
Review Essay

The politics of founding in focus

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Post Sovereign Constitution Making: Learning and Legitimacy

Andrew Arato,

Oxford University Press, Oxford, 2016, 308 pp.,

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Beyond Origins: Rethinking Founding in a Time of Constitutional Democracy

Angélica María Bernal,

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It is not hard to explain why the politics of founding has become a recurring topic in contemporary democratic theory. On the one hand, the revolutions and democratic transitions of the late 20th century made momentous new beginnings an almost daily spectacle. Widely perceived as signaling the triumph of constitutional democracy as *the* legitimate form of statehood on a global scale, these events stirred a fresh interest in constitutionalism and constitution making. On the other hand, various global challenges constantly put more pressure on constitutional democracies and open their foundations to a relentless critical scrutiny. Consider, for instance, how an ever-growing awareness of diversity and pluralism has called into question the received notions of ‘the people,’ while at the same time drawing our attention to the tainted pedigree of democratic regimes and the historical injustices at their origins.

To this picture we should add the so-called ‘paradox of founding,’ an intractable problem that has for long preoccupied political theorists from different traditions. While every democratic constitution features ‘the people’ as its author and ultimate source of legitimacy, ‘the people’ in this specific sense comes into being only by virtue of an enacted constitution. This is a paradox that poses some



hard questions for democratic theory. If it is the constitution that makes ‘the people’ rather than the other way around, then, who speaks in the name of ‘the people’ and with what title? Or conversely, if the figure of ‘the people’ acting on one will and speaking in one voice is a political myth – as numerous democratic theorists emphatically (and in my view rightly) hold today – then how are we supposed to make sense of the democratic credentials of a new constitution? Is it possible to begin democratically where there is no democratic constitution already in effect? Does it matter – normatively and pragmatically – how a constitution gets off the ground? Both books under review here effectively address these fundamental questions, though from quite different perspectives and in quite different ways.

Angélica Maria Bernal’s *Beyond Origins: Rethinking Founding in a Time of Constitutional Democracy* is a thought-provoking book that challenges the predominant conception of founding entrenched in our political imagination and discourse. According to this familiar conception, founding is first and foremost ‘the authoritative beginning,’ a singular and superlative moment of political creation. It refers to an extraordinary act that brings about a new political community and lays down its fundamental norms and commitments. It is *the* origin that shapes the future, allegedly enjoying a unity of meaning across time. Bernal convincingly shows the extent to which this conception of founding is at play both in the longstanding tradition of political theory and the everyday politics of contemporary constitutional democracies. From Plato’s *Laws* to American civic narratives about the founding fathers, from the revolutionary notion of constituent power to the ‘foundational invocations’ of progressive and conservative movements alike, Bernal covers a broad territory, exploring the ways in which the notion of the authoritative beginning manifests itself in a variety of settings. Her opening claim is that this widely held notion is both empirically misleading and normatively problematic.

Throughout the book three major objections come to the foreground. The first one has to do with the philosophical foundationalism of the authoritative beginning. The moral authority of a new beginning is often premised on foundationalist arguments about ‘first principles,’ ‘self-evident truths,’ or ‘facts of reason,’ all of which refer us, in one way or another, to an independent order of moral truth beyond and above ordinary politics. For Bernal, the problem with this kind of argument is that it takes fundamental questions of politics off the table. Once we give into the temptations of philosophical foundationalism, the quintessentially political problem of original authority is set outside the reach of political contestation and deliberation. This, in turn, promotes the dangerous illusion of once-and-for-all settled political foundations.

The paradigm of the authoritative beginning is further problematic, Bernal argues, as it fosters mythical or fabulous accounts of civic unity. Often, these are hegemonic stories that serve to sacralize the founding retrospectively, while at the



same time glossing over the messy stuff that political foundings are made of: conflicts and disagreements, fierce struggles for power, instances of exclusion and repression, violence and injustice. One cannot help but recall here Edmund Burke's dictum (uttered at the impeachment of William Hastings) that 'there is a sacred veil to be drawn over the beginnings of all governments.' In Bernal's view, however, such a veil not only obscures the tainted origins of political order residing in the remote past; much more significantly, it renders invisible their lingering effects in the present. What is at stake, therefore, is not just bad history, but inclusion and exclusion, justice and injustice.

