

Interpretation

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Serdar Tekin has engaged in an extraordinary project to clarify the complexities of explaining and justifying the democratic founding of a constitution. As if foreshadowing the possibility of Tekin’s project, in 1938–39 constitutional scholar Charles Howard McIlwain presented a series of lectures at Cornell University on the theme of constitutionalism (*Constitutionalism: Ancient and Modern* [Liberty Fund, 2010]). McIlwain cited approvingly Thomas Paine’s aphorism that “a constitution is not the act of a government but of a people constituting a government” (20). After having surveyed political conceptions of how to understand the relationship among people, constitutions, and governments, McIlwain concluded, “The phase in the development of these political conceptions...is the latest phase in that development, what might be called the ‘self-conscious’ phase, in which the people are thought of as creating their constitution by direct and express constituent action. But I think enough has been shown to prove that this latest phase is only the outcome of an earlier and a much longer one, in which constitutions were thought of not as a creation but as a growth; not as a national code so much as a national inheritance” (21).

McIlwain incorporated Cicero’s claim that the people’s inherent right—the doctrine of constituent action or power—establishes the legitimacy of the act that founds a constitution of their own making, which act is itself but a phase of a much longer growth or experiential process (24). Although with no reference to McIlwain’s lecture, Tekin refuses to accept that “enough has been shown to prove” the evolutionary character of the doctrine of constituent power. He explores theoretical challenges among the interrelated facets of

constitution making, including constituent power and popular sovereignty, intersubjective experience and the paradox of the democratic founding, and hermeneutics and the temporality of founding acts and internal circularity. Tekin's in-depth exploratory effort is extraordinarily comprehensive and profound in his analyses of relevant modern and contemporary arguments—including those of Arendt, Derrida, Habermas, Hegel, Hobbes, Kant, Rawls, Rorty, and Rousseau, among many others.

With Rousseau's epigraphic admonition—"it would be well to examine the act by which a people is a people"—as the backdrop for his exploration, Tekin observes that the engine that drives the growth of "what binds different people into 'the people' is collective action, that is, the political experience of constructing life together" (6). Furthermore, collective action also explains why "the politics of constitution-making is at the same time a politics of people-making." Nevertheless, Tekin does not shy away from the intellectual rigor of competing arguments that attempt to clarify or challenge the doctrine of constituent power.

Tekin considers the argument of Abbé Sieyès that further develops Paine's declaration (98–100). According to Sieyès, there exist three claims embedded in Paine's notion of constituent power, wherein the people actively create the political conditions to found a democratic constitution: moral, juridical, and political. The moral claim finds its roots in social contract theory and the freedom of individuals to participate in the contract's design, the juridical claim in the natural law of the state of nature, and the political claim in the necessity of popular representation on a grander scale. Tekin contrasts Sieyès's argument with that of Carl Schmitt, who asserts that Sieyès is merely providing an answer to an incorrect question (100–101). That is, Sieyès presents his concept of constituent power as an answer to the question, Who has the right to form a political association? Instead, argues Schmitt, constituent power should be understood as an expression of popular will, which then would place it in a position to answer the correct question: Who has the sovereign right to act on this will? Effectively, Schmitt transforms Sieyès's moral claim to one of Rousseauian political freedom, his juridical claim to a misidentification of a universally acknowledged natural law, and his political claim to the reduction of direct democracy to representative government, all of which then justifies Schmitt's sovereign ruler.

Tekin considers Hannah Arendt's critiques of both Sieyès's and Schmitt's arguments, which find that Sieyès's reliance on freedom of the will undermines pluralist democracy, while Schmitt's reliance on the absolute authority

of the sovereign ruler undermines any possibility of democratic participation (105). He finds attractive Arendt's own position that "the exercise of constituent power must remain faithful to the intersubjective experience of collective action which brings about such power in the first place" (148–49). Tekin argues that intersubjective experience is key to understanding the interface between the people of Rousseau's admonition and the founding act of constitution making of Paine's observation. He endorses theories of deliberative democracy as the only suitable approaches "for exploring the complex nexus between constitutional claims of popular sovereignty and the practice of constitution-making in our pluralistic age" (4). But Tekin recognizes a paradox embedded in the promise of deliberative democratic theory: "how is it possible—or is it ever possible—to begin democratically, especially when there is no democracy before?" (7).

Tekin investigates a broad array of arguments that attempt to resolve the paradox of the necessity of a democratic people to found a democratic constitution, which is itself a necessary condition for the creation of the democratic people. Some philosophers argue that the presence of the paradox itself is due to a category mistake and thus does not exist, or the paradox apparently does exist but is misunderstood as to why it exists and thus can be resolved when properly understood. Tekin explores Hegel's argument that the paradox is of trivial significance owing to the lack of agreement about the "meaning of popular sovereignty and its proper sphere of application" (40). Given that popular sovereignty is itself only a function of the established political institutions through which it must operate, it consequently has no existence either apart from or prior to the institutions themselves. Thus, argues Hegel, the paradox results from a category error that improperly defines the nature of popular sovereignty. While Hegel shifts popular sovereignty from the category of dynamic or efficient cause to static or formal cause, Tekin considers Derrida's conflation of definitions in the apparent distinction between formal and final causes in the paradox: "Contexts are unsaturated, conventions are dynamic, and both are essentially exposed to indeterminacy" (45). The paradox can be resolved, argues Derrida, only when it is recognized that the very act of founding a democratic constitution assumes the presence of its own democratic justification. Moreover, the democratic justification is not only hidden from view but is an empty artifact, and thus "'the people' arrives only after the fact."

