constituante" (1922, p. 485).

Like Duguit and Hauriou, Carré de Malberg rejects the idea of a *volonté constituante* and a "subjective right" that precedes the state, because this theory implies that sovereignty lies outside the state, that is, with individuals. For the Strasbourg jurist, referring to Zweig's work (1909), this approach and belief are typical of the political philosophy and natural law of the 16th to 18th centuries that inspired the French Revolution (1922, pp. 485–486). According to him, the French revolutionaries had the idea that there is a "constituent act" (*l'acte constitutionnel*), the declaration of the rights of man, which precedes and determines the "social contract" (*pact social*) and constitutional law (1922, p. 486). He also says that the same error is repeated in Sieyès's idea of the *pouvoir constituant* and the *pouvoir constitué*, because "la représentation à l'œuvre constituante était illogique" (1922, p. 489). Carré de Malberg counters this approach by arguing that law must be understood as the set of rules imposed on people in a given territory by a higher power capable of exercising authority: the sovereign state.

Carré de Malberg's theory resolves the question of the political legitimacy of the constituent power by including it in the constitutional organs: "The theory of the organs of the state must therefore be extended to the constituent power" (1922, p. 494). The only superior and legitimate authority is the state itself: "The state, which is the source of law [*source du droit*], cannot itself have its source in law" (1922, p. 490). A pre-existing constituent power does create the state because the state is the very condition of law and cannot be conditioned

by law. In contrast to the political philosophy of the 18th century, the Strasbourg jurist argues that the state cannot be said to exist only when it has been created by the consent of all or even the majority of the members of the nation, because "the origin of the state is a fact; it is to this fact that law is later attached" (1922, p. 492). From this approach of legal positivism, the French idea of the constituent power is now a derivative organ of the sovereign state:

> It follows that the so-called constituent organs cannot have more power than the constituted organs [*organes constitués*] before the Constitution. Each organ, including the one called to exercise the constituent power [*puissance constituante*], derives its powers [*capacité*] from the constitution. From this point of view, it can even be said that, strictly speaking, there is no constituent organ: There are only constituted organs [*organes constitués*] in the state (Carré de Malberg, 1922, p. 500).

The elimination of Sieyès's distinction between constituent and constituted powers allows Carré de Malberg to examine the constituent function reserved for the National Assembly. Under the constitutional laws of 1875, "constitutional amendments depend essentially on the will of the majority of the two chambers of parliament" (1922, p. 568). Carré de Malberg (1922, p. 574) explains that since Sieyès, the heir to the doctrine of natural law, the constitution is understood as a fundamental law because it is created by a constituent and not by a constituted power. The constitution is thus understood as a fundamental law, a law superior to the general laws. According to Carré de Malberg (1922, p. 576), however, the constitutional laws of the French Third Republic do not have this structure, which was known under Sieyès. Here, there is a constitutional "shortcut" (*méthode de brièveté*), evident in the first article of the law of February 25, 1875, which states that the Chamber of Deputies is determined by universal suffrage (1922, p. 576). All this shows how Sieyès's idea of the fundamental law and the constituent power is replaced and reduced to the realm of parliamentary legislation.

Carré de Malberg also illustrates this change in the conception of constituent power with the "Law on the Organisation of the Senate" of February 24, 1875. On August 14, 1884, the National Assembly declared that the seven constitutional articles on the Senate "no longer have a constitutional character" (1922, p. 577). Thus, according to him, the organization of the Senate and the election of senators were modified by a "simple organic law" of December 9, 1884 (1922, p. 578). Carré de Malberg points out that the constituent power is no longer merely a constituent function exercised by a special body separate from the National Assembly, but a *competence* within the National Assembly. In other words, parliament has become a non-sovereign constituent power, since only the French state is the bearer of sovereignty.

> To sum up, the separation of constituent and legislative powers in France is now minimal [*très restreinte*]: it currently applies to a tiny [*petit*] number of texts and matters. The sphere of competence of the legislator is correspondingly extended. The power of Parliament appears particularly strong today as far as the legislative regulation of the individual rights of citizens is concerned (1922, p. 578).

In the 1930s, Carré de Malberg (1931/1984) took up this reading in his study of the French constitutional laws of 1875. He adds that another harmful legacy of revolutionary constitutionalism was the lack of distinction between *représentant* and *fonctionnaire*, since parliament was seen as the representative of the nation, which in practice eventually became the "sovereign" (1931/1984, p. 20). The other organs of state, such as the chief executive, judges, and administrators, are not representatives of the nation, but only exercise functions or orders, *puissance nationale*. Bastid (1939/1970, p. 582) is also correct in claiming that this analysis was similarly developed in Sieyès's conception of *pouvoir constitué*; however, since Sieyès also speaks of *l'unité nationale*, his theory is rejected by French legal positivism. In summary, Carré de Malberg reduces constituent power to the positive law of constitutional review in order to clarify its legal nature with his *théorie de l'organe*. This reductionism aims to eliminate the extralegal definition of the constituent power and the negative influence of the revolutionary practices and ambiguities found in the constitutional laws of 1789-1793.

Only through this positive definition of constituent power can we speak of the "will of the people" in parliamentary government. Colón-Ríos (2020, p. 233) rightly points out that Carré de Malberg's approach attempts to equate nation and state. What is the main consequence of the *Théorie de l'organe d'État*?. Rubinelli (2020a, p. 100) has claimed that Carré de Malberg offers a typical 19th-century theory of the relationship between sovereignty and constituent power. However, Carré de Malberg's theory of the state did not originate in France, but in Germany. Beaud (1994, p. 322) points out that Carré de Malberg modifies Sieyès's constitutional theory by replacing the natural law concept of the "nation" with that of the German theory of the "nation-state" as a legal entity. In other words, he transforms the constituent power into a constituent organ (parliament) with a constituent function. Beyond these debates, French legal positivism finally reduces the revolutionary nature that the concept of *pouvoir constituant* had in Sieyès, so that Bastid is also right when he says that in Carré de Malberg's theory there is an abusive reduction of Sieyès's thought, proving that he is "the agnostic who closes himself in the explanation of positive rules" (1939/1970, p. 591).

It is important to compare this positive theory of constituent power with Schmitt's theory of constituent power in the Weimar Republic. While Schmitt distinguishes between

sovereignty and *sovereign dictatorship*, the French positivists distinguish between *constituent power* and *constituent function*. Carré de Malberg represents the adoption of German state theory in France, while Schmitt develops his theory while retaining Sieyès's original idea of the nation as a political entity that precedes the state. The main difference between Schmitt and Carré de Malberg is that the former assumes that the people give a mandate to create a new constitutional order. Carré de Malberg also recognizes the non-constitutional manifestations of constituent power, but unlike Schmitt, he seeks ways to neutralize them. Thus, Carré de Malberg and the Schmittian tradition are absolutely antagonistic. Dogmatically, Schmitt's concept of constituent power is closer to Sieyès's idea than to that of French legal positivism. A key point is that Schmitt, as I explained in the previous chapter, developed his theory of constituent power in the context of his critique of parliamentary government. For him, it would be inconceivable that the parliament would be the bearer of the constituent power. Duguit, Hauriou, and Carré de Malberg, on the other hand, consider it plausible that parliament exercises the constituent power, but understood as Mommsen's concept of the constituent function in Roman law. Third Republic jurists believed that this conception of constituent power protected parliamentary government from the threat of revolution and popular autocracy.

4. Conclusions

Towards the end of the 19th and the beginning of the 20th century, a new conception of the *pouvoir constituant* developed in France, aimed at avoiding the risk that the exercise of the constituent power would turn into a revolution or a popular autocracy (Bonapartist dictatorship). The rejection of constituent power evolved into a rejection of any kind of unlimited power. For liberal thinkers such as Constant, Guizot, and Tocqueville, any sovereign power meant an arbitrary exercise of power. For this reason, the idea of constituent power was seen as the illiberal legacy of the French Revolution. Laboulaye's important article sums up this sense of fear and distrust. For him, the *pouvoir constituant* in France was the cause of all political misfortunes, as evidenced not only by the excesses of the Revolution of 1789, but also by the Revolution of 1848 and the plebiscites of Louis Napoleon that established the Second Empire. For Laboulaye, the constituent power was a "sophism" and an "error," since it was based on the idea of the unlimited power of the people and the delegation of sovereignty to extraordinary representatives. Sieyès's idea of constituent power was therefore considered one of the main causes of the revolution and popular autocracy in 19th century France.

However, when French positivist jurists of the Third Republic discovered Mommsen's conception of constituent power in Roman law, they began to conceive of it as a "special legislative function" within parliamentary government. This reading developed in the context of the rise of legal positivism and the social sciences in France under the influence of Durkheim's sociology of law. Mommsen's conception of constituent power was understood as the true concept of constituent power, which had only been deformed by the political intentions of Sieyès in the French Revolution. French positivist jurists assume that the true concept of constituent power is ancient and does not originate from Sieyès, but is found in Roman law and has an original meaning that is juridical. Constituent power was no longer a mandate from the people to create a new constitutional order, but a "special legislative function" exercised by an authority within the constitutional order. This authority may be the parliament or a constituent assembly. In both cases, the authority to exercise these constituent functions is limited by a law. With Mommsen's interpretation, French legal positivism believed it could neutralize any autocratic and revolutionary derivatives of constituent power. Sieyès's idea was thus constitutionalized in the authority of parliament in the French Third Republic.

Carré de Malberg's theory of the state takes the positive conception of constituent power to its ultimate consequences. For him, the *pouvoir constituant* is no longer even a power, but a "competence" within the parliamentary government. Hauriou anticipated this view by pointing out that constituent power was a "special legislation" that could be exercised in a legislative procedure in parliament or could also be organized in a constituent assembly. For Carré de Malberg, there is no longer a hierarchy between parliamentary legislation and constituent legislation, since both fall under the jurisdiction of parliament in the French Third Republic. The "Constitution of 1875" is understood neither as an unity nor as an expression of the will of the people, as Sieyès and Schmitt conceived it, but as a plurality of constitutional laws amended by parliament. Carré de Malberg thus believes that the parliament in France is effectively "sovereign," but he uses the term in a general sense to affirm that it has legislative and constituent powers. For Carré de Malberg, the true sovereign is the state as a legal person, while the constituent power is a concomitant of the legislative life of parliamentary government.

The positivist conception of constituent power is the origin of the conceptual distinction between *original constituent power* and *derived constituent power*, a distinction systematized by Roger Bonnard in Vichy France and still influential in international literature. The concept of original constituent power refers to the revolutionary mandate of the people in 1789 to create a new constitutional order. Thereafter, the will of the people is 'positivized' in constitutional laws and thus transformed into a derived constituent power. This last term refers to the constituent function of parliamentary government, i.e., the power to amend or create constitutional laws through special procedures. French legal positivism thus attempted to neutralize the danger of revolution and popular autocracy with the positivist theory of constituent power. Bonnard, on the other hand, develops this conception of constituent power further to theorize Vichy France as a "national revolution" and Pétain as the new holder of *derived constituent power*. Bonnard does not draw on the idea of popular autocracy that underlies Schmitt's work, but instead outlines a new conception of popular autocracy inspired by the 1933 Enabling Act in Nazi Germany. Bonnard systematizes this transfer of power from parliament to the executive as an exercise of the derived constituent power that parliament had in the past. The people were not the creators of Vichy France, but only legitimized Pétain with their 'consent'. This consent differs from Sieyès's and Schmitt's ideas of constituent power, for Bonnard's popular autocracy is first established and then 'accepted' by the people.

Chapter 6: Roger Bonnard and the Autocratic Constituent Power of Vichy France

> "The Constitutional Acts of 1940 were enacted by a constituent power that was not an original constituent power, but a derived/instituted constituent power" (Bonnard, 1942, p. 35).

Introduction

In the international literature, the distinction between *original* and *derived* constituent power has become entrenched (Colón-Ríos et al., 2021, pp. 932–935; Le Pillouer, 2017; Viala, 2014). However, this terminology does not originate from Sieyès or Schmitt, but from the French jurist Roger Bonnard (1878-1944). Without being aware of its origins, the literature has established Bonnard's conception of constituent power, which has its origins in his legitimation of the autocratic state under Philippe Pétain in Vichy France (1940-1944). This chapter aims to explain Bonnard's theory of constituent power and to show how it extended and instrumentalized the tradition of French legal positivism. Duguit, Hauriou, and Carré de Malberg understood the concept of constituent power from Mommsen's notion of "constituent function" to make Sieyès's idea compatible with parliamentary government. This was intended to neutralize the danger of revolution and popular autocracy. Bonnard, on the other hand, uses this positivist reading of constituent power to theorize Pétain's constitution-making powers as a *derived constituent power*, i.e., as a transfer of the "constituent function" from parliament to the head of state. Bonnard founded a new variant of popular autocracy, independent of Schmitt's idea in the Weimar Republic, because for him it is not the people who are the source of the constitutional order, but the autocracy is first established with the authorization of parliament and then 'accepted' by the people. I will explain what significance Bonnard's distinction between *original* and *derived* constituent power still has in the current literature.

The conceptual distinction between *original* and *derived* constituent power is often mentioned in the literature to conceptualize a type of institutional exercise of Sieyès's idea of constituent power. In reality, Bonnard's distinction was already implicit in Carré de Malberg's theory, since he assumes that the constituent power no longer acts outside the constitutional order. For him, the constituent power now exists only in the form of Mommsen's concept of "constituent function" within the constitutional order, i.e., in the case

of the French Third Republic, as a special "competence" of the parliamentary government (Carré de Malberg, 1922, p. 553). Georges Vedel then consolidated this conceptual distinction in France (Viala, 2014, p. 82). In an important exchange on the concept of constituent power (Colón-Ríos et al., 2021, pp. 932–935), Pasquino has pointed out that, although the notion of derived constituent power has not been sufficiently clarified, the constitutional court in the case of the French Fifth Republic can be theorized as derived constituent power. Pasquino therefore speaks of the "constituent power of the courts" in terms of the power to revise constitutional laws. Rubinelli also uses this distinction in his intellectual history of constituent power: "Once associated with the *pouvoir constituant*, the principle of popular sovereignty was transformed first into a constituent power and then, after the creation of the Constitution, into a derivative constituent power" (2020a, p. 95). Colón-Ríos attempted to systematize the concepts of *original* and *derived* constituent power, pointing out the difficulty of distinguishing between the two:

> A point of distinction between these two notions may be that the exercise of the original constituent power would normally take place in times of popular agitation for constitutional change and through highly participatory procedures. That is to say, the exercise of the derived constituent power merely requires the meeting of certain formalities, while that of the original constituent power requires that any formalities are accompanied by mass mobilization. But as we mentioned earlier and as we will see in the chapters that follow, on the one hand, military juntas have claimed to be the bearers of the original constituent power and, on the other, amendment processes can be designed in a way that attempts to reproduce a popular constitution-making episode. What this suggests is that, even though its sources may vary (original constituent power comes directly from the people, derived constituent power comes, in an immediate sense, from the constitution), the practical implications of this distinction may easily be overstated (Colón-Ríos, 2020, p. 14).

This conceptual distinction between *original* and *derived* constituent power is of great importance for the theory and practice of constitutional reform. As I explained in chapter five, when Sieyès's idea of constituent power is understood as a "constituent function," there is no longer a clear distinction between these two concepts, since both perform the function of creating or amending a constitution. Colón-Ríos (2020, pp. 193–194) points out that the derived constituent power is a power equivalent to the constitutional amending power that "sovereign parliaments" have. In this context, Colón-Ríos (2020, p. 220) refers to the important reading of Mortati (1945/2020), in which the constituent power is defined as a power created to reform the constitution within the limits of the material content of the constitution (expressed in the exercise of the *original constituent power*): "It seems clear that for Mortati, the ordinary power of constitutional reform (the derived constituent power), has

to respect the fundamental aims of the state" (2020, p. 221). The difference between the *original* and *derived* constituent power is that the authority that makes constitutional changes is not the sovereign, but that the sovereign remains the people. This distinction, which goes back to Bonnard's work, has become important in the constitutional jurisprudence of Colombia (Colón-Ríos, 2020, pp. 276–277) and Turkey (Roznai & Yolcu, 2012), as well as in francophone African states (Nzeko, 2019).

The conceptual distinction between original and derived constituent power was developed in the context of the Nazi occupation of France and the authoritarian state led by Pétain. Vichy France was an authoritarian regime that emerged after the June 22, 1940 armistice and was characterized by an ultranationalist, counterrevolutionary, and Catholic conservative ideology (Azéma et al., 1992; Lochak, 1989; Rousso, 2019). Moreover, the regime pursued a collaborative policy towards the National Socialist regime. One of the most important was the support of Nazi Germany's deportation of the Jews, which built the way to the Holocaust in France (Weisberg, 2013). The official motto of the French *Republic, Liberté, égalité, fraternité*, was replaced with *Travail, Famille, Patrie*. Pétain and his supporters also referred to the authoritarian regime change as the *Révolution nationale*, although there were no revolutionaries, and described the parliamentary democracy of the Third Republic as a period of decadence. In the 1980s, a debate developed over whether or not Vichy had been a fascist and totalitarian state (Bourderon, 1973; S. G. Payne, 1980; Slama, 1986). The question was controversial, but there was agreement that Vichy had been a far-right authoritarian regime that resembled a police state, but was not a totalitarian state like Germany and Italy (Paxton, 1998, p. 20).

In November 2018, President Emmanuel Macron said Philippe Pétain was a "great soldier" in World War I, which immediately sparked criticism of his words. He then had to clarify his remarks, saying, "I forgive nothing, but I also erase nothing from our history" (France 24, 2018). This incident shows how controversial the figure of Pétain remains to this day. Vichy France was a tragic episode in modern European history because of its collaboration with Nazism, anti-Semitism, disappearances and deportations of political opponents, and many other crimes (Lochak, 1989; Weisberg, 2013). Between 1940 and 1944, positivist jurists entered the scene in an attempt to legitimize the authoritarian regime (Terracol, 2021; Troper, 2021). In the traditional literature, constituent power has been called "the truth of modern democracy" (Kalyvas, 2018, p. 87). However, in Vichy France, positivist jurists emerged who tried to give political legitimacy to the so-called *Révolution nationale*. While various legal arguments were made for the legitimacy of the regime (Terracol, 2021),

the most important interpretation was that Pétain was the new holder of constituent power. In 1942, Bonnard stated that "it is appropriate to examine first the national revolution of 1940, the drafting of the constitutional laws of 1940, and the exercise of the constituent power on that occasion" (1942, p. 5).

Bonnard's work remains unknown internationally, which is why there are few studies of his ideas (Bonin, 2023; Mouralis, 2021; Noyer, 1987; Terracol, 2021). In October 2017, his name was surprisingly revived in the French media (Sud Ouest, 2017). After years of student protests against the jurist who had supported Pétain, the "Roger Bonnard Amphitheatre," where thousands of economics and law students from Bordeaux sat for nearly sixty years, lost its name by decision of the University of Bordeaux. Thus, one of the leading French jurists of the early 20th century was forgotten. Bonnard was born in Marmande in 1878 and received his doctorate in 1903 with a thesis on *De la Répression Disciplinaire des fautes commises par les Fonctionnaires Publics*. Léon Duguit, the eminent French positivist jurist, was his doctoral advisor and influenced Bonnard's approach for the rest of his career. Bonnard described himself as a "sociological jurist." In 1922 he was appointed lecturer in comparative constitutional law at the University of Bordeaux, where he collaborated with Duguit and edited his works. Bonnard went on to a successful career, becoming a member of the university council in 1935 and rector of his faculty in 1940. On October 4, 1940, Bonnard gave a speech at the faculty of law in Bordeaux in which he supported the new authoritarian regime established by Pétain:

> The changes will be profound. They will affect the great principles that have governed our public law since the Revolution of 1789, namely individualistic liberalism, democracy, and the separation of powers. (...) These principles will be discarded not because they have become obsolete, because they were useful at a particular time, but because they are radically wrong in themselves; because they destroy the state; because they contradict the very idea of the state. They are absolute errors, both theoretically and practically (Baruch, 2000, p. 53).

It remains to be discussed internationally that Schmitt's constitutional theory is not the only way to an autocratic conception of constituent power, as Bonnard also developed an illiberal reading of constituent power for the legitimation of Vichy France. Bonnard developed a different approach than Schmitt in that he developed a new conception of popular autocracy. Bonnard strives for a pure autocracy theory in which the people do not *mandate* or *commission* the creation of a new constitutional order, but 'accept' it only after it has been introduced by Pétain. Bonin (2023, p. 63) is correct in saying that Bonnard's idea is not that of Bonapartism but that of Boulangism. His idea is to legitimize an autocratic and military

regime similar to that of the monarchy of the *Ancien Régime*. Bonnard did not believe, as Schmitt (1922/2005, p. 51) did, that democracy was the only source of political legitimacy after the fall of monarchies and the Revolutions of 1848. The reading of Vichy jurists is that the constitutional laws of July 1940 made Pétain the new holder of the "derived constituent power" (*pouvoir constituant institué*) (Bonnard, 1942; Laferrière, 1942; Liet-Veaux, 1943). For Bonnard, Sieyès's idea of *pouvoir constituant* no longer had anything to do with popular sovereignty. Rather, he took up the Mommsenian conception of constituent power developed in the French Third Republic. Bonnard's distinction between *original* and *derived* constituent power destroyed the Sieyèsian and Schmittian tradition of the people as the source of constitutional order.

My study is divided into two parts. In the first part, I discuss the ideas developed by the Vichy jurists about Pétain as the holder of the *pouvoir constituant*. This was the first time in the intellectual history of the constituent power that three conceptions clashed: the Sieyèsian, the Schmittian, and the Bonnardian conceptions of the constituent power. In the second part, I argue that Bonnard introduces a new variant of popular autocracy that is independent of Schmitt's idea. His theory distinguishes between original and derived constituent power in order to legitimize that the parliament delegated the "constituent function" to Pétain. This theory is inspired by Bonnard's study of the Enabling Act of 1933 in Germany. His idea of popular autocracy assumes that the people are not the source of Pétain's constituent power, but that the people 'accept' it because they agree with Pétain's empowerment by parliament.

1. The Meaning of Pétain's Constituent Power

To understand the meaning of Pétain's constituent power, one must place oneself in the context of the political crisis in France triggered by the Second World War. On June 16, 1940, the President of the Council, Paul Reynaud, resigned, and the President of the Republic, Albert Lebrun, charged Philippe Pétain with forming a new government that, once constituted, would declare an armistice. As Terracol (2016, p. 306) correctly notes, there was an overlap between a de facto regime and a de jure regime (Third Republic) after the June 25 armistice. In this context, French jurists called themselves "positivists" and supported Pétain's regime by writing legal and political theories about the legitimacy of his power (Lochak, 1989; Terracol, 2021). On July 10, the National Assembly passed a single constitutional law by 569 votes to 80, with 20 abstentions, giving Pétain all governmental powers:

> The National Assembly gives full powers to the government of the republic under the signature and authority of Marshal Pétain, President of the Council, in order to create by one or several acts a new Constitution for the French State. The Constitution must guarantee the rights of labor, family, and fatherland. It will be ratified by the nation and applied by the assemblies which it will have created (Caenegem, 1995, p. 213).

This single article, which consolidated the Vichy regime, raised the question of whether Pétain was the new subject of constituent power. French jurists agreed that Pétain exercised the "constituent function" (*fonction constituante*) in the sense of Mommsen's conception in Roman law and the French tradition of legal positivism (Bonnard, 1942; Burdeau, 1943; Laferrière, 1942; Liet-Veaux, 1943). It was clear that Pétain was not a new subject of constituent power; he did not take the place of the sovereign nation. However, this article raises the question of whether Pétain exercised constituent power by virtue of a delegation granted by the National Assembly. If so, according to Sieyès's terms, Pétain would be a *pouvoir constitué* and not a *pouvoir constituant*. This also opened a new question: Does this mean that the Third Republic legally continues to exist? An even more contentious question for the Vichy jurists: if Pétain disappeared, would the constituent power return to the National Assembly, thus restoring parliamentary democracy? French jurists debated these questions from three different perspectives on the constituent power: that of Sieyès, that of Schmitt, and that of Bonnard.

a. The Sieyèsian Conception

The first approach is the idea of delegation of constituent power from the National Assembly to Pétain, which is close to Sieyès's idea in the French Revolution because it is based on the concepts of *extraordinary representation* and the mandate from the people to create a new constitutional order. Julien Laferrière (1942, p. 32), a law professor at the Paris College, argued that the National Assembly delegated the constituent power to Pétain because of the circumstances of the crisis and the urgency. His book *Le Nouveau Gouvernement de la France* (1942) is an important text for the intellectual history of constituent power because it is an attempt to theorize the Vichy regime based on Sieyès's idea of the mandate from the nation. Laferrière (1942, pp. 13–15) begins his remarks by noting that the constitutional laws of 1875 represented a major political advance for France. It was the constitution that provided stability and democracy as it survived severe political crises and World War I. However, Laferrière (1942, pp. 16–17) points out that the constitutional order of the Third Republic had serious problems, as the authority of the executive was weakened compared to the quasi-sovereign power of the parliament. Laferrière believes that the constituent power delegated by parliament to Pétain in the Constitutional Act of July 10 was a response to this process, i.e., an attempt to establish a strong and centralized government in the executive branch with popular consent.

For Laferrière, the most important message of the Constitutional Law of July 10 is that it states that the new constitution "will be ratified by the nation and applied by the assemblies which it will have created" (Caenegem, 1995, p. 213). Laferrière says that this means that the nation remains as the bearer of the constituent power, so Pétain is only an extraordinary representative on behalf of the sovereign. The nation then should approve the new constitution by means of a referendum (1942, p. 38), as happened in 1791 and 1848. Laferrière (1942, p. 40) argues that the Constitutional law of July 10 means that France remains as a republic and that the delegation of constituent power to Pétain upholds this form of government. So Laferrière (1942, p. 43) points out that if Pétain were to disappear, his constituent power could not be delegated to another person, so it would revert to the National Assembly. The requirement of the nation's consent to Pétain's constitutional order means that the delegation of constituent power still preserves the principle of the nation as the sole bearer of constituent power. Interestingly, Laferrière theorizes this mandate of Pétain's as similar to the 1852 plebiscite that gave rise to the Second Empire. It is an authorization of the nation to establish a Bonapartist dictatorship. For Laferrière, then, Pétain is like Napoleon III, that is, he

establishes a popular autocracy in the sense of Schmitt's idea of Bonapartist dictatorship as a commission:

> In 1940 the general problem was the same as in 1852: to strengthen the authority of the state; to give the government the necessary means of action to meet an abnormal and dangerous situation. It's only natural that we have returned to the same general constitutional solution, namely the primacy of the executive, albeit with variations in its implementation and, above all, with a different mindset and spirit governing its application (Laferrière, 1942, p. 52).

Laferrière recognizes, however, that this delegation ("full powers to the government of the republic") of the National Assembly to Pétain does not mean that the head of state is the new subject of constituent power, i.e., the new sovereign. Neither the parliament nor Pétain were subjects of the constituent power, but exercised it only through an extraordinary delegation of the nation on the basis of the constitutional laws of 1875. Laferrière points out that the requirement of a referendum for the new constitutional order shows that the people remain sovereign: "With the formula adopted, the last word in the constitutional work undertaken belongs to the people, who will be called upon to decide definitively [*à décider définitivement*]" (1942, p. 38). For this reason, Laferrière argues that the Constitutional Act of July 10 did not create a new form of state, but that Vichy France remained a republic that still had continuity with the constitutional order of the Third Republic. For Laferrière, in order to change the republican order, a monarchical hereditary state would have to be created, which did not happen because the French state remained representative: "France remains a republic even after the Act of July 10, 1940, for the simple reason that no other form of state was created" (1942, p. 40). Laferrière says that the Third French Republic continues despite Pétain's constituent powers, since his powers could be returned to the National Assembly:

> If therefore, the Head of State were anyone other than the Marshal, constituent power could no longer be exercised under the conditions formally laid down by the 1940 revision law, and that law would lose its effect. We would be dealing with the Constitution of 1875 itself, which has not disappeared, and Article 8 of which relating to revision would then be reinstated. Constituent power would return to the National Assembly [*ferait retour à l'Assemblée Nationale*] (Laferrière, 1942, pp. 42–43).

When Pétain was given all governmental powers to create a new constitution, he decided on July 11, 1940, to enact new constitutional laws declaring himself head of the French state and centralizing executive powers in his governmental council (*Conseil d'Etat*). With these laws, Pétain made clear the abolition of Article 2 of the constitutional laws of 1875, which stated that the head of state was elected by a majority of the votes of the two

chambers of parliament. Laferrière (1942, p. 45) interprets that France remained a constitutional state even after Pétain's concentration of power. Laferrière (1942, p. 45) points out that the *Révolution Nationale* is not comparable to the Revolution of 1789 or the coup d'état of 1851, so the regime that emerged in 1940 is not an interruption of the constitutional regime of 1875. Laferrière concedes that the constitutional laws of 1875 gradually crumble (*s'émiette*), but they do not disappear in their entirety, for the constitutional laws of 1940 merely reshape the functions of the powers of the state. In other words, Pétain's constituent power is still in the Sieyèsian tradition of the concept of constituent power as a mandate from the people. For Laferrière (1942, p. 47), the only change in the Vichy regime was that the constituent and legislative powers were exceptionally united in a single authority, the head of state (Pétain).