Finally, Bernal scrutinizes the temporal aspect of the authoritative beginning and its crucial implications with regards to political agency. From the vantage point of the authoritative beginning, founding is a 'singular' and 'extraordinary' moment. Marked by the historically decisive deeds of founders and framers, we are often told, it is unlike any other in the life of a political community. All that is left to later generations is to carry on what was already set in motion, to augment what was already built, to make good on what was already promised. Bernal argues that a picture of this sort inevitably stands in tension with the deep promise of democratic politics. Containing constituent action to a fixed moment in the past, it undermines the possibility of reinventing political freedom in the present.

The key achievement of Bernal's work is to counter the predominant conception of founding as the authoritative beginning with a vivid alternative: 'founding beyond origins.' Drawing on an agonistic understanding of political life in general, the book offers a perspective that privileges 'contestation over unity, incompleteness over consolidation, creative unsettlement over perpetual binding, and ongoing foundation building over singular beginnings' (p. 2). The guiding idea is that the foundations of political order are far from being authoritatively settled; they are, instead, 'underauthorized,' both incomplete and bound to be contested. Bernal systematically develops this insight to theorize the politics of founding as a politics of 'underauthorized authorizations.' By this she means: 'claims and political actions that challenge the unstable and incomplete authority of an existing political order, often from a precarious or insufficiently authoritative place within it' (p. 13).

The outcome is a rich and innovative conception of founding, one which is both 'anti-foundationalist' in the sense that it recognizes the role of contingency and contestation in constituent processes, and 'anti-originalist' in the sense that it decisively decouples the politics of founding from the notion of a singular beginning. To demonstrate the viability of 'founding beyond origins,' the book skillfully builds on a stunning variety of sources and contexts, including Livy's pluralistic account of Rome's ongoing founding across time and her many *conditores*; episodes of presidential refounding in contemporary Latin America; Jefferson's plea for the right of every generation to engage in large-scale constituent politics; and the anti-segregation struggles of the Mexican American



families who challenged California's racial foundations in the 1940s, a prime example of Bernal's 'capillary foundings.'

Its merits notwithstanding, the overarching argument of the book comes with its own problems. I want to single out here two concerns, one regarding the analytical scope of the 'founding beyond origins' framework, the other about the normative implications of the 'underauthorized authorizations.' The former is a corollary of Bernal's pluralism and radical anti-originalism. Once the conventional link between foundings and political origins is severed, the pluralization of founding across time inevitably amounts to a conceptual relativization. The problem here is not so much that the concept of founding turns out to be incomprehensible once it is decoupled from a fixed point in time. It surely is comprehensible, as Bernal demonstrates. The analytical problem is rather that the framework of 'founding beyond origins' runs the risk of becoming over-comprehensive. It applies not only to formal markers of founding and refounding such as constitutional formation or revision, but also informal ones such as the 'changes in foundational values and conceptions of citizenship and peoplehood' (p. 233). By the same token, it covers not only large-scale dynamics, but 'capillary' ones as well. In this broad – arguably, too broad – conception, almost every instance of political life can potentially be said to bear, in one way or another, a sort of constituent significance. To put it in a slightly pointed fashion, then, once the concept of founding is amplified this way, the compelling question we are left with is not what counts as a founding, but perhaps what does not. Imprecision may be a risk that we should take to pluralize and democratize the concept of founding, but it may also jeopardize the analytical value of the concept, eventually undermining the democratic benefits of its pluralization.

The other concern I have in mind is of a normative nature. Bernal's conceptual framework with its emphasis on 'underauthorization' serves democratic theory by critically problematizing foundational claims of settlement. However, it fails to give due attention to a crucial set of normative questions arising from its own premises. If every politics of foundation building is inevitably underauthorized, then, how should we frame constitution making processes in order to work through the inevitable deficits of democratic legitimation? What normative criteria should apply to acts of foundation and refoundation in underauthorized settings? What sort of constituent process would reflexively address its own legitimation problems and lead to democratically more legitimate (even if necessarily incomplete) outcomes? Questions of this sort get lost on Bernal's agonistic theoretical outlook. She is certainly right to insist that her proposed framework 'refocuses attention from constitutional outcomes to constituent politics' (p. 226). And yet, once our attention is refocused this way, we come to realize not only that constituent politics is conflict-ridden or that claims of settlement are bound to be contested. We also face the crucial question of how to deal with conflict in a normatively justifiable way and how to generate democratic legitimacy in underauthorized settings. Hence



emerges the moral and political import of constitutional pedigree, i.e., the normative significance of the way in which a new constitution is framed and enacted. To put it differently, we need a normatively driven theory of constitution making precisely because foundings and refoundings are underauthorized. Bernal's best insights about underauthorization, like much of the agonistic literature on which she draws, point toward questions that are hard to address from within the agonistic framework.