Tekin is dissatisfied with Hegel's theoretical deflection of the presence of the paradox by absolving the people of sovereign responsibility for any

founding acts and with Derrida's linguistic deflection of only an apparent role of constituent power in founding acts by defining such roles as hollow and used as subterfuge for politically manipulative purposes. Upon further examination, Tekin identifies an inherent epistemic difficulty in both arguments. Hegel and Derrida are posing the problem of the paradox of democracy as a logical problem that cannot be resolved, which leaves deliberative democratic theory at an impasse. Or, the logical propositions are worded such that the paradox is resolved but the doctrine of constituent power vanishes and thus leaves democratic theory as inconsequential. And yet, Tekin notes, founding acts of constitution making have historically had popular bases that expressed moral justifications for the constitutions that emerged—despite the presence of the paradox of the democratic founding.

By approaching the paradox as a logical problem, says Tekin, one interprets the paradox of the democratic founding in a way that interchanges the decisive significance of the logical problem for the crucial role of democratic politics or hypostatizes the founding itself. That is, hypostatization transforms a political issue into a logical puzzle, “which [in the case of the paradox of the democratic founding] rules out the notion of democratic founding at its core” (10). Consequently, to resolve logically the puzzle of the paradox in order to find the source of democratic political legitimacy is self-defeating. Nevertheless, the paradox still exists. Tekin asks, “If the paradox is permanent, however, isn't it plausible to assume that the possibility of responding to it is also permanent?” (54). If so, reconciling the legitimacy of constituent power in the face of the paradox of the democratic founding does not present a logical problem but a heuristic problem. As a heuristic problem, the paradox of Rousseau's epigraph can be attenuated by engaging in a hermeneutic circle to explicate Arendt's (and McIlwain's) emphasis on the intersubjective experience over time (55).

According to Tekin, “Rousseau sees in founding moments not only a paradoxical circularity, but also an extraordinary window of opportunity to negotiate this paradox and relax its grip” (59–60). Since the people are in need of having their will generally applied, a lawgiver must provide the legal framework to create social expectations and community values to meet the demands of the general will, such that the people authorize the lawgiver to create a democratic society—hence, the paradox. However, Tekin suggests, the people have themselves been “in the making” over time (as previously suggested by McIlwain), such that the “favorable conditions” for the lawgiver are constantly present. In fact, “the task of the lawgiver is first and foremost a hermeneutical one” (66). Rousseau's lawgiver serves not as an architect to

design a society according to what is best for the people, but as an interpreter of the people's will to provide legislation that meets their needs at any given moment. To avoid hypostatization, Tekin interprets Rousseau's lawgiver as one who is "supposed to read the text of collective action and shared experience" of the people (67).

Tekin also addresses Rousseau's view of any democratic founding as a one-time event. He employs Kant's solution to Rousseau's problem of temporality, which provides for the emergence of Rousseau's democracy over time and from diverse starting points. That is, while Rousseau focuses on how the democratic founding of society begins, Kant focuses on how any society evolves, regardless of its beginnings. Consequently, Tekin observes, any lawgiver must establish a legal structure to maintain order so that the people may seek and discuss right principles and facts: "What ultimately matters is not how the state is originally constituted, but the rationalization and republicanization of state power over time through piecemeal and gradual reform" (73). In this way, says Tekin, "the hermeneutic character of legislation and the collective action of the people" may be sustained while evolving temporally.

The hermeneutic circle's interrelated components—the people, the general will, the lawgiver, and the law—evolve dynamically and cyclically over time. Nevertheless, at any given moment the normative origin of a democratic act finds its justification in the act itself. To address the challenge of internal circularity, "all appeals to a transcendental source of normativity" must be avoided (121). To this end, Tekin discusses Habermas's thesis of "co-originality," which asserts that "public and private autonomy, or popular sovereignty and human rights, mutually presuppose each other." Through a socially derived need for active and open deliberation, or what Habermas calls "communicative freedom," Tekin concludes that the constitutional relationship between democracy and law is both circular and cyclical but nonetheless self-legitimizing.

In this prodigious and intelligent contribution to democratic theory and constitutionalism, Tekin deftly engages his "interlocutors" and their insights into the liminal phase of theoretical clarification when constitutions are founded. His defense of the appropriate epistemic approach to explaining and defending deliberative democracy deserves serious attention in a world that too often fails to affirm the simultaneous importance of—and tension between— processes and objectives.