Georges Burdeau (1905-1988), an eminent French constitutionalist, criticized and complemented Laferrière's position. For Burdeau (1943, p. 249), the National Assembly did not delegate constituent power to Pétain, but attributed it to him. The difference between *delegation* and *attribution* is essential in French legal positivism. Burdeau (1943, p. 137) affirms that constitutional doctrine has established that a constituted authority such as the National Assembly cannot delegate a power assigned to it by the constitution. This is a fundamental principle of the French tradition of the primacy of constitutional laws, which applies to the constituent power. In the Sieyèssian tradition, the nation delegated the constituent function only to the National Assembly. Thus, Burdeau (1943, p. 137) points out that there was no delegation of the constituent power in 1940, only the establishment of a new constituent body: Pétain. Burdeau argues that the constitutional laws of July 1940 consolidated executive power, but the *Révolution National* was still underway. Unlike Laferrière (1942), however, Burdeau is more skeptical about the continuity of the Third Republic. Burdeau (1943, p. 145) acknowledges that the political foundations of Vichy France were based on a critique of parliamentary democracy and the establishment of a conservative ideology under the motto *Travail, famille, patrie*.

b. The Schmittian Conception

The second perspective is based on Schmitt's idea of acclamation. It is a conception of Pétain's constituent power as a popular autocracy derived from Schmitt's idea of the plebiscitary mandate of the people in the form of acclamation. It is inspired above all by Schmitt's notion of the *permanence* of the *continuity* of constituent power (1928/2008, pp. 142–143). As I explained in the last section of chapter three, Schmitt developed the notion that constituent power has continuity between regime changes. For example, Schmitt (1928/2008, p. 143) sees continuity between the German Empire and the Weimar Republic because in both cases the bearer of constituent power is the German people. Schmitt also applies this approach to French history, saying that there is continuity between 1848, 1851, and 1852, although the form of government changes. Thus, the continuity of constituent power exists in the Second Republic and the Second Empire because Louis Bonaparte recognized that his dictatorship and then his empire was a plebiscitary mandate from the people. This Schmittian approach is extended and taken up by considering Vichy France as a continuity of the Third Republic. The continuity consists in the idea that the nation is still the sovereign that consents to the constitutional order created by Pétain. In Liet-Veaux's plebiscitary approach, this consent of the nation in Vichy France is *explicitly* expressed as Schmitt's idea of acclamation.

The reception of Liet-Veaux is in the context of the reception of Schmitt's work in France. There is already extensive literature that has examined the reception of the German jurist in France since the 1930s (Baldus, 1987; De Benoist, 2019; Muller, 2003; Séglard, 2007; Storme, 2009). The first books translated into French were *Politische Romantik* (1919/1998), *Legalität und Legitimität* (1932/2005), and *Der Begriff des Politischen* (1927 1932/2018), but without much resonance. Schmitt's significant reception in France began only with the works and commentaries of François Perroux and René Capitant, but especially with the Thomist philosopher Jacques Maritain. According to de Benoist (2019, p. 7), the latter author was of great importance in introducing Schmitt's political-theological ideas to France. In March 1928, Schmitt met Maritain in Paris, who would later commission the translation of *Politische Romantik* for the Bibliothèque française de philosophie, a collection managed by the Valois library. René Capitant, an eminent jurist and later politician of the De Gaulle era, commented on Schmitt's work from the early 1930s (Le Brazidec, 1998; Neumann, 2014). In the postwar period, Schmitt's reception in France continued through intellectuals such as Julien Freund and Raymond Aron. Although Schmitt's reception among

Vichy jurists appears only in the form of brief quotations in the works of Roger Bonnard and Georges Liet-Veaux, his ideas were important in conceptualizing the political legitimacy of Vichy France.

Georges Liet-Veaux (1920-2015), a lecturer at the Paris Law School, remains a little-known author. Little is known about him, although Terracol (2022, p. 157) has also highlighted the influence of Schmitt's work on his constitutional theory of Vichy France. Liet-Veaux's book is entitled *La continuité du Droit Interne* (1943) and is a work that attempts to prove that revolutions do not necessarily mean the emergence of a new subject of the constituent power. In the first part of his book, Liet-Veaux summarizes the main theories of his generation on the discussion of the concept of revolution in constitutional law. Although his bibliographical references demonstrate his extensive knowledge of the authors of German *Staatslehre* and French legal positivism, he emphasizes the positioning of Schmitt's concept of legitimacy (1932/2005, 1928/2017, Chapter 8). In fact, the entire work focuses on proving Schmitt's thesis that there can be continuity of the subject of constituent power during regime changes. Liet-Veaux's concept of revolution is broad, for he considers it as any break with the constitutional order. A revolution in France, such as those of 1789 and 1848, as well as the rise of fascism in Italy and National Socialism in Germany, are described by him as revolutions. I will focus on the reception of Schmitt's ideas in his work to conceptualize the constituent power in Vichy France as an exercise of the acclamation of the nation.

First, it should be clarified that Liet-Veaux uses the term "public opinion" (*opinion publique*) to define "acclamation" because he mistranslated the term in Schmitt's work. Schmitt (1923/2017) obviously does not refer to public opinion as acclamation, but uses the term public opinion to refer to the political foundations of parliamentary government. For Liet-Veaux, "public opinion" refers primarily to popular consent in the form of plebiscitary legitimacy. The central problem Liet-Veaux seeks to solve is that of the legitimacy of Vichy France. In other words, can one speak of a continuity of the Third Republic, as Laferrière (1942) claimed, when parliamentary democracy no longer has plebiscitary legitimacy in Vichy France? Liet-Veaux attempts to base Pétain's so-called *Révolution Nationale* on Schmitt's idea of legitimacy. He defines the concept of legitimacy by quoting it and then relating it to the work of Bonnard:

> Professor Carl Schmitt [in his book *Legality and Legitimacy*] has definitively erased the distinction used by jurisprudence. He defines a "legitimate" government as one whose decisions have some efficacy and signify real political power in the state;

> however, this definition is more in line with the traditional notion of de facto power. Schmitt, on the other hand, defines a "legal" government as one whose power is essentially based on the provisions of positive law, ignoring the reality of its authority. Following these concepts, Roger Bonnard argues that an illegal government can be legitimate, i.e., "de jure" (Liet-Veaux, 1943, pp. 239–240).

Although Liet-Veaux relates Schmitt's concept of legitimacy to Bonnard's notion of illegal government, the latter does not refer to the German jurist in his theory of Pétain's constituent power. Liet-Veaux departs from Bonnard's theory because he emphasizes Schmitt's concept of acclamation as the political legitimacy that any constitutional order must have:

> Public opinion in ancient times was the opinion of the agora or forum. (...) The opinion of a crowd is often no more than a memory when the crowd has dispersed. Moreover, public opinion is generally based on a greater number of individuals than on a crowd. Thus, crowd opinion seems to be the primitive and obsolete form of public opinion. Public opinion is the modern form of acclamation (Carl Schmitt) (Liet-Veaux, 1943, pp. 269–270).

Liet-Veaux uses Schmitt's concept of acclamation to suggest that law is nothing more than the realization of public opinion, understood as plebiscitary legitimation: "The law in force in a given state at a given moment is merely the accumulation of the successive desires of public opinion" (1943, p. 265). Liet-Veaux (1943, pp. 274–279) describes the emergence and expression of plebiscitary legitimacy and develops a legal and sociological understanding of the idea of "public opinion" as a process of individual exchange of opinions in social life. Moreover, Liet-Veaux illustrates the idea of public opinion with Sieyès's political theory. He points out that public opinion always emanates from an individual or a group. During the French Revolution, Liet-Veaux notes, Sieyès's *Qu'est-ce que le Tiers-État?* (1789/2002) gained the support of the clergy and nobility, which enabled the realization of his idea of the sovereignty of the nation (1943, p. 280). Liet-Veaux affirms that this case is an example of what Hauriou calls a "consciousness of justice" and how an opinion prevails in a revolutionary process. However, Liet-Veaux follows Schmitt's idea that acclamation, as the true expression of constituent power, is primarily a disorganized power: "Public opinion has no organization, no official representation; it has no appointed leaders, it is not a person" (1943, p. 271).

The notion of democratic representation is also understood as acclamation, as Liet-Veaux points out that "Schmitt formulates the thinking of the majority of authors by considering democracy as the rule of public opinion" (1943, p. 316). Liet-Veaux says that it is

the recognition of the fact that the general will can express itself through a tacit recognition of the nation. He therefore says that, according to Rousseau, the social contract "results from a tacit and permanent agreement between the people and their government" (1943, p. 317). This view leads him to point out that Pétain recognised the need for plebiscitary legitimacy to his government. Thus, "the consent of the governed is a declaration," while "the realization of public opinion is the explanation" (1943, p. 319). With this account, Liet-Veaux attempts to portray Vichy as a legitimate government, so he distinguishes legal theories of consent from theories of de facto political power: "The greatest theorist of National Socialism, Professor Carl Schmitt, made violence the sole source of supreme power. His political ideas are based on the strange fundamental distinction between friend and enemy" (1943, pp. 322–323).

This brings us to the central idea that Liet-Veaux tries to prove about Pétain's constituent power. For him, Pétain was endowed with supreme power between June and July 1940, derived from Schmitt's idea of plebiscitary legitimacy in the form of acclamation (*public opinion*). The limits of Pétain's power cannot be expressed by positive law, but only by his plebiscitary legitimacy, which derives from the acclamation of the nation:

> The decision of public opinion endowed Marshal Pétain with an unconditional constituent power. This power was not vested in him personally: his designated successor was to receive all the powers that the Marshal now exercised. This solution has the advantage of avoiding unrest and a constitutional revolution, which would be necessary in the event of the death of the marshal or his inability to exercise his powers before the promulgation of the final constitution. For if the constituent power had been vested in him *intuitu personae*, no one could exercise it after him, and the nation could not remain without a constitution, so that a coup d'état or revolution would have to determine the new holder of the constituent power (Liet-Veaux, 1943, p. 401).

Liet-Veaux (1943, p. 401) argues that Laferrière's theory of the extraordinary delegation of constituent power to Pétain is false because the National Assembly no longer realizes or represents public opinion or the plebiscitary acclamation of the French nation. For him, the Sieyèsian view is wrong, because Pétain exercises powers that do not depend on the continuity of republican government. For Liet-Veaux (1943, p. 403), Pétain's constituent power is not limited to either delegation by the National Assembly or ratification by the nation via referendum, as Pétain can abolish this ratification mechanism. Liet-Veaux (1943, p. 404) wonders, however, if Pétain would not be a tyrant, since a third party would not limit his constituent power. Echoing Schmitt's idea of plebiscitary legitimacy in the form of acclamation, Liet-Veaux (1943, p. 405) responds that from a political perspective, Pétain's

constituent power was limited only by public opinion, i.e., the acclamation or consent of the French nation:

> At the political level, the powers of the head of state are limited by public opinion. "France can be governed only with the consent of public opinion, a consent that is even more necessary in a regime of authority" (Pétain's message of August 12, 1940). If this opinion is divided or confided in other leaders, the power of the head of state is weakened. This threat is an effective limitation of the omnipotence [*toute-puissance*] of the head of state (Liet-Veaux, 1943, p. 405).

In contrast to the Schmittian reading of Liet-Veaux on Pétain's constituent power, Bonnard developed an anti-plebiscitary approach. He wanted to develop a genuinely autocratic theory of constituent power, distinct from Sieyèsian and Schmittian conceptions. It is important to explain the difference between my study and the interpretation of Terracol's important work on the legal theories of Vichy France. For Terracol (2021), the legal justifications of the constitutional laws of 1940 are about the interpretation of the constitutional laws of 1875. Terracol (2021, pp. 66–68) distinguishes a theory of deconstitutionalization of the Third Republic as well as the discussion of the delegation of powers to Pétain and the theory of the allocation of constituent power. Terracol (2021, p. 68) even sees the negation of the democratic institutions of parliamentary democracy, founded in 1875, as a theory of constitutional fraud. However, Terracol (2021) did not analyze the important debate among the Vichy jurists about different conceptions of constituent power. Bonnard introduced a new conception of popular autocracy that was independent of Schmitt's ideas of plebiscitary legitimacy, acclamation, and Bonapartist dictatorship. Bonnard's distinction between *original* and *derived* constituent power introduced a new conception of constituent power to legitimize Vichy France.

2. Autocratic Constituent Power

Autocratic constituent power refers to the theory of the state that Bonnard calls truly "authoritarian." He expressed his support for Pétain and rejected the parliamentary democracy of the Third Republic. Bonnard's work is extensive, so I will focus on his book *Les actes constitutionnels de 1940*, in which he develops his theory about the distinction between the *original* and *derived* constituent power of Vichy France. Bonnard begins by stating that "the constitutional acts of 1940 introduced in France a new political regime that replaced the regime of 1875" (1942, p. 1) because an authoritarian regime replaced parliamentary democracy. For Bonnard, the constitutional laws of 1940 do not constitute a final constitution, but create a provisional constitutional organization. However, he says that these constitutional laws form a coherent whole to speak of the "Constitution of 1940." He points out that the parliamentary democratic order was abolished in France because "democracy is a luxury of rich countries" (1942, p. 3). For Pétain's constitutional laws to become a true constitution, Bonnard argues, it is necessary to study their content in and of itself, because then the authoritarian regime can endure: "The legitimacy of a power depends on its origin and the way in which it was established. This problem is that of the constituent power. It must be studied first" (1942, p. 3).

In transforming the French form of government, the *Révolution Nationale* must justify its power, which is why Bonnard points out that it is essential to analyze the old conviction of the legitimacy of democratic power and its replacement by the conviction of the legitimacy of authoritarian power. Bonnard titles his first chapter "The National Revolution and constituent power" (1942, p. 5). He begins his remarks by adopting the perspective of Duguit and Hauriou, claiming that the constitution is an ensemble (*l'ensemble*) of provisions and customs emanating from both the institutions and the organs of the state. For Bonnard, the constitution is a legislation of the constituent power. "Le mot constitution a été réservé à la législation faite par ce pouvoir constituant" (1942, p. 6). Bonnard also points out that "the constituent and legislative powers are distinguished by a separation that is both organic (the two powers are entrusted to different organs) and formal (the two powers are exercised by one and the same organ, but with different procedures)" (1942, p. 6). Bonnard, a good student of Duguit and of French legal positivism, assumes that constituent power is essentially a "special legislative function" (*fonction constituante*) exercised by a new organ of the state (Pétain).

a. Original and Derived Constituent Powers

Bonnard's theory of constituent power is strongly inspired by his analysis of the 1933 Enabling Act (*Ermächtigungsgesetz*). Bonnard had already dealt with the theory of the authoritarian state in his works on the theory of corporate statism. Here Bonnard analyzes the Portuguese case in which a corporate state was established: "La constitution portugaise de 1934 donne à l'Etat la forme corporative au moyen d'un conseil corporatif incorporé dans le parlement" (1937, p. 128). He also analyzes here the case of the Italian fascist state, where he theorizes its corporative theory as a means of eliminating political parties: "Encore plus marqué comme moyen d'éliminer les partis politiques a été en Italie l'introduction de la forme corporative de l'Etat" (1937, p. 127). His work on the theory of the Nazi state was so well received in France that his study of the theory of German racism is still commented on today (Mouralis, 2021). In this book, Bonnard primarily presents Hitler's rise to power as a "national revolution." He is particularly interested in the *Führerprinzip*, which is presented as the transfer of power from parliament to Hitler as Chancellor of the Republic. This description of the transfer of power from parliament to the executive in 1933 is the model for understanding the transfer of power from the parliament of the French Third Republic to Pétain in 1940:

> Adolf Hitler acquired these various qualities one after another. First party leader, then Reich Chancellor, then Führer of the German people. Before the national revolution, he was already Führer of the party. He became Reich Chancellor on January 30, 1933, when he was appointed to this office by Reich President Hindenburg as leader of the largest party in the Reichstag. Shortly thereafter, Hitler called for the dissolution of the Reichstag to give the new elections the significance of an act of public confidence. These elections, held on March 5, 1933, turned out in his favor and were interpreted as a plebiscite that gave him the status of Führer of the German people. Finally, the Enabling Act of March 24, 1933, which gave the Führer legislative power to enable him to exercise Führung over the German people, can be seen as the law implementing the March 5, 1933 plebiscite (Bonnard, 1939, p. 198).

This reading of the Enabling Act of 1933 led us to Bonnard's theory of constituent power. It should be recalled that the constitutional law of July 10, passed by the National Assembly, gave full governmental power to Pétain, the new holder of the constituent power. Bonnard uses the term *pouvoir constituant* in this context to explain the difference between the "instituted" or "derived constituent power" (*pouvoir constituant institué*) and the "original constituent power" (*pouvoir constituant originaire*). It should be recalled that in the French positivist tradition the constituent power denotes the constituent function (Mommsen's

concept of constituent power in Roman Law) and the body that exercises the constituent function (Carré de Malberg's idea of the parliament as the bearer of the constituent power). For Bonnard (1942, p. 6)., unlike in the tradition of Sieyès and Schmitt, the constituent power can be organized within the constitution, that is, it is a mechanism of constitutional revision; a constituent power is thus an "instituted constituent power" (*c'est le pouvoir constituant dit 'institué'*). However, when a new form of state is created, it is a constituent power that is not in the constitution, so that one speaks of an "original constituent power" (*ce pouvoir constituant est dit alors 'originaire'*) (1942, p. 7). The question raised by Bonnard (1942, p. 8) is whether this original constituent power is juridical or non-juridical. For Bonnard, this question implies whether the constituent power can have a revolutionary or non-revolutionary exercise.

Bonnard (1942, p. 9) explains the meaning of a revolution in the legal sense, which in turn is based on his reading of the 1933 Enabling Act as a national revolution. He points out that a "political revolution" is different from a "social revolution," since the latter involves the transformation of the state and the entire social order. Social revolution is part of the Marxist concept of revolution (1942, p. 9). Revolutions are violent and illegal events, but Bonnard points out that there are also "legal revolutions" (*révolutions paisibles et légales*) based on existing constitutions: "In these legal revolutions, it is the institutionalized constituent power that intervenes to destroy and rebuild" (1942, p. 9). It is important to note Bonnard's recourse to his study of the rise of National Socialism (1939, pp. 188–190), in which he, like the Nazi propagandists, defines Hitler's seizure of power as a "national revolution" (in German: *Legale Revolution*). The constitutional acts of the *pouvoir constituant institué* have a legal basis. The acts of destruction and reconstruction of an illegal revolution, on the other hand, are not legal. Therefore, "the original constituent power cannot produce law" (1942, p. 10). As a preeminent French legal positivist, Bonnard states that law can only emerge from the organs of the state and the constitution. Citing Carré de Malberg, Bonnard points out that an illegal revolution can therefore not produce law (1942, p. 11).

Bonnard (1942, p. 14) analyzes the problem of the holder (*titulaire*) of the original constituent power. It is important to note that Bonnard, unlike Schmitt in his time as a propagandist for National Socialism, thinks of the "national revolution" in terms of the Sieyès's idea of constituent power. As I mentioned at the end of chapter four, Schmitt abandoned the terms "constituent power" and "sovereignty" around 1933 and adopted the concept of "concrete order thinking" (Schmitt, 1934b). In contrast, Bonnard still thinks of the concept of constituent power in terms of the transfer of power from parliament to the head of

the state (Pétain). One of his most important theoretical contributions is that Bonnard systematized three different conceptions of the *original constituent power* in French constitutional history.

The first and most important conception is that constituent power belongs to the people, which means that in any other form of state the people are the bearers of sovereignty. This means that the people are not a *derived constituent power*. Constituent power is exercised through semi-direct procedures and referendums. As I explained in the first chapter, this concept of the bearer of the constituent power is based on Rousseau's theory of sovereignty. It is the idea of the *volonté générale*. As the author of the social contract, the people are the bearers of sovereignty; they are the bearers of political rights. The new constitution of the state is presented as a revision of the social contract (1942, p. 15). From this perspective, Bonnard argues, the derived constituent power does not and cannot exist because the constituent power retains the right to revise the constitution (1942, p. 15). Like the constitutional theories of Sieyès and Schmitt, this conception assumes that the holder of the constituent power is in a state of nature or *potentia constituens*. Bonnard affirms that this principle was established in the decree of September 21, 1792: "La Convention nationale déclare qu'il ne peut y avoir de constitution que celle qui est acceptée par le peuple" (1942, p. 15).

The other two conceptions of the holder of the *original constituent power* differ from the tradition of Rousseau and Sieyès. In the second conception, the original constituent power is confused with the "original political power" *(pouvoir politique originaire*) (1942, p. 15). Political power is the governing power of the nation, grounded in the need for political authority in a public official. Bonnard (1942, p. 15) points out that the argument here is that the original holder of political power is also the holder of constituent power. He illustrates that this interpretation was developed in the Charter of 1814, in which the sovereign monarch Louis XVIII claimed to possess the original constituent power because he was the "original holder of political power" in France (*le pouvoir constituant à titre originaire*). This is precisely the view that Schmitt defines as the Bourbon monarch as the holder of the constituent power. However, Schmitt (1928/2008, p. 129) mistakenly confuses this conception of constituent power with that of Sieyès. The third conception of the holder of the constituent power is that of a de facto government, in which the constituent power is exercised as the result of a revolution. According to this conception, the de facto government is illegal, but not necessarily illegitimate, since it is based on the need or urgency to form a transitional government. Such governments may hold and exercise the original constituent

power when they replace a political regime and draft a new constitution through a constituent assembly (1942, p. 16).

In contrast to the conceptions of *original constituent power*, Bonnard points out that derived constituent power exists by virtue of a constitution and is set up to revise a constitution (1942, p. 17). This power presupposes the existence of a constitution in force. Moreover, this power exercises a legislative power that is not ordinary but special. Bonnard takes up here the approaches already developed by Hauriou and Carré de Malberg, which I explained in the previous chapter. Here, once again, the positivist approach that the separation of powers is not a *separation of functions* is shown because there are two constituent powers. In the first possibility, the constituent power is exercised by a special body (constituent assembly) that is not the legislative body; or in the second possibility, it is a power exercised in the same body (parliament) through other procedures. The French revolutionary tradition, in particular Sieyès's idea of *pouvoir constituant*, distinguishes between two legislative powers, one constituent and one ordinary (parliament), which allows for a vertical hierarchy between the constituent and ordinary legislatures. In contrast, Bonnard (1942, p. 17), citing Carré de Malberg, argues that it is impossible in the French tradition to separate an ordinary and a constituent legislation. The reason is that Bonnard (1942, p. 17) says that in France the legal tradition is that the law is the expression of the general will (*La loi, expression de la volonté générale*), so that one cannot admit that constitutional laws and ordinary laws are the result of two different powers:

> This superiority of constitutional law cannot be inferred from an alleged hierarchical superiority of a constituent legislator over an ordinary legislator. In democracy, all legislators can only be representatives of the nation and exercise representation by the general will within the people. This implies equality and excludes hierarchy among them (Bonnard, 1942, p. 17).

When Bonnard, following the approaches of Hauriou and Carré de Malberg, abolishes the hierarchy between the constituent and the legislative power and transforms Sieyès's idea of *pouvoir constituant* into a "constituent function" (in the sense of Mommsen), he introduces an exercise that he calls "constituent legislative power" (*pouvoir législatif constituant*) (1942, p. 21). This term refers to the same idea that the constituent function is a power that acts within the constitutional order. As I explained in the previous chapter, French legal positivism understood this constituent function as Mommsen's concept of constituent power in Roman law. Thus, the *derived constituent power* is synonymous with an authority (constituted power) that has the extraordinary power to create or amend constitutional laws:

> The existence of a constituent legislative power [*pouvoir législatif constituant*], distinct from and superior to the ordinary legislature, with the task of revising the constitution, stems from the idea that it should make the revision of constitutional laws more difficult than the amendment of ordinary laws, thus ensuring greater stability of the constitution. However, this quest for constitutional stability has prevailed to varying degrees. As a result, revision has become more or less difficult. In this way, the revision of constitutional laws has been ordered according to whether revision should be made more difficult or more difficult in the interest of constitutional stability (Bonnard, 1942, p. 21).

As in the tradition of French legal positivism, Bonnard separates the concepts of constituent power as the constitution-making function of parliament and as a special constitution-making body (constituent assembly). For Bonnard, the purpose of the constituent power as a function is to revise the constitution (1942, p. 21). The constitution specifies how this special function is to be exercised. There may be a body with this constitutional function, or other constitutional procedures may be established. Bonnard points out that the French tradition since 1789 has tended toward constitutional stability, so the scope for constitutional reform lies in the constitutional procedures themselves. Thus, the "constituent organ" (*l'organe constituant*) is a special body charged with revising the constitution. The constituent organ may also be the people, who intervene through a referendum. Another form is "constitutional procedure" (*la procédure constitutionnelle*), which requires special or higher majorities in the legislature for ordinary legislation, e.g. two-thirds or three-quarters of the votes in parliament for constitutional reform. Following the positivist tradition of Duguit, Hauriou, and Carré de Malberg, Bonnard's concept of *derived constituent power* is Mommsen's concept of the constituent function but in the French authoritarian state. Thus, Bonnard's theory of constituent power is completely different from the conceptions of Sieyès and Schmitt.

b. The Bonnardian Conception of Pétain's Constituent Power

Bonnard points out that the *Révolution Nationale* of 1940, with the transfer of full governmental power from the National Assembly to Pétain, was a "legal revolution." This is the paraphrase of his reading of the Enabling Act of 1933. After the armistice of June 22-24, it had become impossible to continue the parliamentary democracy of the Third Republic. This was the appearance of Pétain, who, according to Bonnard (1942, p. 25), was accepted by unanimous opinion as "l'homme nécessaire au salut du pays." But his power as head of state established an authoritarian regime that was enshrined in the constitutional laws of 1940:

> For these reasons, and because of the urgency with which he was endowed with the fullness of constituent power [*la plénitude du pouvoir constituant*], Marshal Pétain hastened to make use of it. He does not confine himself to a few amendments to the constitutional laws of 1875, which serve merely to improve the regime. He completely turns the political organization upside down and replaces the constitutional order of 1875 with a completely new regime, even in its principles (...). Now that the facts of the National Revolution are known, it is necessary to interpret them from the point of view of the constituent power and, for this purpose, to consider the characteristics of the National Revolution, the constituent power in the drafting of the constitutional laws and the revising power organized for these laws (Bonnard, 1942, pp. 30, 32–33).

For Bonnard (1942, p. 34), the *Révolution Nationale* is legal and political (*a été une vraie révolution*). The constitutional laws of 1940 were created by a derived constituent power, not an original constituent power. This is a derived constituted power because the constitutional laws of Vichy France are not the act of a sovereign constituent power. Bonnard points out that the derivative constituent power is a power that belonged to parliament in the Third Republic (as Carré de Malberg explained) and now belongs to Pétain. This constituent power was introduced by the Constitutional Law of July 10, 1940, which created a new holder of constituent power that replaced the mode established in the constitutional laws of 1875:

> After revolutions, the new constitution is drawn up by an original constituent power, since a revolution has overthrown the constitution and destroyed the instituted constituent power established there [*le pouvoir constituant institué par elle*]. This was not the case with the National Revolution of 1940. The constituent power there was a derived/instituted constituent power. However, the instituted power that intervened was not the constituent power established by the constitutional laws of February 25, 1875, Art. 8. A new holder of the constituent power [*un nouveau pouvoir constituant* = Pétain] was created by the Constitutional Law of July 10, 1940. This is what must be shown after discussing and rejecting the other solutions that could be considered or advocated (Bonnard, 1942, p. 35).

I can now develop Bonnard's discussion of Pétain's constituent power. Here Bonnard differs from the Sieyèsian and Schmittian traditions of constituent power. Bonnard points out that Pétain's regime was not a de facto government, but was established by the constitutional laws of 1940. He also points out that parliamentary democracy lawfully continued until the emergence of Pétain's constituent power, which established an authoritarian regime in France (1942, p. 38): "The (type of) constituent power that made the constitutional laws was a derived constituent power" (1942, p. 39). In contrast to Laferrière (1942) and the Sieyès tradition, Bonnard points out that the *derived constituent power* is not delegated. Bonnard points out that the National Assembly of 1875 had the delegation of the nation to exercise the constituent power, but this power cannot be delegated, as Burdeau (1943) explains. Following the logic of separating the concepts of *delegation* and *attribution*, Bonnard (1942, p. 40) points out that the constituent power was not delegated by Pétain, but that this power was conferred on him by the constitutional laws of July 1940. Bonnard performs a bizarre theoretical maneuver here when he says that the National Assembly of 1875 disposed of its derivative constituent power (*s'est dépouillée*), so that this power was taken over by Pétain at this moment of vacuum:

> The National Assembly, unable to draft the new constitution itself for the reasons mentioned above, finally disposed of its constituent power [*s'est dépouillée définitivement de son pouvoir constituant*] by creating a new constituent power through the Constitutional Law of July 10, 1940, by revising Article 8 of the Law of February 25, 1875. This new revision system, established by the Constitutional Law of July 10, 1940, is as follows. Constituent power, which had previously belonged [*appartenait*] to the National Assembly, now belonged both in exercise and in perception [*jouissance*] to Marshal Pétain (Bonnard, 1942, p. 41).

Bonnard's core idea is that the source of the new constitutional order is Pétain, not the people. The claim that the National Assembly renounced its constituent power by creating a new constituent power (Pétain) allows Bonnard to argue that there was not a true delegation of constituent power in 1940. This statement brings a paradox to the Sieyèsian tradition of constituent power: What value does the ratification by the nation of the new constitution that Pétain would create? We should recall that Laferrière (1942) had pointed out that the sentence "it will be ratified by the nation" showed that France remained a constitutional and republican state because of the recognition of the people as sovereign. In contrast, Bonnard says that "the ratification of the constitution by the people should not be understood as a recognition of the constituent power in favor of the nation" (1942, p. 42). Bonnard argues that it merely expresses recognition of the fact that "the constituent power always belongs by right to the

nation, whatever the organization of the state" (1942, p. 42). Nevertheless, "this ratification by the people does not confer on the constitution any force or legal value" (1942, p. 42). Bonnard points out that only Pétain exercises the constituent power and establishes the constitution as a binding legal norm. In other words, Bonnard argues that, given the National Assembly's renunciation of its constituent power, "ratification must be interpreted as an act of acceptance by the people to the marshal's constitutional work" (1942, p. 42).