What is missing in *Beyond Origins* is the central concern of Andrew Arato's *Post Sovereign Constitution Making: Learning and Legitimacy*. Bringing together normative political theory and comparative analysis, the book explores and defends a new paradigm of democratic constitution making, assumed to be able to reflexively work through its own legitimation problems. Emerging in the Spanish transition to democracy, taken up in Central and Eastern Europe, and eventually matured in South Africa, this new paradigm has been underway for over 40 years. It involves a multi-stage constituent process, in which all actors are brought under legal rules ('always under law'), and no single instance or institution is authorized to act as a sovereign organ claiming to embody 'the people' as such. Hence the basic sense in which the model is 'post sovereign.'

In his sustained attempt to expound and theorize post sovereign constitution making, Arato relies on the work of Hannah Arendt, Claude Lefort, and Jürgen Habermas at a fundamental conceptual level, while at the same time engaging with a wide array of contemporary constitutional theorists, including, among others, Ulrich Preuss, Bruce Ackerman, and János Kis. His main opponent throughout the book is obviously Carl Schmitt. There is a sense in which the entire argument of the book is meant to counter and overcome 'sovereign constitution making,' of which Schmitt is the paradigmatic thinker. In contrast to Schmitt's decisionist conception of constituent power and the kind of constitutional politics it inspires, Arato argues that the great innovation and advantage of the post sovereign paradigm lie in its capacity to apply the principle of constitutionalism to the process of constitution making. It allows us to 'conceive democratic, legal revision as the model for the very creation of constitutions' and thus 'de-dramatizes conceptions of the constituent power, linked to mythological and dangerous notions of total rupture and the full embodiment of the will of the people' (p. 91).

A difficult question immediately presents itself: how is it possible to remain 'under the law' while creating the higher law? Arato's response draws on a reconstructive analysis of democratic transitions, where major political actors did not seek legal rupture in a revolutionary fashion but instead deliberately attempted to maintain some form of legal continuity in the context of large-scale political transformation. For instance, they used the amendment rule of the old constitution as leverage to initiate the making of the new one, thereby avoiding a juridical state of nature and the dangerous prospect of locating constituent power in a legal vacuum. Nonetheless, as Arato duely notes, legal continuity was rather fictional in



many of the cases as the preceding authoritarian regimes had no real commitment to the rule of law. And yet, he adds, ‘even if based on a fiction, legal continuity can do what it is supposed to do from a functional point of view, namely help actors coordinate their expectations’ in a vulnerable context (p. 100).

In its fully developed or ideal–typical form, the process of post sovereign constitution making is initiated by a ‘round table’ (the original institution of the new paradigm) and involves multiple stages: the making of an interim constitution, that is, a provisional higher law negotiated by the round table; then, free elections and the formation of a democratic assembly; and finally, the drafting of the new constitution. The final work is done by the democratically elected assembly but in consultation with the broader public and in compliance with the provisions of the interim constitution. All actors are thereby brought under legal rules, and the distinction between constituent and constituted powers is creatively relativized. As the successful case of South Africa illustrates, this multi-stage model even makes room for the institution of judicial review in the course of constitutional founding.

Along with ensuring legal continuity, post sovereign constitution making also allows us to make sense of democratic legitimacy without uncritically endorsing the myth of ‘the people.’ Rather than investing the plenitude of constituent power in a sovereign ‘organ’ (say, an omni-potent constituent assembly claiming to speak in the name of ‘the people’ *en masse* but dominated by those who hold the power to impose their terms), the legally structured multi-stage process is meant to open the floor for multiple actors and multiple venues of justification. Accommodating practices of contestation and deliberation, bargaining and negotiation formally and informally, it enables different groups and actors to participate in the making of the new constitution. The key idea here is twofold. First, democratic legitimacy is no longer tied to a singular ‘moment,’ a moment of ‘decision’ where ‘the people’ is supposed to speak in a unitary voice, but rather generated through a pluralistic and participatory ‘process.’ This brings us to the second point: the normative principles of the democratic constitution (such as legality, publicity, plurality, consensus, and reflexivity) are performatively used in its making. Through an in-depth comparative analysis of various cases, the book offers a rich and empirically grounded account of how to generate democratic legitimacy in vulnerable and ‘underauthorized’ settings.