For Bonnard, Pétain represents a new exercise and bearer of constituent power in France. He is employing the conception of constituent power as a power created by positive law, from the constitutional order. Bonnard claims that the abdication of the National Assembly as a constituent legislator on July 10, 1940, led to the emergence of a new "constituent legislator" (*autre législateur constituant*) (1942, p. 42). For Bonnard, only Pétain could revoke his constituent power, since he was vested with this power by the constitutional laws of 1940. Pétain's constituent power thus displaces and replaces the constituent body of the French Third Republic: "The National Assembly disappears as a constituent body and will no longer be able to act, since its jurisdiction has been definitively abolished" (1942, p. 44). When Pétain disappears, Bonnard argues, his constituent power does not revert to the National Assembly, but to his successor, who has the same constituent powers. In other words, Pétain became a new holder of constituent power, first equaling the National Assembly and then replacing and abolishing it. Bonnard concludes that Pétain "is neither an original constituent power nor a constituent power delegated by the National Assembly, but a new *pouvoir constituant institué* as successor to the constituent power created by the law of February 25, 1875" (1942, p. 44).

Although Bonnard's argument that the National Assembly had renounced its constituent power (*s'est dépouillée*) sounds bizarre, it must be understood as a radicalization of his legal positivism to destroy parliamentary democracy from within. In this part, Bonnard has drawn much inspiration from his reading of the Enabling Act of 1933, and thus reads Hitler's seizure of power as a "legal revolution." However, Bonnard's idea that Pétain constituted a new constituent power leaves open the question of the basis of the legitimacy of this new *derived constituent power*. Can Bonnard's notion of the nation's adherence to Pétain's constituent power be understood as an *acclamation* in the sense of Schmitt (1928/2017) and Liet-Veaux (1943)? Bonnard has mentioned that there is an opinion in France that Pétain was "l'homme nécessaire au salut du pays." However, it would be a mistake to say that this opinion represents for him Schmitt's idea of plebiscitary acclamation as a form of exercising the constituent power. Bonnard wants to develop a conception that is

different from the plebiscitary conception of constituent power. Bonnard is concerned with establishing a legal theory of the authoritarian state without the instantiation of "people" and "democracy." He seeks an authoritarian structure of legitimacy because it can neutralize a possible appeal to popular sovereignty and parliamentary democracy. For the autocratic political legitimacy of the constituent power in Vichy France, Bonnard explains what the legal theory of authoritarian political power is.

Bonnard points out that the political power of the Vichy regime has a different source of political legitimacy than democracy in its liberal (parliamentarism) and illiberal (fascism) variants. Bonnard (1942, p. 49) says that the new authoritarian regime of Vichy seeks a strong state without separation of powers. He explains that there is a tradition that establishes the voluntary origin of political power, most developed in France in Rousseau's theory of the social contract. Here, the state derives its legitimacy from the acceptance and consent of individuals (1942, p. 53). Bonnard (1942, p. 53) echoes Duguit's critique of subjective law, pointing out that this theory of political power is based on the false assumption of a transcendent will that has no empirical or scientific basis. Echoing the legal positivist reading, Bonnard says that behind Rousseau's theory is a metaphysical and theological understanding of political power. He defines it as a "first and efficient cause" because the *volonté générale* is consistent with the theology of Thomas Aquinas (1942, p. 54). Bonnard points out that this basis for the legitimacy of political power in Vichy France must be rejected because it represents "an ideology not conducive to the existence of a strong [*fort et puissant*] political power" (1942, p. 54). Paradoxically, while Duguit, Hauriou, and Carré de Malberg rejected Rousseau's theory of sovereignty to avoid the danger of revolution and popular autocracy, Bonnard used the same positivist arguments to justify a new conception of popular autocracy in Vichy France.

c. The Autocratic Political Legitimacy

Bonnard develops a new conception of popular autocracy that deserves to be analyzed. In chapters four and five, I explained how Schmitt introduces three variants of the concept of popular autocracy. The first is the *sovereign dictatorship* of the constituent assembly in the French Revolution, the second is the Bonapartist dictatorship, and the third is the idea of the president as "guardian of the constitution." In all of these cases, the people are recognized as the bearers of sovereignty and constituent power. In Bonnard's case, however, there is an extremely important deviation that sets him apart from Schmitt's idea. For Bonnard, the people are not the creators of the constitutional order of Vichy; rather, it is Pétain who first creates the constitutional laws of the autocratic state, and then the people accept the will of the autocrat. So the people are not really a power that gave a mandate or created the existing constitutional order, but only a subject that accepts the work of Pétain. Therefore, I agree with Bonin (2023, p. 63) when he relates this idea of Bonnard's more to Boulangism, for here Pétain is conceived not as a Bonapartist dictator but as a new kind of monarch or military sovereign. For Bonnard, Pétain's legitimacy is purely positivist and based on the idea of a *derivative constituent power*. There is no explanation or analysis in the literature of this new concept of popular autocracy that Bonnard presents, except for the interesting reading that Louis Terracol shared with me.

Terracol is among the few scholars who have studied in depth the constitutional foundations of the de facto governments and, in particular, of Vichy France (Terracol, 2016, 2021, 2022). In his dissertation, Terracol briefly develops the idea that Bonnard's theory of constituent power is not related to the concept of popular sovereignty, but rather to the idea of "popular consent to government" (*l'acceptation du gouvernement*) once Pétain's constitutional work is completed. Terracol explains that this is a constitutional theory of the jurists of authoritarian and totalitarian regimes concerned with public opinion: "In this search for legitimacy, traces of a theory of the state can be discerned that aims to place the leader at the center and to consider the people not as the basis of power but as its supposed finality" (2022, p. 260). Terracol also places Liet-Veaux's reception of Schmitt in this group of authors reflecting on popular consent in Vichy France. Terracol explains, however, that for Bonnard "The participation of the people does not mean possessing or exercising power. It helps to support the head, who alone exercises and wields power" (2022, p. 260). Bonnard relies on a purely autocratic theory of government. To carry out this theory, he cannot rely on the consent of the people, but "this trusting support of the governed does not limit the personal power of

the leader, but makes him fully effective" (2022, p. 260). Terracol interprets this as a theory of popular consent to government, which to me is a new variant of popular autocracy:

> By this sentence I mean to say that consent occurs only suppletively in a theory of the authoritarian state (even though the term occurs frequently in the discourse). In short, the Vichy authors assume that popular trust in the ruler (or possibly in authoritarian institutions) is a priori and does not need to be proven or demonstrated. And it is on the basis of this trust that the authorities are legitimized to act. But in order not to eliminate the notion of the people altogether, we put it not at the beginning but at the end of the theory: the authoritarian government then claims to act for the people, for their good (the people are the supposed end, but no longer the basis, of the state's action), and from then on it no longer needs to justify itself, for it is in possession of the truth, and the people are only there to place their trust in it. I am simplifying, but the idea is there. Of course, this is all just talk. Because in my opinion, it would be difficult to find mechanisms that put the common good at the center of governance in Vichy. This argument that the people are the goal and not the basis of power is used by authoritarian authors to get rid of democratic or popular legitimacy, which is seen as embarrassing (especially when the state is divided, as was the case in France at the time) (Terracol, personal communication, June 13, 2023).

I agree with this reading of Terracol, which is why I think Bonnard's theory of "popular consent to government" is a new variant of the concept of popular autocracy, because the Vichy jurist still relies on the concept of constituent power. Bonnard (1942, pp. 60–61) argues that since 1789, as in the theory of natural law (*Droits de l'homme et du citoyen*), law has been recognised as standing before the state and standing outside the state. Thus, a French theory of the authoritarian state cannot be in contradiction with this political foundation. For Bonnard, the *Révolution Nationale* did not change the tradition of law outside the state because Vichy France was based on "justice and the common good" (1942, p. 61). This, he argues, was the meaning of the motto *Travail, Famille, Patrie*, which stood for the pre-state principles that the authoritarian state sought to guarantee. This leads Bonnard to state that the French authoritarian state was not based on democracy, but on natural law (*le droit naturel beaucoup plus que la démocratie*). As Terracol (personal communication, June 13, 2023) says, this could be nonsensical talk, because Bonnard does not explain or develop any real theory of Vichy France from natural law. For Bonnard, in the Third Republic, the existence of political parties made it possible to understand the law as an expression of the will of the majority. In Vichy France, on the other hand, the law is not an expression of the *volonté générale*, but is implemented as "the realization of justice, the common good, and the national interest" (1942, p. 62):

> Power is authoritarian because its holder comes from outside and is superior to the ruled. It implies a dualism between the rulers who hold power and the ruled who are subject to it. Authoritarian power thus contrasts with democratic power, which consists in power being in the hands of the governed, so that the governed govern themselves and are their governors. Power limited by law retains the character of authoritarian power. So there is nothing to object [*rien ne s'oppose*] to consider the authoritarian state of 1940 as a state limited by the law (Bonnard, 1942, p. 63).

Although Bonnard distinguishes his authoritarian theory of the state from a plebiscitary conception of constituent power, there are considerable similarities between the two. For example, a characteristic element of Schmitt's plebiscitary conception of constituent power is his critique of individualism, parliamentary democracy, and socialism. Like Schmitt (1923/2017), Bonnard shares the criticism of the crisis of parliamentary democracy due to the private interests of political parties (1942, p. 76). He believes that the crisis of liberalism and democracy was a historical reality in Europe between the two world wars. Moreover, Bonnard shares Joseph de Maistre's counterrevolutionary criticism that Rousseau's theory of sovereignty and democracy was a paradox in itself, since it made the holder of political power (the people) both the ruler and the ruled. Bonnard adds that this "logically leads to the destruction of power" (1942, p. 76) and that "democracy is synonymous with anarchy" (1942, p. 77). For Bonnard, the problem with the theory of democracy is that "the individual remains as free as in the state of nature," so that in democracy "there is no longer any political power" (1942, p. 77). Only in an authoritarian state with a "monocracy" (*monocratie*) or a monarchy is political power "transcendent and logically a reality" (1942, p. 77), according to Bonnard.

This monarchical statement brings us to Bonnard's idea of popular autocracy. He points out that in France there is a new form of political legitimation of authoritarian power based on the transcendence of political power and the conditions of its exercise. The basic idea of the authoritarian state, he says, is not "the systematic exclusion of the people from any participation in political power" (1942, p. 110), as is the case in despotic and absolute states. Bonnard says the authoritarian state contrasts with the democratic state because "the participation of the people does not imply the possession or exercise of power, but is limited to the support (*se borne à aider*) of the leader, who alone possesses and exercises power" (1942, p. 110). In the authoritarian state, Bonnard argues, political power is transcendent through its holder, who is external and superior to the governed, which is why the distinction between rulers and ruled is maintained (1942, p. 111). Moreover, this political power is monocratic because it belongs to a single person who is the head of state (1942, p. 111). Bonnard presents a new variant of popular autocracy, one that resembles an absolute

monarchy in which the people play only a supporting role to the head of state, who in no way owes his legitimacy to the people:

> The authoritarian state is a pure monocracy, a monocracy in which the ruler holds sole political power. Power is not shared undivided between the ruler and the people. It is in the hands of the ruler alone, and the people have no share in it. Modern monocracy is not a moderate or limited government. Monocracy completely excludes that middle ground [*compromise*] between authoritarianism and democracy that is achieved in constitutional monarchies. The fundamental reason for this exclusion of moderate monocracy is the force of power. The indivisibility of power between two holders is a cause of the weakening of power (Bonnard, 1942, p. 111).

The power of the authoritarian regime is monocratic and belongs to a single person who is the head of state (*le Chef*) (1942, p. 111). According to Bonnard (1942, p. 111), the legitimacy of this power is based on the inability of individuals to govern themselves. Political power is neither shared nor shared with the people, thus ruling out a middle ground between authoritarianism and democracy. Interestingly, in contrast to Schmitt's theory of constituent power (1928/2017), in Bonnard's approach there can be neither a sovereign or Bonapartist dictatorship, nor a "totalitarian democracy" (Talmon, 1952), nor a "democratic dictatorship" (Ypi, 2020). Schmitt's theory of acclamation (1923/2017) involves the people as the basis of political legitimacy. For Bonnard (1942, p. 111), on the other hand, power sharing leads to a weakening of the power of the head of state, which is why recourse to democratic legitimation of power must be ruled out, even if it is intended to support an authoritarian regime. Bonnard thus turns against the conception of Liet-Veaux (1943), in which Pétain's constituent power was based on the acclamation of the nation. For Bonnard, authoritarian power excludes any source of legitimacy in popular sovereignty and relies instead on the "prestige" of the autocrat:

> The power of the ruler is an original power in the sense that the ruler possesses it of his own accord, without it having been transferred to him by anyone else. In the emergence of the authoritarian state, the ruler has asserted himself as such because of the circumstances, his personal value, his prestige, his authority, and because at that moment he felt himself to be the necessary man. (...) The authoritarian state thus excludes any popular origin of power [*exclut ainsi toute origine populaire du pouvoir*]. The power of the ruler and his agents does not come from the people in any way or degree. The value, authority and legitimacy of power do not derive from a delegation of the people; they derive essentially from the person of the ruler himself, from what the ruler himself is worth. This is the essential point that must be understood in order to understand the authoritarian regime and distinguish it from the democratic regime (Bonnard, 1942, p. 112).

The difference between Schmitt's theory of constituent power and Bonnard's new concept of popular autocracy is important. Inspired by the reading of French legal positivism, Bonnard defends Pétain's *derived constituent power* (Mommsen's concept of constituent function in Roman law). Schmitt was convinced in the early 20th century that democratic legitimacy is important for all kinds of political regimes. According to Schmitt (1923/2017), liberals, monarchists, and socialists invoke the language of democracy and constituent power to legitimize their political projects. In this context, Ypi (2020) states that in Marx, a republican understanding of dictatorship takes shape: "The distinction between dictatorship *over* the proletariat and dictatorship *of* the proletariat is essential to emphasize this point" (2020, p. 281). Bonnard, however, rejects the Schmittian and Marxist conception of democracy. Bonnard says that democracy "has created such a mentality that many people find it difficult to imagine that power can have authority and legitimacy without having an origin in the people" (1942, p. 113). In his authoritarian theory of the state, Bonnard points out that one must accept the idea that power can be valuable because of "the personality of the holder and his commitment to the common good" (1942, p. 113). Bonnard's authoritarian theory of the state thus brings us into the realm of discussing traditional or charismatic forms of legitimacy of power:

> Thus, the strength and authority of the will of the head of state does not derive from the fact that the head of state expresses the will of the people. His will derives its strength, authority and legitimacy from its value and the deep conviction of the governed; it is always in accordance with justice, the common good and the national interest. The French state of 1940 is thus a pure monocracy (...) This transcendence of power, moreover, was repeatedly expressed and manifested by Marshal Pétain himself in his messages. He makes it clear that the governing will is his own will and not the will of the people, which he would express as their representative (...) The transfer of political power to Marshal Pétain was spontaneous, outside any voluntary assignment, as is the case with political changes that involve a shift [déplacement] of political power (Bonnard, 1942, pp. 120, 121).

After this account, Bonnard goes into detail about the political and administrative organization of the authoritarian state. I will not go into this discussion further, because the central element of Bonnard's theory is that in his conception of popular autocracy, the people are neither the source nor the instance of the legitimacy of political power. The people merely consent to the constitutional order created by the autocrat. Constituent power in the authoritarian state is the central element that makes Pétain the holder of *plenitudo potestatis*, for his power is limited only by himself and his will. In my view, the Bonnardian idea of popular autocracy makes Vichy France a new kind of monarchy. The people and the concept

of *pouvoir constituant* are not excluded in his theory. Bonnard points out that the governed only support the head of state (*L'aide des gouvernés*), which is why Pétain keeps the people informed through the press, radio, and advertising (1942, p. 124). Pétain is the bearer and executor of the *derived constituent power* that replaced and abolished the democratic conception of constituent power (*original constituent power*) of Rousseau and Sieyès, and was familiar with the National Assembly in the Third Republic. Bonnard concludes with his belief in the superiority of the authoritarian state over the democratic state and warns of the dangers of bureaucracy:

> In this study, as a sociological jurist, I have undertaken to describe as objectively as possible the causes that led to the emergence of authoritarian rule in France after the events of 1940 and the essential structural elements of that rule. (...) Although I believe in the superiority of the authoritarian regime over the democratic regime, I also believe that the authoritarian regime can be worse than the democratic regime if it does not contain certain provisions, in particular, to prevent it from degenerating into bureaucracy (Bonnard, 1942, p. 177).

Obviously, Bonnard's whole analysis of Pétain as the holder of the *derived constituent power* means an instrumentalization of French legal positivism. But I think it is undeniable that Bonnard simply extended an idea that was already present in the legal positivist interpretation: the reading that Sieyès's idea of *pouvoir constituant* is simply the "special legislation," the "constituent function" explained by Mommsen. It is this latter conception that helps Bonnard legitimize the destruction of French parliamentary democracy from within.

3. Conclusions

In the international literature, the distinction between the concepts of *original* and *derived* constituent power has become entrenched, without any real knowledge of the origin of these terms. I have shown that this distinction arose in Vichy France in Roger Bonnard's attempt to legitimize Pétain's autocracy. Moreover, this was the first time in the intellectual history of constituent power that three conceptions of constituent power, which were to shape the intellectual development of the concept in the 20th and 21st centuries, clashed simultaneously. Laferrière's Sieyèsian conception of constituent power assumes that the nation remained the holder of constituent power and sovereignty in Vichy France. Thus, Laferrière emphasizes that Pétain is a delegate of the constituent power, an "extraordinary representative" of the mandate of the people. If Pétain were to disappear, the constituent power would be returned to the National Assembly, opening the possibility of a return to parliamentary democracy, Laferrière argues. For him, this also means that Pétain's constituent power resembles the Bonapartist dictatorship, which is why he draws a parallel between Pétain and Louis Napoleon's plebiscites in 1852. This position of Laferrière, which emphasizes the sovereignty of the nation, is treated differently by Liet-Veaux.

For Liet-Veaux, Pétain's constituent power is exercised under the legitimacy of acclamation, a concept he takes directly from Schmitt's work. It is an attempt to conceptualize Pétain as a plebiscitary dictator, a representative of the people. Liet-Veaux draws heavily on Schmitt's notion of the *permanence* or *continuity* of the constituent power. Schmitt had developed this reading in his *Verfassungslehre*, where he points out that the constituent power can persist despite a change of regime. Thus, Schmitt sees continuity between the German Empire and the Weimar Republic because the subject of the constituent power remains the people in both political regimes. Similarly, Schmitt believes that the regime changes of 1848, 1851, and 1852 in France, from the Second Republic to the Second Empire, continue to recognize the people as the bearer of constituent power. Liet-Veaux takes up this Schmittian reading to affirm that there is a juridical continuity in the revolutions expressed in the acclamation of the constituent power. For Liet-Veaux, acclamation is expressed in the public square, and he cites Schmitt to define it as a modern form of political legitimacy. For this reason, Liet-Veaux's central idea is that Pétain's constituent power is neither a delegation of the nation nor a delegation of the National Assembly, but an acclamation of the nation in Vichy France. This is the plebiscitary conception of Pétain's autocracy.

In contrast to Laferrière and Liet-Veaux, and thus to Schmitt's idea of popular autocracy, Bonnard attempts to develop a purely autocratic theory of constituent power. He draws inspiration from the interpretation of French legal positivism, which sees Sieyès's idea of constituent power as synonymous with Mommsen's concept of the "constituent function." Bonnard distinguishes the *original constituent power* as the idea of Rousseau and Sieyès from the people as the bearer of sovereignty. For Bonnard, the original constituent power acts in revolutions, which are defined as constitutional breaches, but also as transformations of the form of the state. The French Revolution is theorized by Bonnard as an exercise of the original constituent power. The *derived constituent power*, based on the constitutional laws, acts within the limits of the existing constitutional order. It is a power to reform or amend the constitution within the framework of positive law. Bonnard conceptualizes the emergence of Vichy France as the exercise of a derived constituent power that resulted from the disempowerment of the National Assembly after the armistice. All contemporary discussion of the concept of *derived constituent power*, exercised for example by the constitutional courts, stems from this autocratic theory, which Bonnard advanced in 1942 to legitimize Pétain's constituent power.

Bonnard establishes a new variant of popular autocracy, for his conception of the autocratic state is not that Pétain's constituent power comes from the people, but that the people accept the constitutional order after Pétain has finished his constitutional work. This is a conception of autocracy that still uses the concept of constituent power as a resource, but in a completely different sense from that understood by Sieyès and Schmitt. It is the concept of constituent power in the sense of Mommsen's work on Roman law. As I pointed out in the previous chapter, this reading was developed in French legal positivism by Duguit, Hauriou, and Carré de Malberg to avoid the danger of revolution and popular autocracy. Paradoxically, Bonnard takes up this positivist reading to conceive of Pétain as a *derived constituent power*. Bonnard's reading of constituent power, like Schmitt's, will cross the Atlantic and have great significance in South America, where it too serves to legitimize a popular autocracy. Schmitt and Bonnard founded the concept of popular autocracy from the 20th century to the present.

Fourth Section: The Autocratic reception in Spain and South America

Chapter 7: Antiliberalism, Civil War and Dictatorship: Carl Schmitt and His Intellectual Influence on the Francoist Ideologists (1939-1942)[2]

> "I have translated Carl Schmitt's *Verfassungslehre* [into Spanish], albeit with a preface warning against its errors" (Francisco Ayala) (Dotti, 2000, p. 233).

> "Conde's work, written with great care, demonstrates a good command of the literature and a genuine philosophical and configural sense. It is evident that Bodin's concept of sovereignty is subordinated to a neutral and tolerant monotheism" (Schmitt, 1935/2003, p. 124).

Introduction

Political ideas cross borders. In Spain, the most prominent historians and jurists of our time who have studied the Francoist state (1939-1975) have defined Francisco Franco as a *sovereign* or *constituent dictator* (Giménez, 2014a; Moradiellos, 2016b, 2019; Saz, 2019), that is, as a type of popular autocracy. This chapter aims to show that this was the first time in the intellectual history of constituent power that Schmitt's distinction between the concepts of *sovereignty* and *sovereign dictatorship*, which I explained in chapter three, was discussed. Without being clear about the origins of this terminology, Hispanic historiography has consolidated the theory of dictatorship outlined in Chapter 4 of Schmitt's *Die Diktatur* (1921/2015). Thus, the association that the German jurist makes between Sieyès's idea of constituent power (*pouvoir constituant*) and the concept of dictatorship has become established in the Spanish literature as the concept of the Francoist state. How did this Schmittian terminology find its way into the historiography of the Civil War (1936-1939)? Why do historians and jurists today conceptualize the Francoist state as a *sovereign* or *constituent dictatorship*? The answer lies in the enormous intellectual influence Schmitt had among the leading ideologists of the Francoist state since the 1930s.

It is paradoxical that the history of the democratic reception of Schmitt has already been written, but not the history of his autocratic reception. Schmitt's ideas began to circulate in Spain in connection with the dictatorship of Miguel Primo de Rivera (1923-1930). The first

[2] This chapter is an expanded and revised version of an article of the same title appearing in *Intellectual History Review*. The paper was awarded the 2023 Charles Schmitt Prize. In this chapter I have extended the explanation of the reception of Schmitt's ideas in the works of Luis Legaz Lacambra and Francisco Javier Conde.

time Schmitt's work was discussed in Spain was with the 1926 Spanish translation of Oskar Georg Fischbach's *Allgemeines Staatsrecht* (1923), where the work *Die Diktatur* (1921/2015) was cited to distinguish between the *commissary dictatorship* as constituted power and the *sovereign dictatorship* as constituent power (Molina, 2019, pp. 217–218). Nevertheless, his Barcelona lecture on the "epoch of neutrality and depoliticization" (Schmitt, 1929/2014), translated by the philosopher José Ortega y Gasset, was his first text published in Spain (Schmitt, 1930a). Thus, he became known early on as a critic of political liberalism. Guillén Kalle (2018) has shown how different jurists of the Second Republic (1931-1939) read and commented on various works by Schmitt from the early 1930s. The *Verfassungslehre* (1928/2008, 1928/2017) was translated into Spanish by Francisco Ayala in 1934, but the democratic reception of this work developed even earlier in Spain.

The seminal study on the idea of constituent power was written by Luis Recaséns Siches (1903-1977), a liberal deputy of the Constituent Cortes of 1931 who went into exile in Mexico at the beginning of the Civil War (Guillén Kalle, 2018, pp. 49–53). His work, entitled *The Constituent Power: Its Theory Applied to Contemporary Spain* [*El poder constituyente: su teoría aplicada al momento español*] (1931), was written in the context of the fall of the monarchy and its attempt to legitimize the Second Republic as a revolutionary process.

The book clearly shows how an intense dialogue took place in the Spanish legal scholarship between French legal positivism and Schmitt's new decisionist approach. The Spanish Constitution of 1876 was destroyed by the coup d'état that established the dictatorship of Primo de Rivera. On April 12, 1931, when King Alfonso XIII was discredited for supporting this dictatorship, municipal elections were held that resulted in broad support for the Republican parties. On April 14, the Second Republic was proclaimed and subsequently a Constituent Assembly was held, which approved the new Republican Constitution on December 9, 1931. Recaséns Siches participated in this constituent process by being elected as a deputy from Lugo (Galicia) for the Republican Liberal Right party. The Spanish jurist quoted various passages from Schmitt's *Verfassungslehre* to show that the era of Spanish monarchies was over (1931, pp. 71–77). Schmitt (1922/2005, p. 51) had said that after the Revolutions of 1848, only democratic legitimacy prevailed in Europe. Similarly, Recaséns Siches asserts that the age of monarchy in Spain has also ended and that constitutional law can only be based on popular sovereignty (1931, p. 71):

> In a constituent situation, the Spanish nation cannot accept any legitimate authority other than the full power of popular sovereignty (...) As Carl Schmitt, professor at the University of Berlin, one of the greatest contemporary authorities in Public Law, says,

> constituent power is unitary and indivisible by its very nature (...) The thesis established by Sieyès remains: The elaboration of a first constitution presupposes, above all, a constituent power (1931, p. 71).

For nearly 80 years, the democratic reading of Schmitt's work has had a profound significance within the democratic tradition of Spanish-language constitutional law. This is evident in the classic works of eminent jurists such as Arturo Sampay (1949, pp. 6–10), Luis Sánchez Agesta (1967, pp. 287–307), and Pedro de Vega (1985/2007, pp. 67–76). The jurist who in our days has most intensively studied the democratic reception of constituent power in Latin America is Joel Colón-Ríos. In his writings, he uses Schmitt's ideas to examine constitutional reform in Colombia (Colón-Ríos, 2013, pp. 269–285). While the history of the democratic reception of constituent power enjoys a long tradition, from Recaséns Siches to Colón-Ríos, the history of autocratic reception is lacking in the literature. The historiography of Francoist ideologists remains separate from studies of Schmitt's reception in Spain, except for a few brief references (Gallego, 2014, pp. 583–585; Moradiellos, 2016a, p. 87; Tahmassian, 2012, pp. 61–65). The topic has received little treatment in the literature. For example, the works of López (1996) and Guillén Kalle (1996, 2018) offer a general description of the intellectual curiosity of Spanish jurists about different parts of Schmitt's work. Saralegui's work (2016, pp. 137–147) also describes Schmitt's connection to the Francoist intellectuals but focuses too much on exchanging letters full of biographical anecdotes. Only Molina (2019, pp. 220–221) has explained Schmitt's influence on the conception of Franco's dictatorship as the exercise of constituent power, but without addressing the discussion developed by Franco's political theorists.

In short, there has been no work to date on the important reception of Schmitt's theory of constituent power for the construction of a popular autocracy in Spain. Given this deficiency, I examine how Schmitt's ideas influenced theorists of the Francoist state between 1939 and 1942. My study begins with a brief introduction to historiography on the relationship between the concepts of fascism and "caudillaje" in the Spanish Civil War.

1. The State Theory of the Caudillo

The first international reception of Schmitt's distinction between the concepts of *sovereignty* and *sovereign dictatorship* developed during the Spanish Civil War. According to Spanish historiography, as the general of the army of the rebel side, Franco declared himself sovereign and established a dictatorship in which he was the bearer of constituent power (Giménez, 2014b, pp. 185–186; Moradiellos, 2016b, pp. 800–802). In its early days, the Francoist dictatorship did not attempt to legitimize itself (until July 6, 1947, with the Law of Succession to the Headship of the State) through referendums (Penadés & Velasco, 2022, pp. 76–77). Franco's dictatorship was born from the centralization of constituent and legislative power through the violent seizure of power and the absence of plebiscitary mechanisms. My study, however, focuses not on the extensive historiography on Francoism (X.-M. Núñez, 2004; Wright, 2021), but on the theory of the state that legitimized Franco's rise to power after the Civil War. The novelty of my analysis lies in bridging three theoretical approaches that have remained unconnected in the literature to date: the Francoist theory of the state, the idea of constituent power, and the history of Schmitt's reception in Spain. Between 1939 and 1942, there was intense reflection among Francoist jurists and politicians on how to legitimize the new postwar autocratic state (Gallego, 2014, Chapter 6; Moradiellos, 2016a, pp. 83–90; Saz, 2012, pp. 33–41). During this period emerged the theories of the Francoist dictatorship that are known as the "theories of caudillaje" (theories of leadership) (Giménez, 2014b; Moradiellos, 2016b; Saz, 2019). My central argument is that these theories are based on a reception, reading, and critique of Schmitt's idea of constituent power.

To show Schmitt's reception and influence on the Francoist theories of the state, my account is divided into two sections. The first section provides a historical and conceptual introduction to the theory of caudillaje in the historiography of the Civil War. I focus on the relationship between the concepts of fascism and caudillaje and then on Conde's decisionist reading on Bodin's theory of sovereignty. The second part explains that two theories of caudillaje can be distinguished between 1939 and 1942. The first is the *Francoist decisionist theory*, which relied on Schmitt's idea of constituent power to claim that the Francoist state was a *sovereign dictatorship*. The second is the *Francoist Weberian theory*, whose reading is inspired by Schmitt's critique of parliamentary democracy and Weber's idea of charisma. For Conde, Franco's caudillaje in Spain restored *sovereignty* and the monarch's 'personalized' authority based on charismatic and traditional leadership. The conclusion of my analysis is that Schmitt's idea of constituent power is at the core of both Francoist theories of the state.

a. Coup d'état, Civil War, and Fascism

The Spanish Civil War (1936-1939) was one of the most critical and tragic episodes in 20th-century European history. The war claimed thousands of victims and initiated a process of persecution and violent repression during the Francoist dictatorship (1939-1975) (Preston, 2012, Chapter 13; Ruiz, 2005, Chapter 6). The conflict was triggered by the coup d'état of July 1936. Spain was divided into two territories, each controlled by two sides, the rebels and the republicans. After the coup, a military dictatorship prevailed in the rebellious zone. Historians have described the Civil War as a prelude to World War II, an expression of class struggle, a political confrontation between the Republic and the dictatorship, and polarization between fascism and communism (Calleja, 2020, p. 265). The military uprising took place after a context of political violence and plots against the Second Republic. On August 10, 1932, there was a failed military coup (*Sanjurjada*) led by commander general José Sanjurjo, while between October 5 and 19, 1934, there was a socialist revolution against the Second Republic (*Huelga general revolucionaria*). After the Popular Front (Left) victory in the elections between February and March 1936, the various right-wing groups began to plot against the government of Manuel Azaña.

The central figure in the history of caudillaje is Francisco Franco Bahamonde (1892-1975). On October 24, 2019, his remains were exhumed from the Valley of the Fallen, a cemetery dedicated to the memory of the victims of the war. Franco was called by his followers as "caudillo of Spain" (*Caudillo de España*) between 1939 and 1975. He played a leading role in the uprising against the Second Republic. In July 1936, he was flown from the Canary Islands to the Protectorate of Morocco. The military uprising in Africa quickly triumphed. On April 20, 1937, Franco promulgated the Unification Decree, with which he proclaimed himself head of the Traditionalist Spanish Phalanx and of the Councils of the National Syndicalist Offensive (FET y de las JONS). Also, on March 9, 1938, Franco promulgated the *Fuero del Trabajo*, a document establishing the fundamental laws of his dictatorship that emulated Mussolini's *Carta del Lavoro* (1927). On April 1, 1939, the radio of the rebel side broadcast Franco's report announcing the end of the war. The First Franquismo (1939-1959) developed from this point on. The historiography has pointed out that this period stopped the Spanish 'fascistization' in the face of the defeat of the Axis powers and consolidated National Catholicism as the ideology of Francoism (Gallego, 2014, Chapter 7; S. Payne, 1984, Chapter 7, 1999, Chapter 11; Saz, 2003, Chapter 5).

Caudillo comes from the Latin *capitellus* meaning "little head." The term alludes to the "main part of the body," so the caudillo is the person who exercises the "main command" (Moradiellos, 2016a, pp. 40–43; Saz, 2012, pp. 29–30). The use of the term became widespread in the wars of independence in Spanish America. Caudillos were military chiefs who took up arms against the Spanish crown in the 19th century. They later became heads of government, thus founding the long tradition of Hispanic American "*caudillismo*" (Hamill, 1992; Lynch, 1993, Chapter 2). However, in Spanish historiography an essential distinction is made between "*caudillismo*" and the singular term preceded by a masculine article ("*el caudillo*"). The latter refers to an institutionalized title that directly alludes to Franco as general of the army of the rebel side ('*Generalísimo*') and also to his status as the highest political authority ('*Jefe del Gobierno del Estado*') (Giménez, 2014b, pp. 187–188; Moradiellos, 2016b, p. 797). That is why the theory of the autocratic state led by Franco is referred to as the *caudillaje* theory. This etymological distinction leads us to the relationship between the concepts of *caudillaje* and fascism.

There is extensive historiography on the complex relationship between the concepts of fascism and caudillaje (Moradiellos, 2016b; Saz, 2012; Zaratiegui, 2016). It has been demonstrated with extensive historical evidence that Francoism absorbed the various fascist, monarchist, and nationalist movements of the early 20th-century (Gallego, 2014, Chapter 6; Saz, 2003, Chapter 7). On the ideological level, the magazine *Acción Española* (1931-1936), a nationalist-monarchist publication that emulated Charles Maurras' *L'Action française*, was of great importance. Before the Civil War, the Spanish fascist parties were a minority force on the political level. The JONS of Onésimo Redondo and Ramiro Ledesma was only an extra-parliamentary grouping with some presence in the provinces. However, their unification with the Spanish Falange (FE) under the command of José Antonio Primo de Rivera consolidated Spanish fascism (S. Payne, 1999, Chapters 4–5). Its ideology was denominated as "National Syndicalism" (*Nacionalsindicalismo*), inspired by the aesthetics and political orientation of Italian fascism. Once the war began, its unification with the monarchist Carlist movement, called "Traditionalist Communion" (*Comunión Tradicionalista*), gave rise to the FET y de las JONS, the sole and official party of the dictatorship. Thus, Francoism emerged as the ideological continuation of Italian and German fascism in Spain.

Nevertheless, this association between caudillaje and fascism has been revised, especially by the influential work of Juan Linz (2003, 2011). His central idea is that every fascist state is authoritarian, but not every authoritarian state is fascist. Linz (2011, pp. 19–42) points out that authoritarian regimes tend to be characterized by an autocratic 'mentality' that

is often pragmatic. Political power is concentrated in an autocrat because of his charisma and not so much because of a party organization or ideology. Therefore, Liz says that the Francoist state is one of the authoritarian regimes that did not evolve into totalitarianism, such as the Italian and German fascisms (Miley, 2011, pp. 29–32).

Although Linz's conceptual distinction is correct, it is undeniable that fascist ideologies played a leading role in the ideological formation of Francoism from the beginning of the Civil War. Franco's attraction to fascism began with his self-proclamation as supreme leader of the FET y de las JONS. The fascist salute with the raised arm and outstretched palm became institutionalized. Like Italian and German fascism, Spanish fascism defined Franco's dictatorship as a "national syndicalist revolution" (Saz, 2003, pp. 187–188). He directed union organizing, education, and political propaganda. Ramón Serrano Suñer, Franco's brother-in-law, multiple times minister of state, and president of FET y de las JONS, played an essential role during this period. After the political crisis of 1941 and the struggle for power between Franco's and Serrano Suñer's factions, Francoism moved closer to the Catholic and monarchist circles. Thus, Franco moved away from his original fascist inspiration and moved closer to other Catholic conservative organizations such as the National Confederation of Autonomous Rights (CEDA) and the National Catholic Association of Propagandists (ACdP).

Between 1939 and 1942, the reception and influence of Schmitt's theory of constituent power to legitimize a dictatorship first appeared in the Spanish-speaking world. Precisely was when Francoism defined its ideological orientation between its early fascist inspiration and the strengthening of conservative Catholic and monarchist groups. The Francoist ideologists asked themselves about the foundations of the political legitimacy of the dictatorship that had emerged from the Civil War. Here we find the works of various propagandist jurists and political theorists of Francoism such as Juan Beneyto Pérez, Francisco Elías de Tejada, Luis Legaz Lacambra, and Francisco Javier Conde. But among them all, historiography has highlighted that Francisco Javier Conde was the most prominent ideologist of the Francoist state (Gallego, 2014, pp. 617–620; Moradiellos, 2016a, p. 86; Reig Tapia, 1990, pp. 67–68). This author was an expert in the history of ideas and German state theory. However, a theme that has received little attention in the literature is that Conde was also a profoundly Schmittian thinker. Next, I examine his work on the ideas of Bodin (Conde, 1935/1974) to show the influence of Schmitt on the development of his later theory of caudillaje (Conde, 1942).

b. Bodin, Political Theology, and Monarchy

Conde's reading is based on the acceptance of Schmitt's theory of *sovereignty* and the absolute rejection of his concept of *sovereign dictatorship*. Conde is one of the first to analyze that *sovereignty* is not the same as a *sovereign dictatorship*, since sovereignty is not necessarily based on popular consent or a *mandate* or *commission* from the constituent power. Conde's conception of sovereignty is inspired by Schmitt's concept of sovereignty as the restoration of order in the face of a state of exception. Conde's entire decisionist reading of Bodin's political thought can be summed up in one sentence from chapter 3 of Schmitt's *Politische Theologie*: "In the struggle of opposing interests and coalitions, absolute monarchy made the decision and thereby created the unity of the state" (1922/2005, pp. 48–49).

Francisco Javier Conde (1908-1974) was an important jurist, historian of political ideas, and one of the main political ideologist of the Francoist theory of the state (Blasco Gil & Correa Ballester, 2005; Molina, 2012; A. R. Núñez, 2018; Reig Tapia, 1990). Legaz Lacambra dedicated a memorial text to him after his death (Legaz Lacambra, 1975). As a politician, he was a procurator in the Francoist Cortes from 1943 to 1956. Moreover, as a diplomat, he was Franco's ambassador to the Philippines, Uruguay, Canada, and the Federal Republic of Germany. Likewise, Conde was an expert in the field of state theory from a young age.

Conde's doctoral dissertation, entitled The Political Thought of Bodin [*El pensamiento político de Bodino*] (1935/1974), already contains the main concepts of his later theory of caudillaje. Conde wrote his theory of caudillaje in his most intellectual Schmittian moment. For nearly four decades, he and Schmitt shared a close friendship and a convergence of political ideas. In 1941, Conde translated and published two books by Schmitt in Spanish: *Political Studies* [*Estudios Políticos*] (Schmitt, 1941b) and *The Leviathan in the State Theory of Thomas Hobbes* [*El Leviatán en la Teoría del Estado de Thomas Hobbes*] (Schmitt, 1938/1941). The first book contained a preface by Schmitt and translations of *La Época de la Neutralidad* (1932 edition) (Schmitt, 1929/2014), *Teología Política* (1934 edition) (Schmitt, 1922/2005, 1922/2015), and *El Concepto de la Política* (1933 edition) (Schmitt, 1932/2007, 1927 1932/2018). The second book was the translation of Schmitt's work on Thomas Hobbes (Schmitt, 1938, 1938/2008). Conde announced these translations in the influential Falangist journal *Escorial*. He also published a translation of the fifth chapter (*Der Reichsbegriff im Völkerrecht*) of *Völkerrechtliche Großraumordnung* (1941) (Schmitt, 1941c) in *Revista de*

Estudios Políticos (Madrid) (Schmitt, 1941a), which was well received (Molina 2019, pp. 118-119).

For his research on Bodin's political thought, Schmitt advised Conde in Berlin. According to Molina (2019, pp. 123–126), Conde received a research grant from the Association for the Promotion of Studies and Scientific Research [*Junta de Ampliación de Estudios e Investigaciones Científicas*] to visit Germany. Thus, he arrived at the University of Berlin in September 1933. He then applied for an extension of the scholarship so that Schmitt himself could advise his research on Bodin. Conde returned to Madrid to defend his dissertation on July 3, 1935 and then managed to publish his work. The correspondence between the two in October and November 1936 shows that Schmitt helped him find a stay in Berlin and facilitated his appointment as a visiting professor at the Romanesque Seminar of the University of Berlin (Molina, 2019, pp. 132–133). In 1935, Schmitt published a Spanish review of Conde's book, introducing him as his Spanish disciple and an expert on Bodin's political theology:

> Conde's study of Bodin is an important and well-documented historical essay on modern state theory that deserves our closest attention (...) Conde offers a systematic exposition of Bodin's political theology and metaphysics (...) Conde's work, written with great care, demonstrates a good command of the literature and a genuine philosophical and configural sense. It is evident that Bodin's concept of sovereignty is subordinated to a neutral and tolerant monotheism (Schmitt, 1935/2003, p. 124).

Conde's work (1935/1974) consists of five chapters: Religion in Bodin, his critique of the technicality of state theory, the metaphysical character of his political thought, his political theology, and his concept of sovereignty. Conde begins by placing Bodin in the French Wars of Religion of the 16th century. This is where the Huguenot political theorists (*Monarchomachs*) and works such as *Vindiciae contra tyrannos* (1579) emerged, legitimizing popular sovereignty and tyrannicide. Citing chapter 2 of *Die Diktatur* (1921/2014), Conde (1935/1974, pp. 29–30) portrays Bodin as an opponent of the "technicality" of Machiavelli's *The Prince* and a champion of freedom of thought and religious tolerance. According to Schmitt (1921/2014, p. 20), Machiavelli was primarily a theorist of "technicity," i.e., rational methods for maintaining political power. Conde echoes Schmitt's idea that although Bodin was opposed to the radicalism of the Monarchomachs, Machiavelli's technicality strikes him as perverse atheism. For this reason, Conde argues, Bodin (1935/1974, p. 29) rejects Machiavellianism because he believes that religion and natural law are essential parts of preserving the state.

Conde's central thesis is that Bodin's theory of sovereignty presents the defense of absolute monarchy as neutralizing civil war. His decisionist reading presents Bodin as a defender of sovereignty in the face of the state of exception (Schmitt, 1922/2005, pp. 8–9). Conde portrays the French political theorist as an enemy of "Machiavelli's atheism, against the libertarian proclamations of the Monarchomachs, against the intolerance of religious confessions" (1935/1974, p. 46). Although he despised any kind of tyranny, it seemed to him "preferable to anarchy" because although it is an "unjust order imposed and maintained by force," it is ultimately a political order (1935/1974, p. 47). But to avoid anarchy and tyranny, the solution lies in the neutrality of the state. For Bodin, neutrality is defined as "an authority with prestige to settle disputes" (1935/1974, p. 49). The state is neutral in religious matters in order to put an end to sedition and civil wars, so that it can resort to justice or force to settle disputes. Who constitutes this sovereign authority to end civil wars? Conde argues that Bodin answers with the monarchy because "the only authority capable of realizing the idea of the strong neutral state is the French monarch" (1935/1974, p. 53).

The interpretation of monarchy as neutralizing civil war in 16th century France leads Conde to Schmitt's concepts of sovereignty and political theology. Conde says that "Bodin usually applies the attribute of sovereign to God," i.e., "God is sovereign and prince of the world, and at the same time the sovereign is the image of God" (1935/1974, p. 76). The Spanish jurist defines Bodin's concept of sovereignty through Schmitt's political theology:

> The unity and indivisibility of sovereignty has a theological basis. God, the "grand Dieu souverain," cannot make another God equal to him because he is infinite and there cannot be two infinite things, which is necessary to prove. Bodin transfers this argument to the political sphere and concludes with the same necessity that the prince -the image of God- cannot make a subject equal to him without abrogating his power (1935/1974, p. 78).

After basing Bodin's concept of sovereignty on Schmitt's political theology, Conde explains why the main characteristic of this absolute power is the relationship between command and obedience. For Bodin, "the power of the state is the power to command; the state commands and the subjects obey" (1935/1974, p. 85). Conde points out that Bodin gives the example of the Roman Senate to distinguish between *auctoritas* and *potestas*, since this institution had no power to command, only *dignité, autorité,* and *conseil* (1935/1974, p. 85). Thus, obedience is a logical consequence of command. But this command is exercised through the power to create laws. Conde here takes up Schmitt's decisionist approach to Hobbes's theory of sovereignty. The Spanish jurist defines command as the will to enforce the

law: “For the *ius* to become a *lex*, a command is necessary, that is, an act of will. The binding force of laws, their positivity, depends on the mandate or commission” (1935/1974, p. 86). Conde here cites the typical Hobbesian formulation of Schmitt (1922/2005, p. 33, 1921/2014, p. 16) to affirm that the validity of laws is

> begins when the holder of the power of command converts them into positive by an act of will. The mandate converts the *ius* into *lex*; without it, the law lacks binding force. We are almost in line with Hobbes: “*Auctoritas non veritas facit legem*.” But we must not forget that Bodin never loses the link with the transcendent level [=political theology] (Conde, 1935/1974, p. 87).

Conde’s Schmittian reading of Hobbes and Bodin is developed further in his final chapter devoted to the concept of sovereignty. Conde says that “the sovereign cannot be subject to the laws” because “it would be a contradiction to think that he who commands is bound by his commands” (1935/1974, p. 91). Therefore, sovereignty is not a competence, but an “absolute power of command, that is, a power that is not subject to positive law” (1935/1974, p. 93). Sovereignty is a unique and indivisible power that is exercised permanently. Conde takes up Schmitt’s political theology by affirming that sovereignty “is the counterpoint of the exception” because “sovereign power does not act solely in the moments of the exception” (1935/1974, p. 98). Like Schmitt (1921/2014, p. 30), he conceptualizes dictatorship in Bodin's political thought as a commission from the sovereign: “Magistrates, lieutenants, governors, regents, dictators, down to the last commissioner, exercise a competence, are subject to the law, that is, to the command of the sovereign” (1935/1974, p. 104). Conde reinforces his decisionist reading of Bodin by pointing out that the monarch, as the holder of absolute and perpetual power, can suspend the laws at will:

> There is first of all a group of norms concerning the state and the foundation of the state, which our publicist [Bodin] calls “*lois fondamentales*” and “*lois royales*.” These laws, which we might call constitutional, are in principle intangible, but if the sovereign violates them, the magistrate cannot disobey their commands, because it is only permissible to disobey norms that violate divine or natural laws (Conde, 1935/1974, p. 109).

This passage shows that the common element between Conde and Schmitt is that the concept of sovereignty is defined as the decision of the sovereign. Conde, in his decisionist reading of Bodin’s political thought, assumes that “sovereignty is the power to command in one’s own name” (1935/1974, p. 101). He echoes Schmitt’s main idea in his *Politische Theologie* that sovereignty in Bodin presupposes the concept of decision. The German jurist

says that “Bodin asked if the commitments of the prince to the estates or the people dissolve his sovereignty,” to which he responds that the prince can act against his promises “according to the requirements of a situation, a time, and a people” (1921/2014, pp. 8–9). Similarly, Conde says that “it is not the law that binds” because “sovereign power measures the justice of law and contract, and when that justice ceases, obligation ceases” (1935/1974, pp. 109–110). At the end of his work, Conde affirms that the only limit of the sovereign is the power of God, for “only God can take vengeance on those who break faith” (1935/1974, p. 111). Since Bodin’s concept of sovereignty “is embedded in this transcendent framework and is not subject to its own norms, sovereign power transforms law into right” (1935/1974, p. 111).

We can come to two conclusions about Conde’s 1935 work on Bodin that will have a significant impact on his Francoist theory of caudillaje, which he developed in 1942. First, the influence of Schmitt’s decisionist idea of sovereignty influenced Conde’s work on Bodin. Conde defends the decisionist idea of *sovereignty* without addressing the concepts of constituent power and *sovereign dictatorship*. Conde was not only advised by Schmitt during his stay in Berlin, but was completely guided by him in his central ideas. It is therefore logical that the German jurist praised this work and introduced Conde as his Spanish disciple. Second, Conde’s reading of absolute monarchy as neutralizing civil war is at the heart of his Francoist theory of the state. Franco and his legal propagandists promoted the idea that the Spanish Civil War resembled a “crusade,” that is, a religious war between a nationalist Catholic faction and an atheist and communist faction (Giménez, 2014b, pp. 81–85; S. Payne, 2012, pp. 111–118). If Conde argues that Bodin defends the monarchy as neutralizing the civil war, I find the same idea in his 1942 theory of caudillaje, which presents Franco as the sovereign who liberates Spain from civil war and revolution. I will now explain the Francoist theories of caudillaje and their relationship to Schmitt’s concept of constituent power.

2. Constituent Power of the Francoist State

In this section I analyze the two theories of caudillaje that emerged between 1939 and 1942. The difference between the two theories lies in Schmitt's distinction between the concepts of *sovereignty* and *sovereign dictatorship*, which I explained in chapter 3 of this monograph. The first theory of caudillaje refers to a type of popular autocracy, known in Spanish historiography as the national-syndicalist theory of the FET de las JONS (Gallego, 2014, Chapter 2; S. Payne, 1999, Chapter 4). This theory of caudillaje was conceived as a mirror of Hitler's and Mussolini's fascist theories of the state. The Nazi motto of "*Ein Volk, ein Reich, ein Führer*" was translated as "*Una Patria, un Estado, un Caudillo*" (Moradiellos, 2016a, p. 35). The theory consolidated between 1937 and 1940 and was advocated by prominent jurists and propagandists of Francoism, such as José Beneyto Pérez and Luis Legaz Lacambra. According to this theoretical approach, Franco was a caudillo in the sense of the German term "Führer." The theory was influenced by Schmitt's concept of *sovereign dictatorship* (1921/2014, Chapter 4) and his National Socialist theory on "the state, the movement, and the people" (Schmitt, 1933). According to this Schmittian approach, Franco was a sovereign dictator who emerged from the uprising against the Second Republic.

In contrast to the fascist theory of the Francoist state, inspired by Schmitt's concept of sovereign dictatorship, the Weberian theory of caudillaje emerged in the context of the consolidation of the traditionalist and monarchist factions between 1942 and 1945 (Gallego, 2014, Chapter 7; S. Payne, 1999, Chapter 11). The central thesis of this theory of caudillaje is that Franco was neither a sovereign dictator nor a *Führer*, as his legitimacy was based neither on a plebiscite nor on Schmitt's theory of constituent power. From this perspective, Franco is *sovereign* but not *sovereign dictator*. The leading theorist of this reading of caudillaje was Francisco Javier Conde, a disciple of Schmitt and a Francoist politician and ideologist. Although Conde rejects the Schmittian reading of the Francoist state as a sovereign dictatorship, he embraces the Schmittian critique of parliamentary democracy (Schmitt, 1923/2017, Chapter 2) and the defense of "personalized" sovereignty (Schmitt, 1922/2005, Chapter 1) as a reaction to the "era of neutralization and depoliticization." For Conde, Franco's legitimacy rests solely on his charismatic sovereignty due to his triumph in the Civil War, which established a continuity of the monarchical tradition in the Francoist state.

a. Decisionist Francoism

Decisionist Francoism is a theory of caudillaje based on Schmitt's theory of dictatorship and constituent power (1921/2014, Chapter 4). It has three major proponents. The first is Beneyto Pérez's (1939) theory of caudillaje, which conceives of Franco's July 1936 uprising as similar to Hitler's self-proclaimed "National Socialist revolution" against the Weimar Republic that eventually led to the establishment of a sovereign dictatorship. The second interpretation comes from Elías de Tejada (1939), who does not believe that the Francoist state emerged from a revolution. Rather, he accepts only Schmitt's (1933) National Socialist theory of the triad of "state, movement, and people" as the basis of the theory of caudillaje. The third reading comes from Legaz Lacambra (1940). This jurist has a distinctive Schmittian interpretation, as he develops a political theology of Francoism. For him, the Caudillaje theory is a reaction to the liberal state, understood as a "culture of discussion" and parliamentary democracy. Despite the differences between these Francoist readings, they are all influenced by Schmitt's concept of *sovereign dictatorship* to justify a theory of caudillaje.

Before we begin to explain decisionist Francoism, it is essential to note that this reading has had an enormous impact on Spanish historiography on the foundations of the legitimacy of the Francoist state (Giménez, 2014a; Moradiellos, 2016b; Saz, 2019). Historiography on the theories of caudillaje, without being aware of its etymological origin in Schmitt's *Die Diktatur* (1921/2014, Chapter 4), has adopted the concept of *sovereign dictatorship* to define the Francoist state. In this way, historians of Francoism inadvertently solidified the theoretical connection Schmitt made between Sieyès's idea of constituent power and the concept of a constituent or revolutionary dictatorship in the French Revolution. The important work of Giménez (2014a, 2014b) is the best example of this contemporary reading. Similar to Schmitt's concept of sovereign dictatorship (1921/2014, pp. 113–116), Spanish historiography defines Franco as a general of the army who accumulated all the powers of the state (*plenitudo potestatis*). The term "constituent dictator" thus underscores how Franco's executive power accumulated legislative and constituent powers:

> According to this model of analysis, the "caudillo" is a "constituent dictator" or "of development" who possesses omnipotent power and rationalizes its exercise by building a rudimentary administrative apparatus. The liberal idea of the "constituent process" is replaced by that of the "founding process" or "open constitution." The establishment of the fundamental legal order is conceived not as a unitary process of short duration, but as a laborious assembling of institutional parts conditioned by historical circumstances, the final duration of which cannot be precisely determined

> either in time or in content, since it depends on the will of the head of state. The "caudillo" is the holder of ordinary "constituent" power and therefore occupies the position of "unilateral enactor" of fundamental laws (Giménez, 2014a, pp. 439–440).

However, this link between Schmitt's concept of sovereign dictatorship and the Francoist theory of caudillaje dates back to the late 1930s. The theory of the Francoist state as a *sovereign* or *constituent dictatorship* was first put forward by Juan Beneyto Pérez (1907-1994). A lawyer, he earned his doctorate at the University of Bologna. He sympathized with fascism from a young age, as evidenced by his book National Syndicalism [*Nacionalsocialismo*] (1934), in which he glorifies Hitler's rule. His most important books were The New Spanish State [*El nuevo Estado español*] (1939), with a preface by fascist jurist Arrigo Solmi (1873-1944), and The Party [*El Partido*] (1939). Their central thesis is that the caudillaje is not a "constitutional dictatorship" in the sense of the Roman Republic (Rossiter, 1948/2002, Chapter 1; Schmitt, 1921/2014, Chapter 2). On the contrary, Franco was a "constituent dictator" because he led a "revolution" against the liberal state represented in the Second Republic and the Constitution of 1931. The Francoist state is an anti-republican insurrection that then establishes a "revolutionary legality:" "The revolutionary dictatorship that will establish a new regime - the national-syndicalist, the fascist, the national-socialist, the Kemalist - is not a constituted power, but a constituent power, and acts as such until the new legal order is established" (Beneyto Pérez, 1939, p. 32).

Beneyto Pérez and Costa take up the Schmittian reading and establish a relationship between the concepts of dictatorship and constituent power to define the Francoist state as a popular autocracy. The Spanish jurist uses the same case studies that Schmitt explains in the fourth chapter of *Die Diktatur* (1921/2014). The influence of Schmitt on Beneyto Pérez is so strong that he even confuses the ideas of Sieyès with those of the German jurist. He wrongly points out that the ex-*abbé* conceptualized the sovereign dictatorship:

> The revolutionary dictator [Francisco Franco] does not act by the grace of a constituted power, but in the name of a constituent power. This problem was already indicated by Sieyès in his famous work on the "Third State." In contrast to the constituted powers, which are subject to laws and rules that are not above but below the constitution, the fundamental constituent power rises, which is "unlimited because it dictates itself - these are Sieyès's words - and constitutes a sovereign dictatorship" (Beneyto Pérez & Costa Serrano, 1939, p. 79).

Beneyto Pérez not only confuses Sieyès with Schmitt, but also translates the term *Führer* as "caudillo." The Spanish jurist refers to Schmitt's work *Staat, Bewegung, Volk* (1933), in which he develops a National Socialist theory of the German state, written between

1932 and 1933. Beneyto Perez affirms that "fascism has used the party as a revolutionary element" because it is opposed to "constitutional formalisms" (1939, pp. 138–139). For him, in National Socialist doctrine, "the unity of the *Führer* and the people is documented by the plebiscite" and "the Reichstag no longer dictates the law" because "it has been transformed into a tribune where the *Führer* speaks his decisive word on general policy" (1939, p. 140). The definition of the *Führer* as caudillo allows Beneyto Pérez (1939, p. 148) to develop the reading that the Spanish Phalanx conceives Franco as the embodiment of all the "revolutionary" values of fascism. Likewise, he adds that the theory of caudillaje has taken "beautiful pages" in the work of the German jurist because "Schmitt has studied the general theory of caudillaje or political leadership in a comparative way" (1939, p. 155), pointing out that the *Führer* is not like the *Duce* in Italy. On the contrary, says Beneyto Pérez, Schmitt stressed that this concept "comes entirely from the substantial and concrete thought of the National Socialist movement" (1939, p. 155).

Beneyto Pérez's Schmittian interpretation of the theory of caudillaje, which he understood as a "revolution" led by a *Führer* (sovereign or constituent dictator), was received with some distance by other Francoist ideologists. This was the case with the important monarchist jurist and political philosopher Francisco Elías de Tejada (1917-1978). On January 17, 1939, he gave a lecture at the Ateneo de Sevilla entitled *The Figure of the caudillo. Contribution to National Syndicalist Public Law* [*La Figura del caudillo. Contribución al Derecho Público Nacionalsindicalista*] (1939). His text also establishes a relationship between caudillaje and the fascist theories of the state. The author points out several examples of caudillaje in history, such as those of Julius Caesar and Napoleon (1939, p. 10). Then Elías de Tejada stops at National Socialism. For him, Hitler's totalitarian movement "arose as a reaction to the ideological and political anarchism inherent in the democratic liberalism that had prevailed in Europe since 1789" (1939, p. 13). Elías de Tejada affirms, however, that National Socialism "also wants to be a purely popular movement, with truly democratic roots, as our José Antonio [Primo de Rivera] had already noted" (1939, p. 14). Like Beneyto Pérez, Elías de Tejada emphasizes Schmitt's reading (1933) of the National Socialist theory of the "state, movement and people" as the ideological basis of the theory of German leadership (*Führerprinzip*):

> Such is the thesis [of the state, the movement, the people] of Carl Schmitt, which is undoubtedly the most original of all the ideas that have sprung from the deep intelligence of the wise Berlin professor. The linkage of the three elements of the state is based on the consideration that the leader or *Führer* concentrates in himself the powers of the State as a whole and in the special consideration of each of its

> constituent elements; thus the leader of the people becomes the vertex of the pyramid of the state, the sides of which are respectively the three elements of Schmitt's thesis (1939, p. 14).