For Arato, as for Bernal, the politics of founding is an underauthorized enterprise. However, unlike Bernal’s agonistic outlook, Arato’s argument seeks to show that post sovereign constitution making can reflexively thematize and address its own legitimation problems, and that this is valuable. Premised on the recognition of its initial underauthorization in terms of both legality and legitimacy, the model outlines a bootstrapping process, in which legal authority and democratic legitimacy are to reciprocally and progressively build on one another. This is not to say that post sovereign constitution making involves a disguised commitment to the untenable notion of once-and-for-all settled foundations (the ‘authoritative



beginning,' as Bernal calls it). Quite the contrary: Arato acknowledges that 'no constituent process can or should ever be considered entirely finalized' (p. 15). Thus, instead of a perfect beginning, the book seeks a normatively desirable alternative to constitutional fiat and authoritarian imposition, on the one hand, and on the other, to the risk of permanent revolution.

This is also the reason why the subtitle of the book emphasizes 'learning' along with and in relation to 'legitimacy.' The multi-stage process facilitates hands-on constitutional learning, experimentation, and self-correction 'without freezing a form that could later become extremely rigid and burdensome' (p. 11). Indeed, the possible success of post sovereign constitution making in a specific setting relies to a large extent on its built-in learning mechanisms. Most notable among them are the mechanisms of cooperation under an interim constitution, and experimentation with constitutional forms and institutions in a multi-stage process. However, contra Stephen Holmes, for instance, Arato also insists that leaving the process indefinitely open-ended without a plausible time frame for enacting the new constitution has its own hazards. This is a theme that comes to the foreground both in the theory of post sovereign constitution making and the two extended case studies of the book, Hungary and Turkey.

Throughout the book, Arato masterfully moves back and forth between theory and history, normative and comparative analysis, ideal types and case studies. While it is all very helpful and instructive, this *modus operandi* also reveals an ambiguity regarding the practical prospects of post sovereign constitution making. Arato concedes that, having been reconstructed from the democratic transitions of the late 20th century, the new paradigm has a certain path-dependent character. On the conceptual/theoretical plane, nonetheless, he seems confident that the post sovereign model is flexible enough to be fully or partially appropriated in quite different contexts, and some of its elements can even be utilized in revolutionary settings or grafted onto processes of top-down reform. Such flexibility, of course, would be a great merit for the new paradigm. The extended case studies of the book, however, possibly suggest otherwise: a deficient version of the multi-stage process can lead to unlearning what has been learnt (the case of Hungary), or insufficient learning from the new paradigm can lead to severe constitutional crisis (the case of Turkey). These case studies support Arato's fundamental claim that not only the material content of the constitution but also the method of constitution making is of great significance to the formation of relatively stable democracies. However, they also raise serious questions about whether the post sovereign model is as flexible as Arato claims. That is, the more we insist on the flexibility of the model, the less we can explain instances of failure through deficient application. But then, as Arato is aware, such a move might in turn imply that constitutional pedigree does not so much matter for success or failure – a quite high theoretical price to pay. To be sure, what we have here is not an either/or option between flexibility and normative cogency, but rather a gray zone extending



between the two. My sense is that Arato's work, as it currently stands, makes a stronger case for the normative cogency of post sovereign constitution making than its flexibility.

To conclude, *Beyond Origins* and *Post Sovereign Constitution Making* can be fruitfully read together. They offer us different, yet complementary perspectives. Foundation building and its continuation into history are often intertwined with hegemonic claims of settlement, retrospective attributions of permanent authority, and a politics of origin-worship that impoverishes the possibilities of the present. Critical perspectives that keep us alert about the dangers of the 'authoritative beginning' have therefore much to contribute to a democratic theory of political foundings. No less significant, however, is the imperative of seeking normatively justifiable and practically applicable answers to intricate questions about authority and legitimacy within the vulnerable context of constituent politics. Especially in a world where the singular voice of 'the people' turns out to be irrevocably fragmented, the democratic credentials of a new constitution must be grounded in a pluralistic and participatory process of constitution making. What this means is that democratic constitution making is no longer simply a matter of making a constitution with the right content, but also a matter of making it in the right way.