This National Socialist theory of Schmitt is used by Elías de Tejada for his theory of caudillaje. The Spanish jurist claims that a theory of the Francoist state must start from the separation between state and people, between rulers and ruled, linked by a relationship of command and obedience (1939, p. 34). Thus, he adds the figure of the caudillo to Schmitt's National Socialist theory: "The elements of the new state can be reduced to four: one active, the caudillo; three passive, the people of the state, the army, and the Phalanx" (1939, p. 35). Francisco Franco is *Führer* because his will leads the masses through the FET de las JONS. However, as a monarchist philosopher, Elías de Tejada asserts that the caudillo, as the executive who has brought legislative and constituent power to himself, is in fact a new monarch (1939, p. 38). Therefore, the caudillo and the king are one and the same, because both are sovereign and autocratic powers. Elías de Tejada is thus skeptical of the foundation of the caudillaje based on the idea of constituent power. For him, the caudillo is the only holder of sovereignty —not the people— because he is "independent in his decisions, supreme in his judgments, indisputable in his orders" (1939, p. 37).

The most pronounced decisionist theory of caudillaje was developed by Luis Legaz Lacambra (1906-1980). He was a legal philosopher, rector of the University of Compostela, procurator in the Francoist Cortes, and director of the Institute of Political Studies [*Instituto de Estudios Políticos*] (Madrid). Schmitt praised his work and also participated in the publication that honored him in Spain (Schmitt, 1960). Legaz Lacambra (1934, pp. 10–22) was an early connoisseur of Schmitt's work from the early 1930s. However, thanks to his book Introduction to the Theory of the National-Syndicalist State [*Introducción a la Teoría del Estado Nacionalsindicalista*] (Legaz Lacambra, 1940), he became one of the most significant Francoist ideologists. The Spanish jurist begins his work by stating that Spain needs a theory of the Francoist state "because a people without concepts is a people without form and without norm, and therefore without being, without historical existence" (1940, p. 5). The book is divided into three major sections: the Rule of Law, the party and the state, and the national-syndicalist state. It is striking that Schmitt is the most cited author in this 264-page work, with 39 bibliographical references to almost all of his works.

Legaz Lacambra presents his theory of caudillaje based on decisionism and political theology. Like Schmitt (1930a, 1932/1979, Chapter 1, 1922/2015, Chapter 1), he starts from the claim that legal positivism and liberalism have led to dissolve the state into normativism.

The Spanish jurist claims that with Hans Kelsen, there has been "depersonalization" of the concept of the state so that it has eventually become a legal regulation to maximize freedom (Legaz Lacambra, 1940, p. 21; Schmitt, 1922/2015, Chapter 2). Political freedom is thus guaranteed by the separation of powers and equality before the law so that we can speak not of a democracy but a government of law (Legaz Lacambra, 1940, p. 22). However, according to Legaz Lacambra, "constitutionalism is not enough; the parliamentary principle is necessary" (1940, p. 53). The liberal state is organized as a "state of political parties," and parliament becomes the liberal institution par excellence (Schmitt, 1923/2017, Chapter 1). Legaz Lacambra cites Schmitt's book (1923/2017) to state that "the essence of the parliamentary regime is precisely to be a regime of debate and free discussion, a regime in which 'discussion takes the place of force'" (1940, p. 54). Therefore, "the parties are the subject of discussion," from which "truth emerges, that is, the law and everyone submit to it" (Legaz Lacambra, 1940, p. 55; Schmitt, 1923/2017, Chapter 2).

Nevertheless, like Schmitt (1923/2017, Chapter 2), Legaz Lacambra argues that the liberal ideal of parliamentarism is in crisis and has become an "empty formality" in the face of the advance of democracy as the sole principle of political legitimacy:

> These are the sociological-spiritual contexts of the rule of law [the regime of debate and free discussion]. Undoubtedly, these preconditions have largely disappeared today, and therefore the rule of law is gradually becoming an empty and formalistic entity, however much its organization and functioning may be perfected. The fact is that democracy, once regarded with suspicion, like monarchy and aristocracy, and recognized only as a possible means of realizing liberalism, today asserts its supremacy and dominates the liberal idea (Legaz Lacambra, 1940, p. 55).

The critique of parliamentary democracy leads Legaz Lacambra to one of the cardinal themes of Schmitt's political thought: the opposition between the concepts of liberalism and democracy. Citing Heller's (1927) classic work on the concept of sovereignty, the Spanish jurist notes that this process of "depersonalization" became entrenched in Kelsen's legal theory (Heller, 1927, pp. 21–23; Schmitt, 1922/2015, Chapter 2). And that this distrust of the sovereign state by European jurists can be observed both in the French *Droit Public* with the work of Duguit and in the German *Staatslehre* with the positivist theories of Gerber, Laband, and Jellinek (Legaz Lacambra, 1940, p. 57; Schmitt, 1932/1979, pp. 37–39). Legaz Lacambra points out that "a state reduced to a (formal) legal order is a form without content" (1940, p. 58), so that "the democratic or real content of this state does not correspond to the form, which is why it is said that the modern state is in crisis" (1940, p. 59). The consequence of this crisis is that democracy develops dictatorial tendencies, as is the case with "the modern

‘mass parties’: communists, syndicalists, fascists in opposition” (1940, p. 59). Democracy means “the will of a popular and proletarian mass that asserts its demands against bourgeois ‘society’ and the ‘state’” (1940, p. 60).

For Legaz Lacambra, caudillaje in this Schmittian approach is an inevitable reaction to the opposition between liberalism and democracy. Franco’s caudillaje is thus linked to Schmitt’s concept of constituent power, that is, to the idea of a popular autocracy:

> The contemporary phenomenon of democracy is thus a sociological phenomenon that had to arise in a fatal way. The dead will of the law had to be replaced by the will of a ruler (a caudillo or a mass), because a political community does not consist of norms but of acts of will (...) The mass of the people claims full sovereignty for itself and reserves the *pouvoir constituant*. Then the law rules as long as the demos does not want to overthrow it from the throne. The law in force is undermined in its rule by revolutions and subversions (Legaz Lacambra, 1940, pp. 60–61; Schmitt, 1928/2008, Chapter 8).

The idea of democracy as the only basis of political legitimacy in mass society leads to political theology (Schmitt, 1922/2015, Chapter 4). Legaz Lacambra points to a political-theological idea in the dictatorial tendencies of Spanish fascism: “The myth of the coming Spanish empire will be the myth and soul of the national revolution of the Jonsists [FET de las JONS]” (1940, p. 115). The idea of violence as myth, which is the thesis of George Sorel’s revolutionary syndicalism defending Mussolini’s fascism, leads to the question of the non-liberative factors of political power (Legaz Lacambra, 1940, pp. 113–114). The violent and mythical character of totalitarian movements leads Legaz Lacambra back to Donoso Cortés’s assertion that in every great political question there is also a theological question (Legaz Lacambra, 1940, p. 101; Schmitt, 1922/2015, Chapter 4). The Spanish jurist understands political theology as a reaction to the depersonalization of the state. Against the “culture of discussion” and parliamentary democracy, political theology is outlined by Schmitt and Donoso Cortés as a defense of the sovereign’s decision against the culture of discussion, that is, dictatorship against parliament. Legaz Lacambra thus takes up Schmitt’s concepts of decisionism and political theology:

> What Donoso Cortés asserts on the basis of his theological faith is also confirmed by the modern sociology of law, which Carl Schmitt calls “political theology” on this point: because, as he says, "all the fundamental concepts of modern state theory are secularized theological concepts," not only in that they have historically emerged from theology but even in their systematic structure (Legaz Lacambra, 1940, pp. 101–102).

Schmitt's political-theological approach allows Legaz Lacambra to point out that in Spain, "there will be no conflict between our mythology and our theology" (1940, p. 116) since the Spanish myth is led by a caudillo and organized with a single party: the FET de las JONS. The Spanish jurist affirms that Spain has experienced a transition from a liberal state with political parties, dominated by the "culture of discussion" and parliamentary democracy, to a fascist state with a single party. Legaz Lacambra draws on Schmitt's *Der Begriff des Politischen* to point out that the single party and the Francoist state constitute a political unity (Legaz Lacambra, 1940, p. 130; Schmitt, 1932/1979, pp. 42–50). The party is "revolutionary" because it is "subversive, dictatorial, totalitarian, and unique" (Legaz Lacambra, 1940, p. 143). Similarly, the Francoist state was led by a caudillo through a single party that had two political moments. The first was the uprising against the Second Republic and the "violent conquest of power and its takeover" (Legaz Lacambra, 1940, p. 144). The second moment is the dictatorship that establishes a "revolutionary legality." Here emerges Schmitt's link between dictatorship and constituent power (Schmitt, 1921/2014, Chapter 4):

> Dictatorship is the full use and absolute exercise of the conquered power for the foundation of the new state: it is a constituent power that ceases only at the moment when the new juridico-political order of the state is established and realized. A revolution without dictatorship is an absurdity; but dictatorship is totalitarian by definition, like the revolutionary idea it realizes. The product of the revolutionary dictatorship is the "regime." The regime is the institutional product of the revolution... (Legaz Lacambra, 1940, p. 144).

Like many of the Francoist propagandists (Giménez, 2014b, pp. 81–85; S. Payne, 2012, pp. 111–118), Legaz Lacambra described the Civil War as a conflict of a religious nature, a "crusade" that distinguished between friends and enemies (Schmitt, 1932/1979). For him, July 18, 1936 was a turning point, because "on that day a unified state structure ceased to exist in Spain, a sovereign political entity, a single state" (Legaz Lacambra, 1940, p. 170). Therefore, the insurgent side could create "the unitary state of the Spanish nation only by eliminating the enemy" in all its "representative figures and its ideologies and symbols" (Legaz Lacambra, 1940, pp. 170–171). This state unity was established through the creation of the FET de las JONS as the only state party under Franco's leadership. However, because this leadership also functions as a "religion" for its combatants, Legaz Lacambra affirms that the only party is a party church because "it has a totalitarian creed and is based on a spiritual relationship of a community of faith and will and on moral virtues of a religious nature" (1940, p. 175). The political theology of caudillaje affirms that Franco is a sovereign dictator

who commands his followers as members of a creed. Legaz Lacambra (1940, p. 189) concludes that the Francoist state functions like a church whose supreme pontiff is Franco.

Decisionist Francoism is a theory of caudillaje built on Schmitt's concept of sovereign dictatorship, which is a type of popular autocracy. In the three readings analyzed, the liberal state, defined as parliamentary democracy, is rejected (Schmitt, 1923/2017, chapter 2). This caudillaje theory legitimizes the revolt against the Second Republic and the establishment of a sovereign dictatorship. Like Schmitt's theory of constituent dictatorship (1921/2014, chapter 4), this reading states that Franco accumulated legislative and constituent powers. This reading goes back to the work of Beneyto Pérez (1939; 1939), who justifies Franco's "constituent dictatorship" and links it to Schmitt's theory of the triad of "state, movement, and people" (1933). However, other Francoist ideologists, such as Elías de Tejada (1939), pointed out that the caudillo is essentially a "monarch" in that he is the sole sovereign power and has concentrated all state powers in the executive. The most Schmittian reading of the caudillaje was developed by Legaz Lacambra, who draws on political theology (Schmitt, 1922/2015). For him, the caudillo is a sovereign dictator who leads a single party that functions as a Christian creed. Against this reading of decisionist Francoism, Conde developed his Weberian theory of caudillaje, which holds that Franco was not a *sovereign dictator*, but only a *sovereign* in the face of the state of exception created by the civil war.

b. Weberian Francoism

Weberian Francoism is a political and intellectual response by Conde (1942) to the decisionist readings developed by Beneyto Pérez, Elías de Tejada, and Legaz Lacambra. Conde makes a clear distinction between Schmitt's concepts of *sovereignty* and *sovereign dictatorship*, associating the former with the monarchical type of political legitimacy. Conde's interpretation is the most important theoretical endeavor to dissociate the Francoist theory of the state from the fascist and theories of the Italian and German states in the face of the imminent defeat of the Axis powers in World War II. Conde's main objective is to eliminate all political foundations based on popular sovereignty and constituent power theories within the theory of caudillaje. Conde was a thinker who advocated a decisionist reading of Bodin (1935/1974) inspired by Schmitt's political theology. In 1942, he published his political essay entitled *Contribution to the Theory of [Franco's] Leadership* [*Contribución a la Doctrina del Caudillaje*] (Conde, 1942). Historians have recognized this work as one of the most important political theories of the Francoist state (Gallego, 2014, pp. 617–620; Moradiellos, 2016a, p. 86; Reig Tapia, 1990, pp. 67–68). However, the literature overlooks Conde's central thesis that Franco is not a "sovereign dictator" (Schmitt, 1921/2014, Chapter 4). For him, Schmitt's concept of sovereign dictatorship, based on the ideas of Sieyès, does not apply to the Francoist state. Conde critically notes that the conceptual link between caudillaje and constituent power is a reading that

> forces one to abandon the concept of caudillaje as a *commissary dictatorship* and interpret it as a *sovereign dictatorship* [(Schmitt, 1921/2014, Chapters 2, 4)], i.e., not tied to a time limit, to the remedying of an exceptional situation, or to the achievement of specific goals. Caudillaje would then be a revolutionary dictatorship based on the constituent power of the people, whose will is manifested in taking up arms, i.e., Caesarism. The legitimacy of caudillaje would be a democratic legitimacy. Behind this construction, one can suspect the positivist piousness of the continuity of the legal order, the democratic-rationalist ballast in the conception of political power, and the inability to explain juridically the concrete Spanish political reality of which the caudillaje is a part (Conde, 1942, p. 22).

What is interesting about this passage is that Conde makes this criticism in order to construct an anti plebiscitarian theory of caudillaje that still draws on Schmitt's concept of sovereignty in *Politiche Theologie* but with an appropriation of Weber's ideas. Conde's central idea of this reading is that Schmitt's concepts of sovereign dictatorship and democracy

as an identity relationship between leader and people are inspired by Weber's theories of plebiscitary democracy (Weber, 1919/1994a, 2019a).

However, according to Conde, Weber's concepts of traditional legitimacy and charisma are not associated with popular sovereignty or constituent power, but rather with monarchical and traditionalist political theories. Conde begins his essay by affirming that the concept of caudillaje arose in response to a process of 'rationalization' of political power that culminated in the Civil War. Since the 19th century, Spain had experienced a process of "relativization and depersonalization of political power" (Conde, 1942, p. 9; Schmitt, 1930a). Drawing on a Weberian approach, Conde argues that in Spain "the general process of rationalization is gradually draining all its strength from the contents that once formed the firm foundation of political unity" (Conde, 1942, p. 9). Consequently, "the religious contents, the traditional values, the monarchical principle based on transcendent grace, are dissolving under the pressure of rational principles that pretend to base political power on purely immanent foundations" (Conde, 1942, pp. 9–10). At the same time, a process of "legalization" was taking place in Spain, expressed in the concept of the rule of law as a "radical depersonalization of political power" (Conde, 1942, p. 10). Conde ties in here with Hermann Heller's analysis (1927, pp. 21–23) of the process of "depersonalization of the concept of sovereignty" in Kelsen's legal theory. Following Schmitt's thesis of "the era of neutralization and depoliticization" (Schmitt, 1930a), Conde claims that Spain consolidated this process in its liberal constitutions (Conde, 1942, p. 10):

> The 19th century Spaniard, like the European since the Renaissance, finds it much better to submit to the power of an impersonal rule than to obey the command of a person. He believes he is freer when he submits to the law, whose intangible objectivity elevates him above all arbitrariness (On the process of depersonalization of power, see the fine monograph by H. Heller: *Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts*, 1927). Legalizing the state and the depersonalization of power can be seen in the long series of Spanish constitutions of the 19th century (Conde, 1942, p. 10).

According to Conde, the "era of neutralization and depersonalization" in Spain began with the Bayonne Constitution (1808). The sixth article of this constitution established that above "the will of the supreme power, the king, stands the objective norm, the constitution," so that "political power appears subordinate to the norm," although some traditional content, such as religion and the "glory of the nation," remained (Conde, 1942, p. 11). The personalization of sovereignty was not completely destroyed in this constitution, as Spain and the peoples of India swore "allegiance and obedience" to the king. Spanish constitutionalism

underwent a significant change after the Revolutions of 1848 (Schmitt, 1922/2015, Chapter 3). In light of these revolutions, Conde says that "formal positivist legality" consolidated, "capable of resisting the proletarian advance," but "political power ceased to protect itself in legality" (1942, p. 12). He also points out that this resulted from a bourgeoisie terrified "by the violent irruption of the proletariat on the historical stage" and by the impossibility of defending a monarchy with a transcendent legitimacy (1942, p. 12). Conde echoes Schmitt's thesis (1922/2015, Chapter 2) that liberalism assumes that "he who rules is always subject to an impersonal order that is rationally statutorily bound," so that "sovereignty is not the attribute of a will but of a norm" (Conde, 1942, pp. 12–13).

For Conde, the caudillaje, understood as personally exercised power, emerges as a reaction to the process explained by Schmitt as the "depersonalization" of sovereignty (Schmitt, 1922/2015, Chapter 1). He says that one of the first enemies of this process was Donoso Cortés, who raised his voice in "prophetic-apocalyptic tones" (Donoso Cortés, 1849/2000) and "called for decision and dictatorship in the face of the demoralization of the bourgeoisie ["*la clase discutidora*"]" (Conde, 1942, p. 13; Donoso Cortés, 1849/2000, 1851/2019; Schmitt, 1922/2015, Chapter 4). However, the tendency to depersonalize sovereignty has become entrenched in Spanish law. For Conde, liberal doctrine reached the pinnacle of depersonalization in the Constitution of 1931, in which the oath to that constitution "was secularized from its root to a mere promise," and the holder of power "pledges allegiance only to the republic," to the "form of government, and to the Constitution, a complex set of norms" (Conde, 1942, pp. 13–14). Like Schmitt's *Politische Theologie* (Schmitt, 1922/2015, Chapter 2), Conde criticized this dissolution of the personal element of sovereignty. For him, Spain before the Civil War had become a mere "addition of classes," or, as the first article of the 1931 Constitution puts it, a "republic of workers of all classes, which is as much a matter of class struggle" (Conde, 1942, p. 14).

Conde's central thesis is that the caudillaje of Franco restores the tradition of personified sovereignty and adds the charismatic element: "To lead is to command charismatically" ['*Acaudillar es mandar carismáticamente*'] (1942, p. 23). The Spanish jurist says that at the beginning of the Civil War democracy "degenerated into a pure depersonalized *nomocracy* ['government of norms']" and there was no bond "that united rulers and ruled" (1942, p. 15). Against the depersonalization of sovereignty, caudillaje recovers a legitimacy based on the belief in personal authority. Conde, however, criticizes the theories of caudillaje of Beneyto Pérez and Legaz Lacambra, in which Schmitt's ideas are used to conceptualize the caudillaje as a *sovereign* or *constituent* dictatorship. He says the

decisionist theory of caudillaje was constructed through Schmitt's concept of the state of exception (Schmitt, 1922/2005, Chapter 1). In this decisionist approach, the Francoist state is conceptualized as an exceptional accumulation of all state powers in the executive branch. Conde critically summarizes the decisionist theory of the Francoist state thus:

> On July 18, 1936, royalist forces of various origins took up arms against the republican legal order represented by the Constitution of December 9, 1931. The breakdown of the liberal-democratic system led to a de facto concentration of the powers of the state. The liberal principle of separation of powers was broken, and all power, previously scattered, came into a single hand. The military power that declared the state of war, that is, the state of exception, assumes full command to deal with an abnormal situation (...) Thus, a purely quantitative concept of caudillaje emerges. It is a type of command that is different from the others, for example, from the democratic command of the 1931 Constitution; but the difference is a quantitative one, not a qualitative or essential one. The technical part that secures transit is a dictatorship, whose purpose and the goal is, in the phrase of its most qualified theorist, Carl Schmitt, "to secure and defend the Constitution as a whole" (Conde, 1942, pp. 19–20).

Sovereignty is not a *sovereign dictatorship*. From my understanding, Conde rejected this decisionist reading of caudillaje because it was dangerous for the Francoist state since it left open the possibility that a return to the Spanish Republic would be demanded after the state of exception. This was unacceptable to him because it was necessary to close the door to parliamentary democracy. For this reason, Conde considers it wrong to conceptualize the caudillaje as a temporary measure to "restore the legal order of the Constitution of 1931" (1942, p. 21). For Conde, behind this misinterpretation is Schmitt's idea of the commissary dictatorship (1921/2014, Chapter 1), that is, "dictatorship as a method of realizing legal norms in order to ensure their validity" (1942, p. 20). Similarly, for him, the decisionist theories of Beneyto Pérez (1939) and Legaz Lacambra (1940) wrongly conceptualize the caudillaje as a "revolutionary dictatorship sustained by the constituent power of the people" so that "the legitimacy of the caudillaje would be a democratic legitimacy" (1942, p. 22). In contrast to these readings, Conde argues that "*acaudillar*" (to lead) does not mean "dictate" because Franco's caudillaje is not a dictatorship but a charismatic leadership. To explain Conde's theory of the caudillo as a charismatic leader rather than a dictator, we must briefly describe Weber's sociological theory of the three types of legitimate authority.

Weber (2019a, p. 7) defines the concept of authority as the probability that a command will be obeyed. There are different motivations why a mandate is accepted. However, Weber (2019a, p. 7) argues that in the relationship between the rulers (*Herrschenden*) and the ruled (*Beherrschten*), government tends to be based internally on legal grounds (*Rechtsgründe*), on legitimacy beliefs (*Legitimitätsglauben*). Weber asserts that there are only three 'pure' types

of legitimate authority: legal, traditional, and charismatic. Legal authority states that obedience is to be rendered not to a person but to laws and regulations expressed in the form of abstract rules (2019a, p. 8). Traditional authority is based on a belief in the sacredness of the social order (Weber, 2019a, p. 11). Weber (2019a, p. 13) says that patriarchal authority represents this form of legitimacy in its purest form. The traditional authority is a lord, and those who obey are subjects. Charismatic authority is based on devotion to a Lord and his gifts of grace (*Gnadengaben*) (Weber, 2019a, p. 16). These gifts of grace refer in particular to magical abilities, heroic deeds, and intellectual and oratorical gifts. The pure types of charismatic authority are those of the prophet, war heroes, and great demagogues. His authority is based on the followers' belief in his charisma. There must be 'proof' of the accomplishments and gifts of the charismatic authority (*Sein Charisma sich durch deren Erweise bewährt*) (Weber, 2019a, p. 16). Therefore, the prophet has believers through his miracles, while the hero has recognition through his triumph in war. Examples of such charismatic authorities were Napoleon, Jesus Christ, and Pericles (Weber, 2019a, pp. 18–19).

Conde's Weberian reading affirms that the Francoist state was essentially based on charismatic authority but that this authority was also fused with Catholic traditional legitimacy. Franco would have gained charismatic legitimacy by being the 'hero' of the rebels in the Civil War. Conde (1942, p. 27) also confirms that this charisma was institutionalized at the end of the war in the message from the secretary general of the FET y de las JONS and in Franco's response to it. The correspondence between the two contains biblical allegories and highlights Franco's "providential character" as caudillo. Likewise, the war and the caudillaje are portrayed as a Catholic crusade: "The miracle of the war brought about the miracle of a charismatic sovereign command" (1942, p. 28). Conde's Weberian theory of caudillaje links Franco's charisma to Spain's Catholic and monarchical tradition. For Conde, the key event in the Francoist theory of the state was Franco's consecration mass at the Church of Santa Barbara on May 20, 1939. The event, which resembled that of Spanish monarchs, included a Te Deum, mass, and medieval consecration by Cardinal Isidro Gomá to anoint Franco as a charismatic caudillo, military hero, and representative of the Spanish Catholic tradition. In this way, the Spanish jurist contrasts the Weberian theory of the charismatic-traditional caudillaje (a monarchical sovereignty) and the Schmittian and plebiscitary theory of the caudillaje (Caesarism) as a sovereign dictatorship:

> Of the two aspects that charisma can assume in daily life, in reason and in tradition, the first leads to plebiscitary Caesarism, the second to caudillaje proper. The first [=sovereign dictatorship] requires the constant recourse to the plebiscite as a principle

> of legitimation of the command. The second [=sovereignty] leads to the linking of the charismatic command with tradition: the latter becomes the supreme authority that realizes the living tradition of its people in a historically concrete way, the true interpreter of that tradition (Conde, 1942, pp. 32–33).

Conde asserts that in the ceremony of the Church of Santa Barbara, there is a "turn to the Catholic tradition" in Francoism because the charisma passes "from a concrete human bearer to an institution," that is, "the caudillaje emerges as an institution" (1942, p. 32). In this way, the Spanish jurist contrasts the Weberian theory of the charismatic-traditional caudillaje and the Schmittian and plebiscitary theory of the caudillaje as a *sovereign* or *constituent dictatorship (Conde, 1942, pp. 32–33).*

This brings us to the contrast that Conde establishes between the concepts of *Führer* (sovereign dictator) and caudillo (sovereign). Decisionist Francoism had translated the German term *Führer* as caudillo, thus developing the theory of the Francoist state as a sovereign dictatorship. For Conde, the *Führer* in German state theory is based on the concept of *sovereign dictatorship*. Franco's caudillaje, on the other hand, is characterized by the concept of *sovereignty*, by "the predominance of the charismatic element and the scarce validity of the rational democratic principle" (1942, p. 39). Conde (1942, pp. 41–42) affirms that the theories of fascism constantly appeal to the idea of a "popular spirit" and the "unity of the nation." Similarly, the Spanish Phalanx has theorized caudillaje as an identity of the "popular spirit" of the caudillo. Conde rejects this plebiscitarian reading and introduces the religious idea of "destiny" as the element that connects the concepts of the people and the caudillaje: "The *auctoritas* of the caudillo is based on the identity of destiny of the one who leads and the those who led" (1942, p. 43). He concludes that this "destiny" is the Spanish Catholic and monarchical tradition, so Franco is not "the true spirit [or embodiment] of the people but the 'interpreter of the [Spanish Catholic] tradition'" (1942, p. 44). Instead of theorizing the Francoist state as a popular autocracy, Conde defines it as a pure autocracy.

Conclusions

The post-Spanish Civil War context gave rise for the first time in the intellectual history of constituent power to a discussion of Schmitt's distinction between the concepts of *sovereignty* and *sovereign dictatorship*. This also provided a conceptual distinction between the concepts of autocracy and popular autocracy. However, this was not an academic discussion, but a political discussion among the Francoist ideologists.

The main contemporary researchers in the historiography of Francoist Spain have defined the Francoist theory of the state as a *sovereign* or *constituent dictatorship*, consolidating Schmitt's concept explained in the fourth chapter of *Die Diktatur*. Through an intellectual historical analysis, I have explained how Schmitt's terminology came to Spain in the 1920s, during the dictatorship of Primo de Rivera, and how it was consolidated in the 1930s among the ideologists of *decisionist Francoism*. Pérez Beneyto imports Schmitt's decisionist and plebiscitarian theory to define Franco as a sovereign dictator. This jurist uses Schmitt's work to establish a link between Sieyès's idea of constituent power and the concept of dictatorship. On the other hand, other jurists, such as Elías de Tejada, do not consider Franco a plebiscitary dictator, but a sovereign dictator along the lines of the *Führerprinzip* in Germany. Therefore, Beneyto Pérez and Elías de Tejada agree with the reading of "state, movement, people" that Schmitt developed during his Nazi years. The greatest theoretical development of *decisionist Francoism* was developed by Legaz Lacambra.

Legaz Lacambra was close to Schmitt, and the latter participated in the publication of a book that honored the former in Spain. Legaz Lacambra cites almost all of Schmitt's major works published up to the 1930s and develops a typically decisionist reading of the Francoist state. For him, Franco's sovereign dictatorship is a reaction to a process of "depersonalization" of sovereignty in Spain and also a reaction to parliamentary government characterized by the culture of debate and the dominance of political parties. Legaz Lacambra takes up Schmitt's concept of political theology to think of the Francoist state as a new politico-religious order similar to a new Catholic church. He defines Franco as a new pontiff and the Spanish Phalanx as the creed. Using all these political-theological terms, however, Legaz Lacambra argues that it is Schmitt's concept of constituent power that gives political legitimacy to Franco's sovereign dictatorship. In reality, the concepts of sovereignty, dictatorship, and constituent power overlap here. For Legaz Lacambra, to be a dictator is to be sovereign, and to be sovereign is to be a sovereign dictator. His reading is important because

it also shows how, since the 1930s, there has been a reception of Schmitt that confuses and overlaps the concepts of *sovereignty* and *sovereign dictatorship*.

The theory of the Francoist state as *sovereign dictatorship* is contrasted with Conde's theory of Franco as *sovereign*. Conde's theory of caudillaje is inspired by his dissertation on Bodin's political thought. Schmitt supervised this work in Berlin and exerted a remarkable intellectual influence on Conde. The Spanish jurist translated Schmitt's work and introduced it to Spain, so that the German jurist considered him his disciple. Although Conde is a follower of his ideas, he rejects the idea that Franco is a sovereign dictator. He is one of the first, if not the first, to explicitly point out that the concepts of *sovereignty* and *sovereign dictatorship* are distinct and even antagonistic in Schmitt's work. Sovereignty, for Conde, lies in the conception of decision in the face of the state of exception. Therefore, he relates this concept to the traditional and charismatic form of legitimacy described by Weber. The concept of sovereign dictatorship and constituent power, on the other hand, is related to a popular autocracy, that is, the plebiscitary form of legitimacy. For Conde, the latter form of legitimacy is rational and is in the tradition of democratic legitimacy. Conde completely rejects Franco as a sovereign dictator and defines him merely as the autocrat who becomes the sovereign (caudillo) of Spain in the face of the civil war. Conde concludes by contrasting the concepts of "Führer" (sovereign dictator) and "caudillo" (sovereign).

The Spanish reception of Schmitt's work opened a new horizon for the autocratic concept of constituent power in the Spanish-speaking world. Spain and Latin America are linked not only by their history but also by their intense cultural and intellectual exchanges. In the 1940s, intellectuals and jurists emerged in South America who admired Spanish public law as much as French and German public law. But South America was also in a political crisis and was experiencing the emergence of new political and social movements. One of the most important was that of Peronism in Argentina. Here, jurists familiar with the theories of constituent power of Sieyès, Schmitt, and - indirectly - Bonnard appeared. While Schmitt's distinction between the concepts of *sovereignty* and *sovereign dictatorship* was first developed in Spain, Schmitt's and Bonnard's conceptions of constituent power clashed for the first time in Argentina. The contribution that Peronist ideologists such as Joaquín Díaz de Vivar and Arturo Sampay made to the intellectual history of constituent power was to seek a synthesis between these two opposing conceptions of Schmitt and Bonnard that had developed in Europe. Moreover, this led to a new understanding of the idea of popular autocracy, which was associated with an important Latin American phenomenon: populism.

Chapter 8: Charisma, Constituent Assembly and Populism: Carl Schmitt and His Intellectual Influence on the Peronist Ideologists (1949)

> "Carl Schmitt made me understand the rule of law. He insightfully predicted the future hostile to liberalism in the 1930s and 1940s, using two fundamental dialectical methods: decisionism and the friend-enemy distinction, without which there is no politics" (Joaquín Díaz de Vivar, Peronist politician and one of the ideologists of the Peronist state in 1949) (Dotti, 2000, p. 97).

> "Caesarism or Bonapartism is also a historical realization of democracy because it is the sovereign people who, through plebiscitary expression, transfer all political power to one man" (Arturo Sampay, "father" of the Constitution of 1949) (Sampay, 1942a, p. 84).

Introduction

In the last decade, an important international debate has developed on the relationship between the concepts of constituent power and populism, which has also opened a literature on "populist constitutionalism" (Blokker, 2019a; Corrias, 2016; Doyle, 2019; Halmai, 2019; J. Müller, 2017). The discussion is directly related to the concept of popular autocracy. In Latin America, the historical archetype of populist constitutionalism was the Argentine Constituent Assembly of 1949 (Ajmechet et al., 2019; Casagrande, 2022; Negretto, 2012, 2013; Vita, 2019b, 2020). This was also the moment of the most important reception of Schmitt's concept of constituent power in South America. Unlike in Francoist Spain, Schmitt had no disciples in Latin America, but he had followers who commented and analyzed his political and constitutional theory since the 1930s. Schmitt's presence in Argentina has generated considerable debate and controversy over the decades (Abad, 2007; Dotti, 2000; Segovia, 2015). Dotti (2000) compiled more than 40 articles on how various Argentine politicians, jurists, and intellectuals have read Schmitt's work. However, this literature has overlooked the fact that Schmitt's concept of constituent power influenced the leading political ideologists of the so-called Peronist theory of the state of 1949. This chapter aims to show that the Peronist ideologists' reception of Schmitt's approach to Sieyès's idea of constituent power was crucial to their legitimization of a popular autocracy. I will briefly

place the Argentine case in the context of the international debate on populist constitutionalism.

The debate over populist constitutionalism has focused on the institutional form of populism, particularly the use of constitutional assemblies to concentrate state power. Müller (2017, p. 593) argues that populism must be understood from this institutional dimension, as the term alludes not only to a discourse against elites, but also to anti-pluralist politics. This refers to the notion of the people as a *homogeneous* entity, so that populism always appeals to the idea of a single "will of the people" (2017, p. 594). Müller emphasizes that Schmitt shares this idea of representation: "The people as an existential reality was played by Carl Schmitt against merely liberal representation of voters in parliament" (2017, p. 595). Populist constitutionalism aims to "constitutionalize the charisma" of the popular leader, so that the creation of a new constitution is also understood as a means to keep the populist leader in power: "As the only legitimate representatives of the people, populists should perpetually be in office. And if the perpetuation of power becomes the aim, then there's also the possibility that populists treat the constitution as a mere façade" (2017, p. 599). As examples of populist constitutionalism, Müller cites Hungary's new constitution, which came into force in 2012, and Venezuela's constituent assembly, which took place from 2017 to 2020.

The concept of populist constitutionalism brings us to the discussion of the relationship between the concepts of constituent power and populism. There is still debate about the very concept of populist constitutionalism, whether it is not an oxymoron because constitutionalism is necessarily associated with the defense of limited government (Halmai, 2019; Landau, 2021). It has also been pointed out that the phenomenon of populist constitutionalism has several varieties (Blokker, 2019a). Aside from this important debate over the term, there is a consensus that populist constitutionalism is associated with a notion of constituent power as the "will of the people." For this reason, the literature has pointed to the relationship between the concept of populist constitutionalism and Schmitt's theory of constituent power (Blokker, 2018; Doyle, 2019; Verdugo, 2023; Wittrock, 2020). Here, Schmitt's concept of the constitution as an expression of the unity of the will of the people is emphasized above all. Arato and Cohen (2021, pp. 155–156) have explained the practice of populist constitutionalism, pointing to the cases of Brazil (1937), Argentina (1949), Ecuador (1945, 1946), Peru (1992), Venezuela (1999), Ecuador (2008), and Bolivia (2009) as "populist constitutional replacement." To these cases I would add the attempt by Pedro Castillo in Peru to carry out a coup d'état on December 7, 2022, with the aim of illegally

convening a constituent assembly. Arato and Cohen (2021, p. 184) also recognize Schmitt's theory of constituent power as the basis of populist constitutionalism.

In the context of the debate on populist constitutionalism, Negretto (2012, p. 344) has pointed out that the Argentine Constituent Assembly of 1949 was the "archetype" of populist constitutionalism in Latin America. This was a constitutional process in which Perón, as head of state, concentrated powers to "constitutionalize" his charisma and leadership, benefiting from his large majority of deputies and popular support. Like Sieyès's (1789/1989a) idea that the king has the right to reconvene the constituent power, populist constitutionalism in Argentina was a constituent assembly that the head of state reconvenes, albeit by populist methods (Negretto, 2012, p. 353). Perón had announced his intentions for a constituent assembly since his victory in the 1946 election. On August 27, 1948, most of the Peronists deputies approved Law 13,233 to convene a constituent assembly to replace the Constitution of 1853. However, Article 30 of the Argentine Constitution of 1853 states as follows: "The necessity of reform must be declared by Congress with the concurrence of at least two-thirds of its members; but it shall be carried out only by a Convention called for that purpose" (*Constitución Argentina 1853*, n.d.). This meant that at least 102 deputies (two-thirds of the members of Congress) had to approve the law to convene a constituent assembly. In contrast, the Peronist ideologists argued that a two-thirds majority of the deputies present in Congress would be sufficient to pass the law, and so it was approved by 96 votes.

The Argentine Constituent Assembly of 1949 was not only the "archetype" of populist constitutionalism, but also the moment of the most important reception of Schmitt's concept of constituent power in South America. On January 24, 1949, the sessions of this assembly began. From the beginning, the minority bloc of deputies opposed to Peronism criticized that the constituent assembly had been unconstitutionally convened on August 27, 1948. In the session of February 15, 1949, the Peronist deputy and ideologist Joaquín Díaz de Vivar (1907-2002), quoting and explaining Schmitt's concept of constituent power, tried to show that it was no longer a matter of debating unconstitutionality. In his opinion, it was important to understand that the decision of the constituent power was expressed beyond the constitutionality in the results of the constituent elections of December 5, 1948 (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 185). Peronism received 67% of the votes here, or 109 deputies out of a total of 156 constituent deputies. The political opposition, which was in the minority, denounced that the convening of the constituent assembly had been orchestrated by the head of state (Perón), who had exploited his popularity to hold a plebiscite on his self-proclaimed "Peronist revolution" (Vita, 2019b, pp. 35–38). Like his

colleague Díaz de Vivar, Arturo Sampay (1911-1977), who is considered as the "father" of the Constitution of 1949 (Regolo, 2017), attempted to delegitimize the accusations of the minority opposition by calling them "Kelsenians" and referring to the leading European constitutional theorists who had worked on the concept of constituent power:

> Can a constituent convention make a declaration of unconstitutionality? A constitutional convention is a constituted organ of a state with an extraordinary function but whose specific task is regulated by the law that declares the need for reform. It is, in the classical nomenclature of Sieyès, a *constituted power* and not a *constituent power*, because the latter is the exercise of the supreme political power of the nation over the pre-established legal order. Constituent power is the power to give itself a new constitution by committing a rupture with the logical antecedent of its creation, as we would say with Kelsen, whose memory and lexicon will please some distinguished Kelsenians who sit on these benches [of the opposition]. A constituent convention acts within the framework of the given legal order and must therefore submit to the task assigned to it by law, which in this case is the total revision of the constitution. This is explained in detail to distinguish it from constituent power in the doctrine that begins with Jameson, the American classic on the subject, and extends to the authors of our time: Carl Schmitt and Egon Zweig; the Spaniards Recaséns Siches and Pérez Serrano; the Italians Messineo, Santi Romano, and Costantino Mortati; and the Frenchman Carré de Malberg (Sampay, 1975, pp. 483–184).

Based on this reception of different European jurists and political thinkers in the constituent assembly of 1949, my study focuses on the reception of Schmitt's concept of constituent power among two leading Peronist ideologists in 1949. Evidently, different ideologists and intellectuals were associated with the Peronist movement (Fiorucci, 2002; Recalde, 2021; Rein & Panella, 2017). However, Díaz de Vivar and Sampay were the two most important ideologists of the Peronist constitution, since they made the greatest efforts to legitimize the constituent assembly convened by Perón. My analysis is not about Peronism or the constituent assembly itself, but only about these two Peronist ideologists. Already the legitimacy of the convening of the constituent assembly of 1949 was questioned in Argentina and gave rise to decades of legal, political and ideological debates (Vita, 2019b, pp. 28–35). In this context, the ideologists of the Peronist constitution focused on discussing fundamental rights and reorganizing the powers of the state. There is already extensive literature on how the Constitution of 1949 expressed an international movement for expanding social and political rights, called "social constitutionalism" (*constitucionalismo social*) (Benente, 2019; Vita, 2022). The Constitution of 1949 has been studied extensively from the perspective of social rights, social justice, and economic issues (Koenig, 2015; Olivares, 2019; Vita, 2022), but not sufficiently from the perspective of the political ideas of the Peronists ideologists.

It is important to mention that the reception of the concept of constituent power in Argentina started not only from Schmitt's conception, but also from Bonnard's distinction between *original* and *derived* constituent power. This intellectual reception in Argentina opened the way for the autocratic tradition of constituent power and the legitimization of various military dictatorships and popular autocracies in South America.

The autocratic tradition of constituent power in South America has a long history. In Brazil, Francisco Campos (1891-1968) engaged in a dialogue with Schmitt's work since the 1930s (Bueno, 2016; Dos Santos, 2007). Campos (1942, pp. 66, 74) later aligned himself with Schmitt's concept of constituent power, which he used to legitimize the 1964 military coup. He drafted the first constitutional article that established the military dictatorship (1964-1985), affirming that the constituent power of the Brazilian people was expressed in the military coup itself (*AIT-01-64*, n.d.). On the other hand, Cristi (1999, p. 1770) has pointed out how the concept of *derived constituent power* can be found in Jaime Guzmán's legitimization of the constituent and legislative power of the military junta after Pinochet's 1973 coup in Chile. Cristi overlooks, however, that this conception is not Schmitt's, but Bonnard's. In Venezuela's 2017 case, Nicolás Maduro was the one who convened the constituent assembly, in a process challenged by the absence of a political opposition, so that his regime is now considered an autocracy (Corrales, 2023; Jiménez, 2023). The autocratic tradition of constituent power reached its peak with the coup d'état of Pedro Castillo on December 7, 2022, who invoked a 'mandate' of the constituent power to dissolve Congress, declare a state of emergency, and convene a constituent assembly to keep himself in power (Pacco, 2022). All of these autocratic receptions would be inconceivable without the initial reception of Schmittian and Bonnardian concepts of constituent power in Argentina.

This chapter focuses on the reception of Schmitt's ideas in the Argentine Constituent Assembly. The analysis is divided into two parts. The first part describes the relationship between the concepts of Peronism, popular autocracy, and charismatic leadership in Argentina. It introduces us to the classical debate on the political foundations of Peronism in two of its most important political theorists: Sampay and Díaz de Vivar. Moreover, I analyze the reception of Schmitt's political theory in Sampay's work on the liberal state and his critique of totalitarianism in the context of mass democracies. In doing so, I show that while Sampay rejects decisionism, he embraces Schmitt's concepts of the constitution, democracy, and constituent power. The second part describes how Schmitt's idea of constituent power is the central concept of the Peronist political theories of Díaz de Vivar and Sampay to legitimize the Constituent Assembly and thus underpin a popular autocracy in Argentina.

1. The Theory of the Peronist State

The Constituent Assembly of 1949 is relevant not only for being the archetypal case of *populist constitutionalism* in Latin America but also for being the first relevant case to receive Schmitt's and Bonnard's conceptions of constituent power. Peronist ideologists such as Díaz de Vivar and Sampay used the concept of constituent power to legitimize the concentration of powers in Perón as head of the state. Unlike Díaz de Vivar, however, three elements stand out in Sampay's work. First, Sampay is familiar with conceptions of constituent power in the French and German legal traditions. Through his reading of Pérez Serrano's famous lecture in Madrid (1947), Sampay draws on the distinction between *original* and *derived* constituent power introduced by Bonnard (1942). Besides, Sampay rejects Schmitt's decisionism but embraces his plebiscitary conception of democracy as *homogeneity* and as an *identity* relationship between leader and people. Second, Sampay demonstrates a deep knowledge of the intellectual history of constituent power and its relation to natural law, constitutional theory, and especially Schmitt's approach to political theology. Finally, as a constituent deputy and ideologist of the Peronist state, Sampay introduced in Argentina the concepts of the constitution, democracy, and "guardian of the constitution" from Schmitt's work. Sampay was an expert on Schmitt's political thought and, along with Díaz de Vivar, one of the leading ideologues for the Constitution of 1949.

a. Peronism, Popular Autocracy, and Charismatic Politics

Peronism is the most important phenomenon in Argentine political history, which is why there is an extensive historiography on it (Grimson, 2019; Malet, 2007; Palacio, 2010). This section focuses exclusively on the question of the relationship between Peronism, popular autocracy, and charismatic leadership. In contrast to the hegemonic literature, my study analyzes the theory of the autocratic and plebiscitary state that underlies the Peronist ideologists of the Constitution of 1949. I will therefore focus on the writings of Díaz de Vivar and Sampay as the two leading theorists of the Peronist Constitution. The main feature of reading these authors lies in the notion of Perón as a *caudillo* carrying out a "national revolution." Before I begin this analysis, it is important to briefly introduce the topic.

The main character in this story is Juan Domingo Perón (1895-1974), an army general, politician, and three-time president of Argentina. Perón was vice president of the de facto government of 1943, which staged a coup d'état that was a reaction to the so-called *Década Infame* (1930-1943), a period marked by corruption and electoral fraud. In 1939, Perón was sent to Italy, where he received military training. His biographers emphasize that it was here that he learned about the social and political organization of Italian fascism. From 1943 to 1945, Perón served as Secretary of Labor and Minister of War, gaining much popularity in the Argentine labor movement. By 1945, this popularity led to a political polarization between two camps that would define contemporary Argentine politics: Peronism and anti-Peronism. On October 12, 1945, Perón was arrested and taken to Martín García Island. On October 17, however, a mass demonstration took place in the historic Plaza de Mayo, carried mainly by the labor movement, demanding Perón's freedom. In Argentine history, this date is known as the "Loyalty Day." On October 8, 1945, a new coup d'état took place. On February 24, 1946, democratic elections were held in Argentina, in which Perón consolidated his leadership by winning the presidency with his Justicialist Party.

Not every popular autocracy is fascist, but every fascist state is autocratic and plebiscitary. For this reason, the figure of Perón in Argentina has led to an extensive and complex national and international discussion on the relationship between fascism and Peronism (Cucchetti, 2012; Finchelstein, 2014, pp. 65–92; Lewis, 1980). There is agreement that Peronism is not identical to fascism, but this does not mean that Peronism does not have some features of the autocratic and plebiscitary character of fascism. One of the seminal studies that addressed this question, although criticized in the contemporary literature, was by

the Italian sociologist Gino Germani (1978), who discussed with the American political scientist Seymour Martin Lipset what Peronism is (Amaral, 2018, pp. 51–80).

From a sociological perspective, Germani (1978) points out that Peronism is a "popular national movement." Germani was born in Rome and went into exile in Argentina as a militant anti-fascist. He was also a professor at Harvard (1965-1975) and Naples (1975-1979). Because of his anti-authoritarian intellectual profile, Germani studied the similarities between Italian fascism and Peronism. For him, the common characteristic of the two was charismatic and autocratic leadership in the organization of the popular classes. However, Germani (1978, pp. 230–242) emphasizes above all the differences. Italian fascism developed a totalitarian system, while Peronism had an autocratic and plebiscitary exercise of power that organized and integrated the labor movement into the Argentine political arena. Although initially it was primarily the trade unions that supported Peronism, Perón later broadened this popular base to include various political groups from the left and right, Catholics and anti-Catholics, Communists and anti-Communists. Germani's study thus illuminates Perón's rise and how the historical milestone of October 17, 1945, marked the beginning of a populist movement that revolved around a strong charismatic leadership.

The charismatic and autocratic element of Peronism highlighted by Germani brings us to the international discussion of *populist constitutionalism* (Blokker, 2019b; Corrias, 2016; Halmai, 2019). Although populism is one of the most studied topics worldwide, especially in Latin America (De la Torre, 2019, pp. 1–27), this concept has recently been studied intensively in European countries as well (Bozóki & Hegedűs, 2018; Bugaric & Kuhelj, 2018). In Latin America, as Negretto explains, "the creation of a new constitution and the design of a plebiscitary democracy are integral to the project of political renewal that populism promises in the face of the failure of a representative regime" (2012, p. 343). Beyond the friend-enemy dichotomies established by the "populist reason" (Laclau, 2005, p. 170), Negretto argues that populism also expresses itself institutionally. In South America in particular, the Constituent Assembly of 1949 is "the archetype of constitutional populism" (2012, p. 344). A key component of this concept is what Guillermo O'Donnell (1994) calls "delegative democracy," that is, the idea that "the president embodies a form of popular representation superior to that of legislative assemblies or other representative institutions" (2012, p. 353). Negretto points out that this populist glorification of the figure of the president has its theoretical reference point in Carl Schmitt's plebiscitary concept of representation, whose "critique of parliamentarism and of the institutional mediations of the representative regime was familiar to lawyers and intellectuals close to Perón" (2012, p. 353).

However, the relationship between Peronism, popular autocracy, and charismatic leadership has been overlooked in research on Schmitt's reception in Argentina. Although, as Negretto (2012, p. 353) says, Schmitt's concept of plebiscitary representation is the idea behind the populist constitutionalism in 1949. The traditional literature has focused on how different Argentine jurists, intellectuals, and essayists have read and commented on the German jurist's ideas (Abad, 2007; Dotti, 2000). This is the case with the critical studies that have compared the work of Sampay and Schmitt (Rodriguez, 2016; Segovia, 2015). However, a political theory study on the reception of Schmitt for constructing the Peronist theory of the state still needs to be included. For this reason, my study proposes a new approach of the transatlantic reception of Schmitt in Argentina that allows conceptualizing the relationship between Peronism, popular autocracy, and charismatic leadership. From this perspective, I explain the ideas of Díaz de Vivar and Sampay, who attempted to construct a theory of the Peronist state from Schmitt's and Bonnard's conceptions of constituent power.

Let us begin with an examination of Díaz de Vivar's ideas. Like Schmitt's idea of democracy, he had already conceptualized Caesarism and fascism as expressions of mass democracy in his work *Ideas for a Biology of Democracy* [*Ideas para una biología de la democracia*] (1937). The Peronist jurist and politician traveled to Francoist Spain and delivered a lecture in Madrid entitled *Our National Peronist Revolution* [*Nuestra Revolución Nacional Peronista*] (1947). This last work is divided into five sections: the doctrine, the economy, the social problem, the place of Peronism in the international arena, and the relationship between hero and people. I focus on the first and fifth sections because they are relevant to my argument. For Díaz de Vivar, the Peronist doctrine claims it is carrying out a "revolution" (1947, p. 44). But his concept of revolution has the meaning given to the term by fascist intellectuals: the "national-syndicalist revolution" of the Francoist ideologists and the "national revolution" of Roger Bonnard in Vichy France. Like fascism, this "revolution" of Peronism involves glorifying nationalism and the state and rejecting liberalism and capitalism. Díaz de Vivar defines the "Peronist revolution" as the preservation of tradition, the affirmation of Catholicism, and the unity of the Argentine nation (1947, p. 45). This unity, however, becomes politically concrete through the glorification of the state: "We conceive of the state as the realization of that society which is the most highly developed form of the collective being and which synthesizes the thought and action of the people" (1947, p. 48). This political doctrine of Peronism, according to Díaz de Vivar, is also anti-capitalist:

> We also reject supercapitalism, which, if it becomes international, would become the true Pandora's box of our time. Nor are we seduced by a socialist state, although we

> want to build a powerful nation-state (...) Our statism is national because and to be Christian, because and for catholicity, because and for Latin America, because and for the continental bloc, to bring order instead of disharmony and the joy that comes from fullness in perfection (Díaz de Vivar, 1947, pp. 48, 49).

This anti-capitalism, Catholicism, and etatism of the "Peronist revolution" is articulated politically with charismatic legitimacy, that is, with the idea of the hero (Perón as caudillo) and the people. We know that the political milestone of Peronism was October 17, 1945, when a large popular demonstration demanded Perón's release from prison. Díaz de Vivar points out that "the exact contours of our national revolution are reaffirmed at the moment when the Argentine people, without exaggeration, save our leader, General Perón" (1947, p. 51). Therefore, according to the Peronist ideologist, Perón is a hero and a caudillo, an "instrument of Providence" that appears in history. Díaz de Vivar affirms that "every revolution, if it is an authentic revolution, has its hero, its caudillo, its *conductor* [*Führer*/Leader]" (1947, p. 69). The caudillo is "a doctrine, a bundle of urgent needs, a bundle that synthesizes the imponderables" (1947, p. 69). The caudillo is transcendent because "the revolution he causes will depend on his political gifts" (1947, p. 70). The political doctrine and the figure of the caudillo "mutually influence each other in inseparable intimacy until later, at another stage, the final symbiosis takes place" (1947, p. 70). Díaz de Vivar makes this statement in his Madrid Conference in the aftermath of the Civil War to affirm that the caudillo of the Argentine nation, like Franco in Spain, is Perón:

> The Argentine National Revolution has in its leader a hero, an authentic leader. Never have the Argentine people succeeded in expressing themselves so fully as in Juan Domingo Perón, and in this sense he has no equal in our history. While his flesh waits to become bronze, his name has long since become a multitude [*su nombre hace mucho tiempo que se hizo multitud*] (Díaz de Vivar, 1947, p. 70).

Nevertheless, the caudillo Perón not only led a "national revolution" but also left his mark forever on the juridical structure of the Argentine state. In Sampay's speeches as a Peronist deputy in the Constituent Assembly of 1949, there is the same glorification of Perón's charismatic element that seeks to institutionalize itself in the new constitutional order. To explain this institutionalization, Sampay draws a fascinating analogy between Napoleon and Perón. As a member of the Constitutional Commission, Sampay (1975, p. 517) points out that Napoleon said at the end of his life on St. Helena that his true glory would not be the memory of his battles but his civil code. The Argentine jurist points out that "it is difficult to understand why a politician would consider a juridical work as his great work" (1975, p. 517).

However, according to Sampay, “every revolution, when it solidifies as such, survives in a new legal order” (1975, p. 517). Then, Napoleon’s political triumph lies in introducing his civil code for France. This analogy to Napoleon leads Sampay to believe that Perón’s leadership will leave its mark on the new constitutional order of the Argentine state. Thus, for Sampay it would be impossible to separate the Constitution of 1949 from the figure of Perón, which is the basis for the political theory of the Peronist state:

> This constitutional reform could also be called by General Perón his great work - that is why the voice of the people, the *vox Dei*, calls it Perón’s Constitution - because it projects everything he has achieved into the future and will consolidate his titanic work, marked by a precise political worldview that he himself proclaimed: a democratic Argentina based on labor, politically sovereign, socially just and economically independent (Sampay, 1975, p. 517).

The link between Sampay, Perón, and the Constitution of 1949 has been extensively studied in the literature (Koenig, 2015; Olivares, 2019; Segovia, 2007). It is known that Perón met Sampay in 1944 and read his work *The Crisis of the Bourgeois-Liberal Rule of Law* [*La crisis del Estado de derecho liberal-burgués*] (1942a) with great interest in his critique of liberalism and his attempt to overcome it (González Arzac & Sampay, 2007, p. 15). What is certain is that Sampay was one of the most important figures in Argentine constitutional law. In recent years, he has been honored posthumously in his native country, and his name is now even engraved on the buildings of some public institutions (IADE, 2013). I do not wish to discredit the honors bestowed on Sampay in his homeland, for he was an erudite political thinker who should be better appreciated internationally. My main objective is to examine Sampay’s intellectual reception of Schmitt’s and Bonnard’s conceptions of constituent power in the 1940s. This analysis will explain how Sampay attempted to develop a political theory of the Peronist state based on the main political concepts of the German jurist. In his book published in 1944, Sampay did not develop Bonnard’s conception of constituent power, but anticipated what he would later say about the Peronist constitution in 1949.

b. Political Theology, Caesarism, and Totalitarianism

Sampay's reading of the crisis of the liberal state can be summarized in a sentence from Schmitt's book on the crisis of parliamentary democracy: "In the history of democracy there have been numerous dictatorships, Caesarisms, and other more striking forms that have tried to create homogeneity and to shape the will of the people with methods uncommon in the liberal tradition of the past century" (Schmitt, 1923/2017, p. 22).

Arturo Sampay was born in Concordia, Entre Ríos, on July 28, 1911. He was a jurist, university professor and expert in constitutional law. In his youth, he supported President Hipólito Yrigoyen and his democratic "personalist movement," developing a social Catholic approach. In the 1940s, Sampay joined Peronism. In December 1948 he was elected constituent deputy for the Province of Buenos Aires and later became the main Peronist ideologists of the Constitution of 1949. There is evidence that Sampay was familiar with Schmitt's concept of constituent power from 1938-1939 (Sampay, 1938, pp. 23–24, 1939, pp. 66–69). Sampay's first reflections on constituent power refer to the theory of the people's right to resist tyranny. Later, Sampay published an important article (1939, pp. 66–69) in which he explains Sieyès's idea of constituent power and Schmitt's constitutional theory very well. Sampay's work in the 1930s shows that his reception of Schmitt's ideas developed simultaneously with the reception of the German jurist among the Francoist ideologists during the Spanish Civil War. Schmitt's reception in Spain and South America must therefore be understood, in my view, as a single reception in the Spanish-speaking world.

From the perspective of political theory, Sampay's work heralds what would later become his theory of the Peronist state in 1949. The Argentine jurist published his study in 1942 under the title *The Crisis of the Bourgeois Liberal Rule of Law*. Sampay's book has a preface by Francisco Ayala, who published the Spanish translation of Schmitt's *Verfassungslehre* in 1934. At the very beginning of his book, Sampay (1942a, p. 11) explains that his study is inspired by the Argentine political context and the "collapse" of the liberal state in the development of World War II. The work is divided into five sections. The first deals with political theology as a legal-theoretical approach; the second with the political foundations of the liberal state; the third section is a philosophical study of the origin and crisis of the idea of the modern individual; the fourth section examines the emergence of mass democracy; the fifth section describes the foundations and history of totalitarian forms of the state resulting from Soviet communism and Italian and German fascism. The central element of Schmitt's reception of Sampay's work lies in the connection he makes between political

theology, constitutional theory, and constituent power in the intellectual history of the transition from the liberal state to the totalitarian state in Europe.

In the first chapter, Sampay lays out his Schmittian approach to understanding the modern state: political theology as the relationship between a " religious worldview" and a form of the state (1942a, p. 36). Sampay points out that the constitution of a state is the result of fundamental political decisions. Here, the Argentine jurist takes up the existential approach of Schmitt (1928/2017, Chapter 1), namely the definition of the constitution as an expression of the "unity of the people" (*politische Einheit*). According to this approach, the constituent political decision that creates a constitution is an expression of "the form and purpose of the political being itself, i.e., the state in the modern lexicon (cf. Carl Schmitt, *Constitutional Theory*, 1934, p. 4 and p. 86)" (Sampay, 1942a, p. 37). Therefore, the constitution as a decision expresses "the total situation of the unity and political order of a people, considered in its singular form of existence" (1942a, p. 37). Sampay says that this concept of a constitution as the unity and existence of the people represents "the original Aristotelian meaning," which "has been updated in our days by Schmitt with his theory of the *absolute concept of the constitution*" (Sampay, 1942a, p. 36; Schmitt, 1928/2008, Chapter 1).

Schmitt's *absolute concept of the constitution* (1928/2017, Chapter 1) inspires Sampay to claim that every state is conditioned by an "organic conception of the world" (1942a, p. 37) so that every political and constitutional theory presupposes a political theology. Sampay defines political theology as "the recognition that every state singularity, like the soul to the body, is characterized by its inherent and necessary metaphysical core" (1942a, p. 37). Sampay (1942a, p. 38) points out that this conception is already announced in Hegel's philosophy of law (*Philosophie des Rechts*, §270). However, following Schmitt (1922/2015, Chapter 4), Sampay notes that it was Donoso Cortés who systematized the importance of political theology in the 19th century by pointing out that "in every great political question, there is always a theological question" (1942a, p. 38). Sampay explains the political-theological approach of Donoso Cortés and his critique of liberalism. Then, he points out that "in Carl Schmitt's *Politische Theologie*, the foundations of Donoso Cortés's conception are systematized with the intellectual verve characteristic of the German publicist's scholarly production" (1942a, p. 43). For Sampay, Schmitt (1922/2015) was the most important representative of Donoso Cortés's political theology and the one who continued his critique of parliamentary democracy and the liberal constitution:

> In our days it is Carl Schmitt who valorizes the egregious lineage of Donoso Cortés's philosophical thought for the theory of the state. After many of his most brilliant and

> biting criticisms of the modern parliamentary situation (cf. *Die Geistesgeschichtliche Lage des Heutigen Parlamentarismus*, 1926) and of the hollow bourgeois-liberal concept of formal legality (cf. *Legalität und Legitimität*, 1932), Schmitt discovers, albeit in a modified form, the same truths that were already known in the works of the Spanish Catholic publicist (Sampay, 1942a, p. 43).

Sampay shows in this passage and in the following pages of his work that Schmitt's political theology strongly influences him. The Argentine jurist develops an account of the central ideas of Schmitt's theoretical approach to affirm that a new idea of legitimacy emerged in the 18th century based on Sieyès's idea of constituent power:

> The concept of God of the 17th and 18th centuries presupposes the transcendence of God over the world, as in political philosophy the transcendence of the king over the state. (...) From 1848 - after the failure of the attempts to renew the traditional legitimacy - the juridical theory of the state became positive and generally hides behind this word all its difficulties or, using various artifacts [*artificios*], the constituent power of the people. This means that the democratic legitimacy takes the place of the monarchical idea of legitimacy (See Carl Schmitt, *Politische Theologie*, 1922, pp. 45-46) (Sampay, 1942a, p. 45).

When Sampay refers to constituent power as an "artifact," he means, as Schmitt (1928/2008, Chapter 8) points out, that it is a secularized theological conception that now takes the form of the modern theory of popular sovereignty. Sampay invokes Kelsen to assert that even in his legal positivism there is a "meta-positive" conception that expresses a political theology: "God is essentially identical with the world; analogously, as the *Reine Rechtslehre* elaborates, it is also possible to identify state and law (cf. Hans Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, 1922, p. 228)" (1942a, p. 46). He states that there is a "real external connection" between politics and political theology. Schmitt's approach to political theology helps Sampay understand Sieyès's idea of the constituent power as a secularized theological concept in constitutional theory. Sampay concludes his first chapter with a brief intellectual history. He says that political theology originated in Hegel's philosophy of law and its conceptual systematization in the counterrevolutionary thought of Donoso Cortés. However, Sampay (1942a, p. 47) sees the intellectual culmination of political theology in the constitutional theories of Carl Schmitt and Hans Kelsen.

The political-theological substance of the liberal state is thus found, as Sampay points out, "in the notion that the people are the subject of the constituent power, the basis of the constitution and the exclusive source of all power that holds the collective will" (Sampay, 1942a, p. 84; Schmitt, 1928/2017, Chapter 8). It is important to emphasize, however, that

Sampay applies this definition of the people concerning the idea of democracy. Without quoting him but referring to his approach, Sampay defines the concept of democracy as Schmitt's idea of homogeneity and identity (1923/2017, Chapter 1, 1928/2017, Chapter 16):

> Democracy is the identity of subject and object of political power, of rulers and ruled, factually distinguished in government and subjects, but identified in the essential homogeneity of the "people," who remain in action and potentially the entity that makes the fundamental political decisions, either directly or through the organs of state that depend on them (Sampay, 1942a, p. 84).

From this Schmittian idea of constituent power and popular autocracy, Sampay derives his plebiscitary conception of the Peronist state. Sampay's approach to democracy as "homogeneity" and "identity" is also accompanied by the idea of a popular autocracy legitimized by constitutional plebiscites. Like Schmitt (1923/2017, Chapter 1, 1928/2017, Chapter 16), Sampay notes that "Caesarism or Bonapartism is a historical realization of democracy since it is the sovereign people who, through plebiscitary expression, transfer all political power to one man" (1942a, p. 84). Therefore, according to Sampay, "in our days, massive or authoritarian democracy is constituted by the totalitarian state" (1942a, p. 84). For this reason, he affirms that "we must separate the concept of democracy and the historical formulation of liberal democracy, which is mistakenly conceived as a pair of consubstantial elements" (1942a, p. 84). Sampay, who also follows Schmitt's idea of popular autocracy, affirms that democracy and liberalism are not only different concepts but also "bipolar opposing organizations" (1942a, p. 84). His plebiscitary definition of constituent power, as opposed to parliamentary government, is understood as "an immediate will that precedes and is superior to any function regulated by the formal constitution" (1942a, p. 98). Sampay defines the concept of the constituent power by quoting Schmitt again:

> The constituent power of the people is an immediate will that precedes and is superior to any established procedure; it does not emanate from any positive law and cannot be regulated in its procedures by previous legal norms. It has the following characteristics: unitary and complete, indivisible and untransferable, permanent, inalienable, and imprescriptible. It always remains in potency, latent above all constitutions derived from it and all laws enacted within the framework of the formal constitution in force (cf. Carl Schmitt, *Constitutional Theory*, 1934, p. 86) (Sampay, 1942a, p. 99).

Unlike Schmitt, however, Sampay understands the political theology of constituent power from the standpoint of natural law, essentially as a doctrine of resistance to tyranny and a political theory of revolution. Sampay thus anticipates Fasel's emphasis (2022) on natural

law theory in Sieyès's idea of constituent power. For Sampay, the only check on the arbitrary rule is natural law. The people "are bound by no authority insofar as it dictates the rules of jurisdiction" (1942a, p. 99). Thus, there are natural limits to the exercise of constituent power. Sampay quotes Sieyès to affirm that the will of the people is always lawful because it is the law itself, i.e., before the law, there is only natural law (*Avant elle, et au-dessous d'elle il n'y a que le droit naturel*) (1942a, p. 223). The Argentine jurist departs from Schmitt's decisionist reading, which he associates with a "totalitarian" conception of constituent power. For Sampay, "totalitarian decisionism" is opposed to natural law. He points out that it is necessary to distinguish, as Sieyès did, between the exercise of the constituent power and the mechanisms of constitutional reform that reside in the constituted powers. For Sampay (1942a, p. 100), that means that the concept of constituent power presupposes that the people can resist a tyrannical government or eliminate an unjust constitutional order through revolution.

Here Sampay introduces his Catholic conception of natural law, which, as has been rightly pointed out, is closer to Thomism (Pierpauli, 1999, p. 141; Segovia, 2007, pp. 177–180). According to Sampay, the subtraction of anti-tyrannical sources in the idea of constituent power would have provoked the crisis of the liberal state: "When the *pathos* of the rationalist natural law of the Enlightenment was lost, the constituent power of the people, now transformed into masses, no longer faced any moral barrier…" (1942a, p. 99). This crisis has led to the totalitarian reading of the constituent power:

> It is remarkable —and this is the reason for the previous digression— how already in the act of bourgeois liberal democracy, with the fleeting appearance of the "social idolatry" [*sociolotría*] of the Jacobins [=Reign of Terror], the end that awaited them is anticipated. When the *pathos* of rational natural law, the only recognized limit to the constituent power of the people, disappears, authority as a moral principle is transformed into an absolute power of the masses, or of those who represent them. This is what we call totalitarian dictatorship... (1942a, p. 223).

Nevertheless, when the Argentine jurist speaks of a crisis of the liberal state, despite his Thomism, he inevitably returns to Schmitt's reading. Indeed, Sampay refers to a process of "neutralization and depoliticization" (Schmitt, 1930a) that begins with 19th-century liberal theory and is consolidated with Schmitt's decisionist theory as a totalitarian antidote to the crisis of parliamentary democracy. Sampay (1942a, p. 193) cites and accepts Schmitt's intellectual diagnosis of the liberal state as a process of "neutralizing" the essence of the political (*Die Freund-Feind-Unterscheidung*) but does not share the autocratic political motives of Schmitt's decisionism. Rather, Sampay criticizes the link between mass

democracy, irrationalism, and totalitarianism in Europe: "The massive avalanche, in existential inquiry, made the incursion recognized by the sovereign constituent power without moral measurements" (1942a, p. 100). For the Argentine jurist, the intellectual history of the constituent power has been tainted from the beginning with the despotic power of the Jacobin terror in the French Revolution. In the same way, the totalitarian use and abuse of the constituent power in the context of mass democracy has an irrational and despotic component. Sampay, therefore, criticizes the totalitarian use of the Sieyès's idea of constituent power to justify the fascist dictatorships in the first half of the 20th century.

In chapter 3, Sampay develops his political-philosophical analysis of the connection between the despotic understanding of constituent power and European totalitarianism. For Sampay (1942a, p. 193), who cites Schmitt (1930a), the project of the "state's neutrality" toward the individual has brought about a process of depoliticization in the context of mass society in the 20th century. Sampay says that "this neutral process has produced a new protagonist of history and maker of culture: the mass man" (1942a, p. 216). Sampay sees the Jacobin terror as the first link between politico-religious fanaticism and the despotic exercise of popular sovereignty (1942a, p. 216). Sampay then connects mass democracy with irrationalism. The Argentine jurist points out that George Sorel is the intellectual of this violent irruption of the masses into political life and that Mussolini represented this political project in Italy (1942a, p. 256). However, Sampay points out that the link between myth and violence in Germany was best expressed in Schmitt's work on parliamentary democracy (1923/2017). Sampay agrees with Hans Krupe that there are three stages in Schmitt's thought: normativism, decisionism, and concrete-order thinking. Sampay points out that the common denominator of Schmitt's political thought is his critique of parliamentary democracy:

> In particular, [Carl Schmitt] made the Weimar Constitution the object of his criticism, in which he emphasized the intermingling of three different state systems, viz: the parliamentary state, with its inherent vices of pluralism and polycracy, the creator of the legal framework; the plebiscitary state, characterized by the decisive intervention of the people in the constitutional mechanism, generating plebiscitary legitimacy; and finally, a "Diktator" of commissarial action, who has to affirm the unity of the people as a political whole and consequently plays the role of guardian of the constitution (Sampay, 1942a, p. 267).

The reference to Schmitt's theory of the dictator as "guardian of the constitution" is important because it will later play an important role in Sampay's conception of Perón as protector of the will of the people. We find here an important reception of one of the variants of popular autocracy that I explained in chapter four of this monograph. However, for

Sampay, Schmitt is also the leading intellectual of the totalitarian state. The Argentine jurist sets out Schmitt's friend-enemy distinction in detail (Sampay, 1942a, pp. 267–270; Schmitt, 1932/1979), drawing on the National Socialist edition of *Der Begriff des Politischen* (Schmitt, 1927 1932/2018). Sampay says that "for Carl Schmitt, political unity presupposes the coexistence of other enemy political entities" (1942a, p. 270), so that there is a pluriverse of states that are distinguished as enemies. Thus, Schmitt's friend-enemy distinction "formulated the ideological elements of mass democratic totalitarianism: Violence and myth as the driving force of culture; ideologies as masks covering the power instincts of the ruling classes; war seen as the essence of the political" (1942a, p. 271). Sampay's central thesis is that with the mass democracy there is a crisis of the liberal state, so that the democratic principles that support the idea of constituent power suffer a degradation into totalitarianism:

> The masses of the people, who have no moral-legal conscience and as such act as bearers of constituent power detached from the imperatives of justice, have overthrown precisely the guarantee apparatus that liberalism had created with the rule of law and that was ultimately aimed at the legal protection of the cultural, political and economic neutrality of the state (Sampay, 1942a, p. 280).

Sampay argues that Schmitt's idea of constituent power, applied to mass democracy, is the political basis of the one-party state and totalitarianism. The Argentine jurist quotes various passages from the speeches of Mussolini, Stalin, and Hitler in which he attempts to show that the basis of the legitimacy of the totalitarian state is the plebiscitary call to the masses (1942a, p. 280). The central element of the totalitarian legitimacy is plebiscitary support for the autocrats. In Germany, the despotic exercise of constituent power, deprived of its moral and democratic foundations, eventually became, for Sampay, the basis of a totalitarian system based on the charisma of the *Führer* with unlimited powers. The plebiscitary leader accumulates legislative, judicial, and executive functions. For this reason, Sampay argues that Schmitt (1933) is the leading ideologue of the National Socialist state:

> In the National Socialist state, the law is an act of the Führer's will; *Der Wille des Führer Recht ist*, Carl Schmitt asserts, updating Ulpian's famous definition of law, which is the formula of Roman despotism: *Quod Principi placuit legis habet vigorem*. (...) Carl Schmitt regards the German Reich as composed of three structures of order and organization: the state as the political-static part, the movement as the political-dynamic element, and the people, which is to be regarded as the protection and foundation of growing political decisions in non-political times (Carl Schmitt, *Staat, Bewegung, Volk*, 1933, p. 11) (Sampay, 1942a, p. 347).

Sampay's criticism was later summarized in his book on the German jurist, published in the 1960s: *Carl Schmitt and the Crisis of Legal Science* [*Carl Schmitt y la crisis de la ciencia jurídica*] (1965). Despite his criticism, Sampay held three central ideas of Schmitt's political thought. First, the approach of political theology (Schmitt, 1922/2015, Chapter 3) as the basis of his constitutional theory. Sampay adopted Schmitt's idea that the constitution expresses the existence and unity of the people (the constitution as a unified whole) (Schmitt, 1928/2017, Chapter 1). Second, Sampay adopted Schmitt's idea of constituent power as a sovereign will of a pre-legal nature (Schmitt, 1928/2017, Chapter 8). Thus, he defines the constituent assembly as the execution of the mandate from the people to create a new constitutional order. In doing so, the people as *pouvoir constituant* always remain in the state of nature (*natura naturans*). Finally, Sampay accepts Schmitt's notion of democracy as "homogeneity" and "identity" and the dictator as "guardian," which supports his claim that Caesarism and Bonapartism are illiberal but not anti-democratic phenomena (Schmitt, 1923/2017, Chapter 1). His notion of a popular autocracy that establishes an "identity" between the charismatic leader and the people is central to the legitimacy that Sampay developed as a Peronists ideologist in 1949. Only by reading Schmitt could Sampay theorize the plebiscitary nature of the head of state represented by Perón in the new Argentine state.

2. Constituent Power of the Peronist State

In this section, I analyze the reception of Schmitt's concept of constituent power to legitimize the Constituent Assembly of 1949. Vita (2019a, 2020) has argued that there was not only a reception of Schmitt in this assembly, but a general reception of the ideas of various jurists of the Weimar Republic. The reception of Schmitt's work, however, does not reduce to a general interest or intellectual curiosity in German constitutional law. My central argument in this section is that Schmitt's concept of constituent power is the political foundation that the Peronist ideologists gave to the Constituent Assembly of 1949. My study distinguishes two conceptions of popular autocracy in Argentina: *Decisionist Peronism* and *Plebiscitary Peronism*. The first is based on Schmitt's concept of constituent power as a mandate from the people to create a new constitutional order, which I explained in chapter three. The second is a sophisticated blend of Bonnard's concept of *derived constituent power* and Schmitt's concept of the Reichspräsident as protector of the will of the people.

These variants of Schmitt's and Bonnard's ideas of popular autocracy are represented by the Peronist ideologists Joaquín Díaz de Vivar and Arturo Sampay, respectively. The first reception relates to the discussion of the legitimacy of Law 13.233, which convened the Constituent Assembly by a two-thirds majority of the deputies present. Here I show how, in Díaz de Vivar's reading, a reception of Schmitt's concept of constituent power intersects with the decisionist idea of sovereignty. Thus, the legitimacy of the *plebiscitary mandate* is emphasized over the constitutional procedures for convening the constituent assembly. I then explain how, in Sampay's reading, the concept of constituent power is linked to the "legal revolution" in Bonnard's sense. The legitimacy of the constituent assembly consisted in the fact that a constitution-making body was created with the votes of the parliament. Sampay attempts to legitimize Perón as the "guardian of the constitution." Thus, Sampay lays the foundation for a plebiscitary theory of the state, which ties directly into Schmitt's idea of the Reichspräsident. Sampay's conception of the head of state is that of a directly elected president with the power to declare a state of emergency. My central argument is that the reception of Schmitt's concept of constituent power in Díaz de Vivar and Sampay shows that the theory of the Peronist state in 1949 was conceived as a popular autocracy.

a. Decisionist Peronism

In South America, Díaz de Vivar is one of the most important cases of a state theorist with pronounced decisionism. He later confessed that he had suggested to Perón that Schmitt should be invited to the University of Buenos Aires. According to his testimony, Perón replied that the political opposition "accused us enough of being Nazis to bring this German professor" (Dotti, 2000, p. 110). Díaz de Vivar wrote two important works that show his early involvement with constitutional theory and Peronism: *Ideas for a Biology of Democracy* (1937) and *Our Peronist National Revolution* (1947). Díaz de Vivar was a Catholic nationalist who, shortly after the Constituent Assembly, wrote a theory of the Peronist state: *Theory of a Constitution: The Rule of Law and the Justicialist Constitution of 1949* [*Teoría de una Constitución: El Estado de Derecho y la Constitución Justicialista de 1949*] (1953). His central thesis is that the Constitution 1949 is a reaction to the liberal doctrine of the Constitution of 1853. In contrast to the latter, "in the Peronist Constitution, we conceive property in the dual function already analyzed with maximum dialectical efficiency by the genius of St. Thomas" (1953, p. 138). Furthermore, he claims that the only valid theory on fundamental rights as pre-state rights is to be found in the work of "the brilliant German author Carl Schmitt, when he speaks of any political entity that becomes aware of itself as an existential value and therefore expresses itself as a unity" (1953, p. 121).

From his overtly Schmittian approach, Díaz de Vivar composed a Peronist constitutional theory from Schmitt's concept of constituent power in 1949. Here he defines this idea as a transfer of sovereignty from the monarch to the people:

> In the modern absolute state, the holder of the constituent power was the monarch; in the constitutional state, however, this holding [*titularidad*] [of the constituent power] is transferred to the people. (...) The constituent power, according to Schmitt, presupposes the people as an existential political entity; it designates a people capable of acting and awakens political consciousness. This is the meaning of the term "nation," which is used with preference by French writers: the politicized nation (Díaz de Vivar, 1953, p. 113; Schmitt, 1928/2017, Chapter 8).

Let us return to the Constituent Assembly of 1949 to understand how Díaz de Vivar incorporated this Schmittian definition of constituent power into his Peronist theory of the state. First, we must place his remarks in the context of the debate that took place in the first session of the Assembly. On January 24, Moisés Lebensohn, leader of the political opposition to Peronism and activist of the Radical Civic Union (*Unión Cívica Radical*, UCR), took the

floor and spoke against the convening of the Constituent Assembly. Lebensohn's main argument was that the constituent assembly would express both the destruction of the separation of powers and the establishment of a popular autocracy in Argentina:

> When the power of the state is concentrated in one man [Perón] and he exercises it alone or through other men dependent on him [Peronist deputies], a country falls into the abjection of despotism. (...) Without division of powers there is neither freedom nor constitutional regime. Without division of powers and federalism, there is no republic in Argentina. (...) Through the mechanisms of the ruling party and its head of state, the concentration and confusion of powers characteristic of totalitarian states and the de facto abolition of constitutional order are achieved. (...) The Radical Civic Union (UCR) challenges this Constituent Assembly and the titles of all its members, on the grounds that the legislative declaration with which the reform has been advanced is unconstitutional because the climate of freedom that is essential for the free debate of ideas does not exist in this country… (Convención Nacional Constituyente, Diario de Sesiones, 1949, pp. 17–18).

After this declaration, the UCR deputies withdrew from this session of the Constituent Assembly, while the majority of the Peronist deputies remained to proceed with the drafting of a new constitution. Among these deputies, as members of the Constitutional Commission, were Joaquín Díaz de Vivar and Arturo Sampay. Let us begin with the intervention of Díaz de Vivar. Díaz de Vivar's presentation was an altogether unusual event in the history of the transatlantic reception of German constitutional theory. For the first time in Latin American history (and perhaps in the world), a constituent assembly was intensely engaged with the ideas of Carl Schmitt. In the February 15, 1949 session, Díaz de Vivar explained why Schmitt's concept of constituent power was the basis for the legitimacy of the Constituent Assembly in Argentina. In the face of challenges to the UCR and claims that the Assembly was illegitimate and represented the establishment of a popular autocracy in Argentina, Díaz de Vivar explained that the legitimacy of the Constituent Assembly of 1949 should be understood as the mandate and decision (*acto decisorio*) of the Argentine people:

> I seek, as I said, a new approach to this problem (...) I believe, Mr. President, that the value of the legal title of our [imperative] mandate does not lie, as I hope to show, in the law of convocation [Law 13,233 convening a Constituent Assembly], but in the decisive act [*acto decisorio*] of the Argentine people expressed in the election of December 5, 1948 (*Applause*) (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 181).

In light of this statement, Emir Mercader, another deputy and leader of the UCR, asked Díaz de Vivar if, according to this constitutional theory, he wanted to introduce, Article

30 of the 1853 Constitution, which required the approval of two-thirds of the deputies for the convening of the constituent assembly, was not necessary. Díaz de Vivar counters that to understand the legitimacy of the constituent assembly, we must distinguish between the *constitutional annihilation* and the *constitutional elimination*. His terminology alludes to the explanation Schmitt gives in Chapter 11 of his *Verfassungslehre* (1928/2017).

The Schmittian approach allows Díaz de Vivar to assert that "one can only speak of constitutional annihilation when the created legal order is destroyed, but the validity of the constituent power is maintained" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 181). Therefore, according to the Peronist ideologist, "in my opinion, it is not the constitution that is being reformed, but constitutional law" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 181). Furthermore, Díaz de Vivar says that we can speak of a *constitutional elimination* when it "creates the need to suspend one or more constitutional provisions" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 181). Likewise, we can speak of a *violation of the constitution* when "one or more constitutional provisions are violated, but with the understanding that these provisions remain in full force" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 181). Díaz de Vivar argues that Schmitt should be followed in this distinction between the concepts of constituent power, constitution, and constitutional law:

> It can be defined - one of the many possible definitions is that of Carl Schmitt, whom I follow in the fundamental part of my doctrinal construction, (I explain it with all intellectual honesty) - it can be defined, I say, the constituent power, by saying that it is the political will whose power or authority is able to make the concrete decision as a whole about the mode and form of political existence itself (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 181).

Díaz de Vivar reinforces his Schmittian reading by pointing out that the people are the bearers of the constituent power and that this implies a will, a wish: "Sieyès has an apodictic phrase that points to the core of the problem: it is enough that the nation wishes —says Sieyès—, which of course alludes to the capacity of the political entity to bring about a decision" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 182). The Peronist ideologist disagrees that the relationship between the constitution and the constituent power is equivalent to the relationship between *natura naturans* and *natura naturata*. This formulation alludes to the analogy Schmitt makes between Sieyès's idea of constituent power and the philosophy of Spinoza. Díaz de Vivar explains that he prefers another type of metaphor, also from Schmitt: "It can be said that the constituent power is that which, without

having a form, which, being formless, attains a form, a spirit, a precision, a juridical fullness" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 182). Further, he says that it is necessary to consider that there are different conceptions of the constitution. Here he mentions the typology pointed out by Schmitt: "This concept — constitution — can, of course, be considered from different points of view: in the *absolute* sense, in the *relative* sense, in the *ideal* sense, in the sense of a political *paradigm*, and many others" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 182). Díaz de Vivar states that the essential concept is the *positive concept of the constitution* (Schmitt, 1928/2008, Chapter 8), that is, the Schmittian conception of the constitution as a decision of the constituent power:

> The constitution, unlike the constitutional law, is a decisive act [*acto decisorio*] of the constituent power, that is, it is the expression of the existential will, the decision of the constituent power. The constitutional law is nothing else than an eminent norm, a norm of high juridical hierarchy, whose amendment or suppression is simply prevented [by constitutional procedures] (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 182).

After explaining Schmitt's concept of the constitution as a decision of the constituent power, Díaz de Vivar explains how this decision is explicitly manifested. Here, the Peronist deputy returns to a central theme of Schmitt's idea of popular autocracy: the constituent power as the *acclamation* of the people (Schmitt, 1927/2014, Chapter 3, 1928/2017, Chapter 8). According to Díaz de Vivar, since ancient times, the people have gathered in squares to deliberate on matters of state. And here, acclamation was "the only way to know the exact contours of the decisive act [*acto decisorio*]" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 183). However, according to Díaz de Vivar, in modern times, when states are larger, "this decisive act, the main element of the acclamation — that is, the audible choral utterance— is fundamentally changing and being transformed into modern public opinion" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 183). Thus, the decisive act (*acto decisorio*) of the constituent power does not always take place as a revolutionary and bloody act. On the contrary, it can be an act of acclamation with a certain peace. Diaz de Vivar points out that there are few examples in this regard. However, he points out that there was an acclamation when the Estates-General convened by Louis XVI became the National Assembly in 1789. According to the Peronist deputy, "there was a clear, pristine, perfectly perceptible case of *destruction of the constitution* [(Schmitt, 1928/2008, Chapter 11)]" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 184).

Díaz de Vivar's remarks were interrupted by Anselmo Marini, another deputy of the UCR. Marini criticized the Peronist ideologist by pointing out that his remarks on Schmitt's constitutional theory fell into the fallacy of begging the question (*petitio principii*) since "the constitution itself determines the form in which norms are to be produced" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 184). What is fascinating about this interruption is that this was the moment when the legal theory of Hans Kelsen was invoked in the constituent assembly to refute the decisionist theory of Schmitt. In Marini's words:

> The positive constitution can only be thought of as a basic norm [Hans Kelsen's idea of *Grundnorm*], which would be a gnoseological hypothesis of knowledge, to be able to think of it as juridical and positive. So, I allow myself to justify this brief discrepancy with the constituent deputy [Díaz de Vivar] since I disagree with the decisionism of Carl Schmitt, a treatise writer not very renowned because of his connections with Nazism (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 184).

Díaz de Vivar counters Marini that the conceptual distinction between *constitution* and *constitutional law* (Schmitt, 1928/2017, Chapter 3) helps explain the Argentine case. Regarding Carl Schmitt, however, the Peronist deputy responds to Marini apologetically, which also sets off a crossfire of opinions about the German jurist in the middle of the 1949 Constituent Assembly session. In the words of Díaz de Vivar:

> As far as Carl Schmitt's National Socialism is concerned, this [phase of his thought] is later than the work to which I refer [*Verfassungslehre*, (Schmitt, 1928/2008)]. Moreover, ideas are valuable not because of their connection to the man who produces them, but because of their virtue and intellectual quality. But I just want to tell you, Mr. constituent deputy Marini, that Schmitt's dialectic is a source that has nourished the most modern intellectual currents in the field. Many professors in Europe and America move in these waters, even if some do so in a shameful way (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 184).

Díaz de Vivar's apologetic statement set off a crossfire between Sampay, the Peronist ideologist of the Constitution of 1949, and UCR deputies. Sampay interrupted Díaz de Vivar's remarks by saying that Marini had alluded to "the much-discussed argument of Kelsen's hypothetical fundamental norm" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 184).. However, one could also say that "Kelsen was in a sense a theorist of National Socialism" because "he said that his Reine Rechtslehre was quite useful for the National Socialist state" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 184). In the face of this provocative remark by Sampay, Amílcar Ángel Mercader, another UCR deputy,

declared that “Kelsen was expatriated from his country” because “he is a victim of National Socialism from his first hour” (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 184). Díaz de Vivar followed up on this criticism of political opposition by pointing out that Kelsen’s constitutional theory did not contribute to the understanding of the “decisive acts” (*actos decisorios*) of the constituent power (Schmitt, 1928/2017, Chapter 8), as they were in the constituent assemblies of Philadelphia and France in the 18th century.

The central argument of Díaz de Vivar’s Peronist decisionism reaches its target point when he points out that Law 13,233, which convened the Constituent Assembly, is a decisive act (*acto decisorio*) of the constituent power (Schmitt, 1928/2017, Chapter 8). While the UCR, as a political opposition, denounces this as the installation of a popular autocracy in Argentina, Díaz de Vivar points out that the decision, which according to Schmitt, is understood as the mandate from the people, manifested itself in the election results of December 5, 1948, which were favorable to Peronism. Díaz de Vivar relativizes and discredits the UCR’s challenge of unconstitutionality. Thus, his Peronist theory on the legitimacy of the constituent assembly builds entirely on the ideas of the German jurist. This becomes clear when the main conclusion of Díaz de Vivar, who explicitly invokes Schmitt’s ideas, is applauded by the Peronist majority in the 1949 Constituent Assembly:

> What is interesting is not how the decisive act [the decision/will of the people in Schmitt’s sense (Schmitt, 1928/2008, Chapter 8)] was provoked. What is interesting is whether there was a decisive act and what the exact contours of the Argentine decisive act are. I believe that in fairness no one can doubt that the Argentine people, with an exemplary and undisputed will, gave their consent [*dio su sanción*] in the historic elections of December 5, 1948 (*Very good! Very good! Sustained applause*) (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 185).

Diaz de Vivar’s conception of popular autocracy is that of the Bonapartist dictatorship, since the constitutional process is conceived as a *plebiscitary mandate* of the constituent power. This theory overlaps with Schmitt’s theory of the mandate of the constituent power and its explicit and acclamatory manifestations. Díaz de Vivar’s decisionist Peronism did not go unnoticed in the Argentine academic community. In 1949, Julio César Cueto Rúa (1920-2007), a law professor at National University of La Plata and later an important anti-Peronist politician of the civil-military dictatorship called Revolución Libertadora (1955-1958), published an article titled *Constituent power (about a debate within the Constituent Convention of 1949 and Carl Schmitt's ideas)* [*El poder constituyente (a propósito de un debate en el seno de la Convención Constituyente de 1949 y de las ideas de Carl Schmitt)*] Cueto Rúa (1949) criticizes the use of Schmitt’s concept of constituent power to legitimize

the constituent assembly convened by Peronism without adhering to Article 30 of the Constitution of 1853. Cueto Rúa's text shows that the Schmittian approach of the Peronist ideologists did not go unnoticed in the context of the Constituent Assembly. Díaz de Vivar's argument represents the decisionist reading of Peronism about the idea of constituent power, in which an acclamatory and decisionist legitimacy of the new Argentine state under Perón's leadership is established. In Díaz de Vivar's view, the "Peronist revolution" is a decision/will of the people, so that, as Schmitt points out, it is beyond positive law and the constitutional procedure established by the Constitution of 1853. What matters is the plebiscitary legitimacy of the constituent power called by Perón.

b. Plebiscitary Peronism

The reading of Perón as the "guardian of the constitution" (Schmitt, 1929), as a plebiscitary president protecting the will of the people, is the central idea that Sampay adopts from Schmitt to legitimize a popular autocracy in Argentina. In his study of Schmitt's reception in Argentina, Dotti (2000) notes that Sampay was a critic of decisionism, suggesting that the Peronist ideologist was never Schmittian. Mention has also been made of the later influence of Hermann Heller's ideas on his concept of the state and his defense of Thomism and natural law (Fraile, 2020). In the previous section, however, I showed that Sampay takes up three idiosyncratic ideas of Schmitt. First, his political theology (Schmitt, 1922/2015, Chapter 1) and his *absolute concept of the constitution* (Schmitt, 1928/2017, Chapter 1). Second, Sampay defends the Schmittian reading of the opposition between liberalism and democracy (Schmitt, 1923/2017, Chapter 1). For this reason, he argues, like Schmitt, that Caesarism and Bonapartism are illiberal but not anti-democratic. The idea of democracy as "homogeneity" and "identity" between rulers and ruled is a characteristic element of Schmitt's work, which Sampay incorporates into his theory of the Peronist state. Finally, Sampay takes up Schmitt's concept of constituent power (1928/2017, Chapter 8), but tries to merge it with Bonnard's conception. Let us first explain Sampay's Bonnardian reading of constituent power in the context of the Constituent Assembly.

To contextualize Sampay's plebiscitary Peronism, we must return to the February 15, 1949 session. Amilcar Ángel Mercader, deputy of the UCR, critically points out that "in Peronist literature," it was emphatically affirmed "that the country was living in a revolutionary era" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 153). Indeed, Díaz de Vivar (1947, 1953), for example, theorized Peronism as a "national revolution." Mercader points out that with the constituent process initiated in August 1948, "it is not precisely established, either legally or constitutionally, that we are experiencing a revolution." The revolution, Mercader says, is "a supreme fact that suspends all legal structures and abolishes the existing order;" therefore, the constituent assembly of 1949 is not a revolutionary process, but a "process created and regulated by the Constitution of 1853 itself" (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 153). Díaz de Vivar asked for an interruption before this argument, pointing out that this distinction made by the UCR about the unconstitutionality of the convocation law was irrelevant. Likewise, the Peronist ideologist, anticipating his Schmittian approach, added that later he would "show Mr. Mercader that the thesis of the UCR bench is absolutely false from the legal point of view"

(Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 153). However, Sampay intervenes in this discussion, giving the reason to deputy Mercader, referring to the "legal" nature of the Peronist revolution:

> Mr. Mercader is right. We do not carry out a revolution outside the legal order, but produce it in a sociological sense. That is, with the help of the pre-existing legal order itself, using the forms for constitutional amendments, we are carrying out a revolution, not juridically, as he puts it, but sociologically (...) So we fully agree with his premise that we are not exercising an absolute/unlimited constituent power, but in the capacity of a constituted body [the Constituent Assembly] that has an extraordinary power granted by the legal order itself [in the Constitution of 1853] (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 153).

The intellectual-historical significance of this passage is that it initiated the dialogue between Roger Bonnard's and Carl Schmitt's conceptions of constituent power in South America. Sampay's remarks refer to the distinction between a revolutionary, i.e., non-legal, constituent power and a constitutional constituent power. Here, Sampay introduces Bonnard's (1942) concept of "legal revolution" and his distinction between *original* and *derived* constituent power (Le Pillouer, 2017). He arrives at this positivist interpretation of Bonnard by reading Pérez Serrano's (1947) famous lecture on Bonnard's conceptual distinction. In the context of the Constituent Assembly, Sampay published a text entitled *The Financial Powers of the Constituent Conventions* [*Las Facultades Financieras de las Convenciones Constituyentes*] (1949). In it, he states that it is necessary to "distinguish between *de facto* constituent conventions and *de jure* constituent conventions in order to show that a *de jure* constituent convention is established and operates in accordance with positive law" (1949, p. 4). Sampay says that the constituent power is "an original property of the sovereign political community" and therefore "cannot be subjected to positive organization" (1949, p. 5). It is possible, however, to think of a different conception of constituent power with limits in positive law. Here Sampay takes up his critique of Schmitt's decisionism and defines constituent power as a natural law theory that presupposes both a political theology (an omnipotent creator) and an *absolute concept of constitution* (the existential unity of a political community) (Schmitt, 1922/2015, Chapter 3, 1928/2017, Chapter 1):

> This innate power of the political community, which is an inherent property of its natural constitution, is not wholly unlimited [incondicional] - as Carl Schmitt's knotty decisionism claims - but has its direct origin in natural law (...). Constituent power is thus the exercise of a natural right of the political community and, as such, has its roots in the order willed by the Creator of nature, who, creating man as an essentially social being, made the state, in which this social nature is perfected, a natural entity

> with a final goal that coincides with the nature willed by the Creator. It follows that the norm on which the exercise of constituent power is based, and in which it finds its *raison d'être*, arises from the substantial constitution of the political community (Sampay, 1949, pp. 4–5).

In addition to this political theological approach, Sampay makes a remarkable attempt to merge, for the first time in South America, Bonnard's concept of *derived constituent power* with Schmitt's concept of constituent power. Sampay's distinction between an *original constituent power* (sovereign and revolutionary) and a *derived constituent power* (non-sovereign and constitutional) leads him to conclude that the Constituent Assembly is a constituted power (*pouvoir constitué*) in Sieyès's terminology (in my view, a *pouvoir constituant dérivé* in Bonnard's terminology) (Sampay, 1949, p. 8). This is the first attempt to think about the concept of constituent power in the tradition of French legal positivism and Schmitt's idea of popular autocracy. Sampay was able to venture into such sophisticated and refined interpretations of constituent power because he was a reader of Schmitt and of French positivist jurists such as Carré de Malberg and Hauriou and Spanish ones such as Recaséns Siches and Pérez Serrano. For this reason, Sampay affirms that the Constituent Assembly of 1949 is an exercise of the *derived constituent power* that arose from the preceding constitution. The constituent assembly, convened under Art. 30 of the Constitution of 1853, is "limited to certain provisions of the present Constitution" and has a term of operation to exercise its specific functions as a constitutional body (1949, pp. 9–10). In short, the Constituent Assembly has no sovereign powers since it is a *derived constituent power*:

> The *de jure* constituent conventions [*pouvoir constituant dérivé*], like the other organs of the state [constituted powers], enjoy, within limits indicated, the implied powers which permit the proper exercise of the express powers. It follows that if the *de jure* conventions are subject to positive law, that is, if they are not sovereign [*pouvoir constituant originaire*], their right to dispose of fiscal property freely must be excluded (1949, p. 12).

With this distinction, initially developed by Bonnard, between a de facto constituent power (*originaire*) and a de jure constituent power (*dérivé*), Sampay, as a Peronist ideologist, pursues two political goals. First, in contrast to Díaz de Vivar's decisionist reading, Sampay seeks to ground the legitimacy of Law 13.233, which convened the Constituent Assembly. In other words, his notion of the "Peronist Revolution" as a "legal revolution" is to be understood in the same sense that Bonnard gives to Pétain's *Révolution nationale* in Vichy France. Likewise, secondly, Sampay develops this discussion to offer a critique of constitutional liberalism. He takes up here the Schmittian critique contained in his study of the

crisis of the liberal state (Sampay, 1942a), but also in his book *La filosofía del iluminismo y la Constitución argentina de 1853* (1944). Here, Sampay states that "rationalism and bourgeois economism determine the cultural affirmations of the Constitution of 1853" (Sampay, 1944, p. 17). In his critique of the 1853 Constitution, Sampay draws on Schmitt's criticism of the liberal state as an expression of the "neutralization" of politics:

> At the time of the adoption of the Argentine Constitution of 1853, the process of neutralization and relativization of modern culture that began with the great historical turning point of the Renaissance had reached its final stage: the general economization of spiritual life and a state of mind that finds in production and consumption the main categories of human existence. (...) [Sampay's footnote to this paragraph: "For an understanding of the neutralization process of modern culture and the determination of the stages that led to the economization of spiritual life, see: Carl Schmitt, *El proceso de neutralización de la cultura* [Spanish translation of *Das Zeitalter der Neutralisierungen und Entpolitisierungen* (Schmitt, 1929/2014)], in: *Revista de Occidente*, Issue LXXX, February 1930, pp. 199-221)]" (Sampay, 1944, p. 11).

In his speech as a member of the Constitutional Review Commission, Sampay takes up this reading of the Constitution 1853 as an expression of a liberal theory of the state, i.e., a "depoliticized" and "neutralizing" conception of politics (Schmitt, 1930a, 1932/1979). Thus, Sampay thinks that the political opposition's attempt to challenge Law 13.233, which convened the constituent assembly, is also an expression of this liberal doctrine, which states that "legality is the supreme value, for when the moral legitimacy of positive norms was banished from legal science, legality remained as the only legitimacy" (1975, p. 480). In his report of March 8, 1949, Sampay reaffirms his Schmittian reading by presenting the Constitution of 1853 as neutralizing the political character of the Argentine state:

> The vision of the state that underlies the Constitution of 1853 aims to limit the state to a minimum of action and to neutralize it as much as possible vis-à-vis the tensions of interests existing within society. The Constitution of 1853 separates the economic-social sphere, conceived as the field reserved for free and apolitical initiatives, and the political sphere, reduced to the functions strictly indispensable to restore the necessary conditions for the free play of private interests (1975, p. 487).

Against the "neutralizing" character of the liberal Constitution of 1853, Sampay proposes to aggrandize the executive with emergency powers. In his famous speech as one of the ideologist of the Constitution of 1949, Sampay develops the same Schmittian diagnosis of the liberal state as "neutralizing" and "legalistic" (Schmitt, 1930a, 1932/1979). For him, a process of "depoliticization" of the state in Europe created the conditions for totalitarian regimes in mass democracy. He points out that after World War I, the "neutralizing state" of

liberalism following the overthrow of the European monarchies was characterized by a weak executive (1975, p. 490). In light of this, Sampay says, Western states sought to "reform the executive in order to remedy the breakdown of democracy" (1975, p. 490). Sampay says that "constituent gentlemen versed in political science will remember in this regard great authors such as Joseph Barthélemy, Carl Schmitt, Émile Giraud" who advocated "dictatorships [of the executive] that absorbed the legislative function" (1975, p. 490). Sampay affirms he does not believe that "the crisis of the bourgeois liberal state has its ultimate cause in the weakness of the executive" (1975, p. 490). In a later section of his speech, however, Sampay, like Schmitt, acknowledges that a strong executive guarantees that the rule of law can combat revolutionary movements. Thus, Sampay explains why it is essential that the president of the republic have the power to declare a state of emergency to protect the constitutional order:

> The state of emergency [*el estado de alarma*] created in Article 23 aims at the same objective, namely, to place in the hands of the executive branch a rapid instrument of action, very limited in its powers and mandatory in the duration of its attributions, for cases of disturbance that do not require the state of siege established in Article 23 (Sampay, 1975, pp. 513–514).

The constituent assembly not only strengthened the emergency powers of the president, but also showed an autocratic and plebiscitary tendency as one of the essential elements of the Constitution 1949. Nicolás Pérez Serrano, the leading Spanish expert of the time on constitutional law and the theory of constituent power, gave a brilliant lecture on May 5, 1949, highlighting this topic. Pérez Serrano (1949, pp. 14–15) shows how presidential elections in Argentina were democratized by abolishing the multiple indirect election system of Articles 81 and following articles of the 1853 Constitution. The new Constitution of 1949, in Article 82, establishes the direct election of the president and vice president by the people, with all the people acting as a single electoral college. Election by the people strengthens the person of the president, allowing for immediate reelection. While Article 77 of the 1853 Constitution prohibited reelection, Article 78 of the 1949 Constitution removed this prohibition. Similarly, the president's authority as head of state is strengthened, as he now has up to twenty working days to veto a law passed by congress (Article 70). Finally, the new Article 83, Number 19, allows the president to decree a state of prevention and alarm (state of emergency), with prudent limitations, and to report to Congress.

My central argument is that all these 1949 constitutional reforms defended by Sampmay, which strengthened executive power and elevated the presidential magistracy, have their political foundation in Schmitt's idea of the Reichpräsident as "guardian of the

constitution" (Schmitt, 1929). It is a conception of popular autocracy as the protector of the will of the people. Unlike Díaz de Vivar, Sampay takes a plebiscitary approach between the lines. In the March 9 session, the constituent assembly discussed the powers of the president and his immediate reelection. Here, Sampay speaks up on behalf of the "Comisión Revisora" and presents a Schmittian approach that defends the president as a plebiscitary leader and protector of the Argentine people. Sampay reiterates his reading of democracy and liberalism as two antagonistic traditions. Recall that for the Argentine jurist, as for Schmitt (1923/2017, Chapter 1), Caesarism and Bonapartism are illiberal but not anti-democratic. Thus, as Sampay paraphrases the central idea of the "guardian of the constitution," the president not only has emergency powers, but his direct election by the people also represents a "plebiscite of the constituent power." Sampay thus confuses the president with the "bearer of the constituent power," which I discussed in detail in chapter four of this monograph:

> The fact is that indirect election, or election by parliament, as Dr. Luder recalled yesterday, was one of the masterpieces of the liberal conception of the weak executive because there is no doubt that a plebiscitary president generates extraordinary political power because he becomes the true holder of the will of the people [*auténtico titular de la voluntad del pueblo*] (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 363).

The idea of the Argentine president as the true representative and "bearer of the constituent power" is related to the discussion of Schmitt's (1929) approach of the Reichspräsident as "guardian of the constitution" (*Hüter der Verfassung*). For Sampay, the danger that had developed in European totalitarianism with the concentration of legislative and constituent powers at the head of the state did not exist in Argentina. On the contrary, and here I come to the central point of my argument, Sampay uses the same Schmitt's idea of the Reichspräsident (an important variant of popular autocracy) to define the Argentine president (Perón) as the "guardian of the constitution." We must recall that the first Spanish translation of *Der Hüter der Verfassung* was a "the protector of the constitution" (1931) conceived by Schmitt as the representative of political unity and homogeneity of the people. In other words, in the Constituent Assembly of 1949, Sampay does nothing but use the terms "protector," "homogeneity," and "political unity" to buttress the strengthening of the president of the republic, represented at that time by Perón. These are all terms that are central to Schmitt's idea of the Reichspräsident as protector of the will of the people:

> I have already said, Mr. President [of the Constituent Assembly], that the reasons for this fear [of strengthening the powers of the Argentine president of the republic],

> which stemmed from the struggle against the absolutism of the monarchies, have disappeared and that today, on the contrary, the head of the executive, elected directly by the people, is the indispensable condition for an independent and energetic government, which the state needs today. Moreover, there is no doubt that a democratically elected president of the republic is the best guardian of the constitutional order [*Hüter der Verfassung* in Schmitt (2015)], an active center of political unity [*Politische Einheit*], continuity and homogeneity [*Homogenität*] in the functioning of the state, conditions that are inherent in the life of the state. It should also be remembered, Mr. President [of the Constituent Assembly], that this is the reality that the country has been experiencing for some time with the advent of mass democracy (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 363).

This Schmittian terminology, translated into a new plebiscitary design for presidential reelection in Argentina, was proposed by Sampay in the constituent assembly and subsequently applauded and adopted by the Peronist majority with 85 votes (Convención Nacional Constituyente, Diario de Sesiones, 1949, p. 368). As in the case of Francoist ideologists, Sampay filtered Schmitt's political terms into a new autocratic and plebiscitary state. His claim that Peronism was not making a revolution that destroyed the constitutional order, but a "national revolution," a "legal revolution" in Bonnard's sense, alludes to the suppression of the liberal spirit that the constitutional laws of 1853 had by the Constituent Assembly of 1949. And the most important political change consists of strengthening the president of the republic, who now represents the "plebiscite of the constituent power." For this reason, Sampay says in his report of March 8, 1949, that "the country is experiencing a profound revolutionary process of overcoming bourgeois liberalism (...) carried by the Argentine popular sectors behind an extraordinary political personality" (1975, p. 516). This extraordinary personality (Perón) has become "historically aware of this crisis, having defined what dies with it and what is valuable and renewed by it" (1975, p. 516). He is the caudillo who leads this "legal revolution." Sampay concludes that the presidential reelection is an expression of the plebiscitary identity between Perón and the Argentine people:

> This popular movement around General Perón (...) is based on extensive confidence in his political virtue. It aims at the revolutionary realization of the highest values of the community because the bond that unites General Perón and the Argentine popular masses is the participation in the same national enterprise. This extraordinary form of government (...) is, by its very nature, personal and temporary: the trust of the people is not transferred because it is based on the sublimation of a man's prestige, and the personal action in pursuit of the enterprise is exhausted only when its objectives are achieved (1975, pp. 516–517).

As a Peronist ideologist of the Constitution of 1949, Sampay sought to legitimize an autocratic and plebiscitary theory of the Argentine state based on Schmitt's idea of popular

autocracy. Sampay accepts the opposition between democracy and liberalism and therefore argues that Caesarism and Bonapartism are illiberal but not anti-democratic. Sampay makes a remarkable attempt to conceive of the constituent assembly as a *derived constituent power* in Bonnard's sense. In making this distinction from Bonnard's work in Vichy France, he critiques Schmitt's decisionist reading and its totalitarian derivatives. However, this reading develops in parallel to Sampay's political plan to conceive of a President of the Republic (Perón) as the "guardian of the constitution," elected by a "plebiscite of the constituent power," with the power to impose a state of emergency, and with a charisma forever inherent in the new Argentine state. Sampay overlapped the "guardian of the constitution" with that of the "holder of the constituent power." As Sampay says, Perón will resemble Napoleon in this sense. For Sampay, Bonapartism and the Peronist state of 1949 are popular autocracies legitimized by the adoption of a new constitution that centralizes all state power in the hands of Perón as head of state. Thanks to this Schmittian reading, Sampay believed that Perón's popular autocracy was as 'democratic' as the Bonapartist dictatorship.

3. Conclusions

The archetype of populist constitutionalism in Latin America was the Argentine Constituent Assembly of 1949. In the last decade, interest in the concept of populist constitutionalism has pointed to the relationship between Schmitt's concepts of constituent power and populism. As part of this discussion, this chapter has analyzed how the Peronist ideologists received Sieyès's idea of constituent power. In reality, this is a reception of Schmitt's and Bonnard's conceptions of constituent power, whose goal was to legitimize a popular autocracy. I have analyzed the political ideas of Díaz de Vivar and Sampay, emphasizing that in both there are two conceptions of popular autocracy.

Díaz de Vivar is a decisionist thinker and at the same time a defender of Schmitt's concept of constituent power. His popular autocracy resembles the concept of a Bonapartist dictatorship. In reality, Diaz de Vivar confuses and overlaps Schmitt's concepts of *sovereignty* and *sovereign dictatorship*. For him, constitutional procedures are subordinate to the will and mandate of the people to create a new constitution. For this reason, Diaz de Vivar argues that it is no longer important to discuss the constitutionality of the law convening the Constituent Assembly of 1949. Rather, he says, it is important to see the *explicit* mandate of the constituent power in the election results, which gave Peronism a large majority. For Díaz de Vivar, Perón is a caudillo, a plebiscitary leader carrying out a "national revolution." In his lecture in Madrid, Díaz de Vivar presents his conception of Perón's leadership as a *caudillo* dismantling the foundations of liberalism as expressed in the Constitution of 1853. Díaz de Vivar is a decisionist thinker, because in all his contributions he sees decision as the basis of the constitutional order. He defends Perón's decision to convene a constituent assembly and then defends the Schmittian idea of acclamation as the *plebiscitary mandate* of the constituent power. For Díaz de Vivar, although the convening of the constituent assembly was illegal, it was not illegitimate in the sense of Schmitt's idea of the plebiscitary mandate.

Sampay's conception of popular autocracy in Argentina is more nuanced than Díaz de Vivar's. Sampay initiates a dialogue between Schmitt's and Bonnard's conception of constituent power in South America. For Sampay, the Constituent Assembly was legitimately convened in 1949. Therefore, the exercise of constituent power is legal and constitutional because it was authorized by a vote of the parliament. This is Bonnard's concept of *derived constituent power*. Sampay rejects Schmitt's decisionist idea of sovereignty, but borrows three key concepts from him for his Peronist theory of the state. First, the idea that Caesarism and Bonapartism are illiberal but not undemocratic. Second, the political-theological approach to

the concept of the constitution. And finally, the idea that the head of state is a "guardian of the constitution." The concept of popular autocracy is primarily informed by Schmitt's notion of the president as the protector of the will of the people. Sampay defends Perón's direct election as a "plebiscite of the constituent power." The notion of the "guardian of the Constitution" is thus overlaid by his notion that the head of state is the "holder of the constituent power." In Sampay, for the first time, an attempt is made to merge the idea of a plebiscitary leadership with Schmitt's notion of the "guardian of the constitution."

The 1949 archetype of populist constitutionalism found its most recent application in South America with Pedro Castillo's December 7, 2022 coup in Peru. Faced with polarization between the executive and parliamentary branches and allegations of corruption, Castillo decided to unconstitutionally dissolve congress, declare a state of emergency, and call for a reorganization of the judiciary (Pacco, 2022). In his speech, Castillo presented his decision as a 'mandate' from the people to convene a constituent assembly. Even before coming to power, Castillo and his supporters had publicly stated their intention to convene a constituent assembly in Peru to replace the Constitution of 1993. This was reminiscent of Fujimori's 1992 coup d'état, which had popular support and was described as similar to Louis Bonaparte's coup d'état (Cameron, 1997). Castillo's coup, while unsuccessful, demonstrated that the notion of the head of state as representative and potential activator of constituent power remains an important tradition in South America. The invocation of constituent power by the president is not a pathology or instrumentalization of the concept of constituent power. On the contrary, in the intellectual history of constituent power by Sieyès, Schmitt, and Bonnard, the head of state is considered an important authority in the exercise of constituent power. The popular autocracy of the Peronist ideologists of 1949 was nothing other than the implementation of what Castillo unsuccessfully attempted in Peru on December 7, 2022.

Conclusions and Final Remarks

In my study I have tried to show the close relationship between the concepts of constituent power and autocracy through the new concept of popular autocracy. I have provided an intellectual history of the origin, conceptualization, intellectual development, and transatlantic reception of this concept between the 18th and 20th centuries. I have shown that Sieyès's idea of *pouvoir constituant* (1789/1989a, 1789/2003) in the French Revolution contained a potentially autocratic element that enabled Schmitt's later conceptualization of popular autocracy in the Weimar Republic (1921/2015, 1931/2016). Schmitt played a key role because he gave form to the autocratic element in Sieyès's idea of constituent power by defining it as a *sovereign dictatorship*. Schmitt noted that behind Sieyès's ideas of the sovereign constituent assembly, the head of state as a potential activator of the constituent assembly, and the king as the protector of the will of the people, there was a concept tainted with autocracy. Schmitt and Bonnard's conceptions of popular autocracy extended, consolidated, and established the autocratic tradition of constituent power. In my study, I have outlined how the concept of popular autocracy spread even beyond France and Germany. In Spain it was used in the theory of the Francoist state, and in South America it found its application in the "archetype" of populist constitutionalism. The relationship between autocracy and constituent power can therefore be seen not as a pathology or instrumentalization of the concept, but as an element inherent in the very notion of constituent power coined by Sieyès in 1789.

The concept of popular autocracy helps to better situate the relationship between the concept of constituent power and autocratic forms of government. By this I mean that I have emphasized in this study that it is an autocracy that is legitimized by an alleged consent of the *pouvoir constituant* to create a constitutional order. This consent does not make the autocracy a democracy. It would be a mistake to overlap these terms. Autocracy is the rule of one person or one entity. That is why autocracy was defined in ancient times as kingship or tyranny. I have explained why the concept of dictatorship is autocracy par excellence. One should not confuse the rule of one with the rule of many (democracy). Therefore, it is a mistake to use terms that obscure the true nature of the autocratic state. The mandate of the constituent power does not make the autocratic state a "totalitarian democracy" (Talmon, 1952), because it is not a democracy. Unfortunately, oxymorons are repeatedly used in the literature to give an autocracy the appearance of a democracy (Ypi, 2020). It is therefore important to emphasize that Schmitt's concept of popular autocracy does not refer to a democratic theory

of the state, but to a theory of the autocratic state (*sovereign dictatorship*). The tendency to confuse these terms has been most clearly resolved by Bonnard, who explicitly describes himself as a representative of an autocratic theory and uses the term constituent power only to legitimize the constituent power of the autocrat. This discussion leads me to a final consideration of the relationship between democracy and constituent power.

In the introduction I mentioned that Kalyvas (2018, p. 87) has pointed out that "constituent power is the truth of modern democracy" because the concept is consistent with the modern doctrine of popular sovereignty and also with the idea of democracy understood as the exercise of acts of self-legislation and self-change. The studies of Arato (2017b) and Colón-Ríos (2012, 2016, 2020) have also highlighted this link between the concepts of constituent power and democratic constitutionalism. From the perspective of intellectual history, an extensive literature has been written on the concept of constituent power in the context of theories of popular sovereignty from the 16th century to the Atlantic revolutions (Lee, 2016; Loughlin, 2017; Rubinelli, 2020a). However, according to the evidence and findings of my study, the concept of *pouvoir constituant* has no necessary relationship to democratic constitutionalism. Sieyès's idea of delegating powers to create a new constitutional order can be exercised by either a democratic or an autocratic government.

I have found no indication that the concept of *pouvoir constituant* must be exercised exclusively under the condition of a democratic theory of the state. On the contrary, I have shown that the concept of constituent power is not merely applied to autocracy by chance, but that it already contains in its origin an autocratic element that has accompanied it for more than two centuries. The problem of the relationship between constituent power and democratic constitutionalism continues to be a subject of discussion and criticism in the literature (Colón-Ríos et al., 2021; Fasel, 2022; Verdugo, 2023). The aim of my work was not to examine how the concept of constituent power can prove its purely democratic character. Rather, I was interested in showing its connection to autocracy, which is seen as a flaw or pathology. The concept of constituent power is potentially autocratic in its foundations and in its intellectual development. I have found no evidence of how this autocratic element of constituent power can be eliminated. One possible solution to eliminate it, as attempted by Sampay (1938, 1939, 1942b) in the past and by Fasel (2022) in the present, is to emphasize the natural law character of Sieyès's idea. In my opinion, however, the autocratic element has been built into his idea from the beginning in such a way that it is hard to imagine it without it. In other words, the autocratic element is not a challenge to the theory of constituent power, but an element that must be accepted in its genesis and intellectual history.

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Appendix

1. Appendix 1: English Abstract

The purpose of this work is to analyze the relationship between the concepts of constituent power and autocracy using the new concept of popular autocracy. The study is a political theory analysis with the approach of intellectual history between the 18th and 20th centuries. The origin of Sieyès's idea of constituent power in the French Revolution is analyzed as the origin of the concept of popular autocracy. The concept of constituent power essentially refers to the delegation of powers to create a new constitutional order. Thus, this work examines how the concept of popular autocracy is conceptualized in the works of German jurist Carl Schmitt during the Weimar Republic. The concept of constituent power underwent a significant change in meaning among jurists of the French Third Republic and Vichy France. However, Roger Bonnard's theory of constituent power redeveloped the relationship between this concept and autocracy. The study ends with an analysis of the reception of the autocratic tradition of constituent power among the ideologists of the Francoist state after the Spanish Civil War and the Peronist ideologists of the Argentine Constituent Assembly of 1949. The concept of popular autocracy represents the origin, conceptualization, intellectual development, and transatlantic reception of the autocratic tradition of constituent power.

2. Appendix 2: German Abstract

Das Ziel dieser Arbeit ist es, die Beziehung zwischen den Konzepten der verfassunggebenden Gewalt und der Autokratie zu analysieren, indem das neue Konzept der Populären Autokratie verwendet wird. Die Arbeit ist eine politische theoretische Analyse mit dem Ansatz der Ideengeschichte zwischen dem 18. und 20. Der Ursprung von Sieyès' Idee der verfassunggebenden Gewalt in der Französischen Revolution wird als Ursprung des Konzepts der Populären Autokratie analysiert. Das Konzept der verfassunggebenden Gewalt bezieht sich im Wesentlichen auf die Delegation von Machtbefugnissen zur Schaffung einer neuen Verfassungsordnung. Daher wird in dieser Arbeit untersucht, wie das Konzept der Populären Autokratie in den Werken des deutschen Juristen Carl Schmitt während der Weimarer Republik konzeptualisiert wird. Der Begriff der verfassunggebenden Gewalt erfuhr unter den Juristen der Dritten Republik und des Vichy-Frankreichs einen erheblichen Bedeutungswandel. Die Theorie der verfassunggebenden Gewalt von Roger Bonnard entwickelte jedoch die Beziehung zwischen diesem Konzept und der Autokratie neu. Die Arbeit schließt mit einer Analyse der Rezeption der autokratischen Tradition der verfassungsgebenden Gewalt bei den Ideologen des franquistischen Staates nach dem Spanischen Bürgerkrieg und den peronistischen Ideologen der argentinischen verfassunggebenden Versammlung von 1949. Das Konzept der Populären Autokratie stellt den Ursprung, die Konzeptualisierung, die intellektuelle Entwicklung und die transatlantische Rezeption der autokratischen Tradition der verfassunggebenden Gewalt dar.

3. Appendix 3: Publications Resulting from this Dissertation

Chapter 1 is an expanded and revised version of my paper "Constituent Power: A Moderate and Illiberal Idea of Sovereignty in the French Revolution," forthcoming in the journal *History of European Ideas*. In this chapter, I have highlighted the concept of the mandate to better clarify my discussion of the illiberalism of the concept coined by Sieyès.

Chapter 7 is an expanded and revised version of my paper forthcoming in the journal *Intellectual History Review*. The paper was awarded the 2023 Charles Schmitt Prize. In this chapter I have expanded the explanation of the reception of Schmitt's ideas in the works of Luis Legaz Lacambra and Francisco Javier Conde.