Constituent Power in the (Counter-)Revolutionary Thought of Emmanuel Joseph Sieyes, Maximilien Robespierre, and Carl Schmitt

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Foreword:

This thesis is the product of a chance re-encounter with Carl Schmitt's political theory at a conference in Hamburg in late 2014. The conference was dedicated to Bruno Latour's legal ethnography *The Making of Law* and I had arrived with the intention of kindling an interest in his geopolitical thought; however, it was a presentation on Schmitt's influence on Bruno Latour's "hardcore geopolitics" that inspired me to return to read his *Nomos der Erde* and set me on my academic current trajectory. This project has turned into a point of departure for doctoral research on Schmitt, which I will begin in October 2016.

I would like to take a moment to thank the German Academic Exchange Service (DAAD) for their generous support during the second half of my studies in Hamburg. I owe a large thank you to the Hamburger Institut für Sozialforschung for the institutional support and friendship they provided. To that end, I am thankful to Prof. Bernd Greiner, who took a chance by hiring me as his research assistant in 2014 and who was exceptionally accommodating in letting me pursue my own research interests.

Additionally, I am profoundly thankful to the supervisor of this thesis, Prof. Peter Niesen, who was always willing to meet with me, even if that meant meeting at a train station in a foreign country. I am especially thankful for the guidance and intellectual stimulation he provided over the past two years, and for (inadvertently?) re-introducing me to the work of Carl Schmitt.

Any list of acknowledgments would not be complete without Eileen and Stephan Pott, whose enduring friendship defined my time in Hamburg.

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CHAPTER 1: REVOLUTION AND CONTEXT

On the Ninth of Thermidor II, revolutionary politician Maximilian Robespierre was a fugitive in hiding, having been formally denounced and arrested by the Convention. After escaping to the Hôtel de Ville – and surrounded by crowds chanting "Long live Robespierre! Robespierre or death!" – Robespierre faced a dilemma: either to call the Paris sections to revolt against the Convention, or else face the same fate as had slews of his political opponents during the Reign of Terror, the Madame Guillotine. And yet, in this dramatic moment of the Thermidorian Reaction, Robespierre became fixated on a single question: given that he now found himself formally outside the law, "in whose name" could he possibly call for a revolt? (Buckley 2006, 64; MacFarlane 1845, 93).

This question, which for Robespierre was transformed into a matter of life and death, goes to the very center of political debate during the French Revolution, being enshrined in Article III of the Declaration of the Rights of Man and of the Citizen: "The principle of any sovereignty resides essentially in the Nation. No body, no individual can exert authority which does not emanate expressly from it." As such, the question of constituent power plays a double role as both a *Grenzbegriff* and as a *Kampfbegriff* in deciding the foundation of the state (Loughlin 2013, 1). As the young revolutionary Saint-Just put it, "Il est impossible que les lois révolutionnaires soient exécutées, si le gouvernement lui-même n'est constitué révolutionnairement" ("Revolutionary laws cannot be executed if the government itself is not constituted in a revolutionary fashion") (Edelstein 2012, 283). Indeed, at each stage of the revolution, constituent power emerges as a key point of contention.

This thesis begins by taking a contextualist approach to the analysis of constituent power in the early work of Emmanuel Joseph Sieyes. Sieyes, the revolutionary actor responsible for transforming the Estates-General into the National Assembly, functions as a point of comparison for the rest of the thesis – having developed the concept of constituent power, both of the later theorists in this thesis refer back to his work. After analyzing Sieyes, I turn to Maximilien Robespierre and reconstruct his theory of constituent power from fragmented texts before arguing that a fundamental inversion has taken place in the transition from Sieyes to Robespierre: in

the Jacobin understanding, the subject of constituent power must be reshaped to fit the constitution imposed upon it. This position is interpreted as reflecting the precarious political position of the Montagnards after expelling the Girondins and establishing a "revolutionary government." In the last section of my thesis, I skip forward a century and a half to discuss the function of constituent power within the legal and political theory of Carl Schmitt. In this last chapter, I argue that Schmitt's understanding of constituent power is not only the key to understanding his broader political thought, but also that his understanding is based on a fundamental misreading of Sieyes' *What is the Third Estate?*

1.1 Uncovering Contextualism

The title of this thesis is somewhat deceptive: although the title might suggest that the concept of constituent power is a "universal" or "timeless" subject within political philosophy (Skinner 1969, 30-32), appearing time and time again in the canon, in this thesis I employ the contextualist methodology closely associated with twentieth century academics such as Quentin Skinner (1969; 2001), John Dunn (1980a; 1980b; 1980c; 1985a; 1990a; 1990b; 1996), James Tully (1989a; 2007), and J.G.A. Pocock (2004). While each of the above authors differs slightly in their approach, the school remains unified by the common and simple assertion that context matters in the history of ideas.

The school is most deeply indebted to Collingwood, whose autobiography (2013) presented a theory of the history of philosophy radically opposed to the Realists and Idealists ("Greens") which dominated British philosophy before him. Collingwood's radical proposition was to ground philosophy in history: "My aim was to concentrate on the question, 'what is Aristotle saying and what doe she meant by it' and to forgo, however alluring it might be, the further question 'is it true?'" (Collingwood 2013, 29). This led to a theory of question-answer which was diametrically opposed to the true-false dichotomy of the realists:

> "It seemed to me that truth, if that meant the kind of thing which I was accustomed to pursue in my ordinary work as a philosopher or historian -- truth in the sense in which a philosophical theory or an historical narrative is called truth, which seemed to me the proper sense of the word -- was something that belonged not to any single proposition,

> nor even, as the coherence-theorists maintained, to a complex of propositions taken together; but to a complex consisting of questions and answers" (37)

By focusing on the question-answer relation in classical texts, Collingwood opened an analytical gap that could only be filled by historical analysis: to use his example, it was no longer important whether Plato's theory of the state or Hobbes' was the more accurate description. While both authors referenced some form of political organization which to the modern eye might appear to be the state, the very nature of the state was radically altered between these two periods – Plato is referring to the Polis, while Hobbes has in mind the absolutist state of his period – and thus the authors are in fact answering a different set of questions. As a result, the Realist philosopher is engaged in a fool's task of comparing two related but foreign concepts unaware that "the sameness is the sameness of an historical process, and the difference is the difference between one thing which in the course of that process has turned into something else … anyone who ignores that process, denies the difference between them, and argues that where Plato's political theory contradicts Hobbes' one of them must be wrong" (Collingwood 2013, 62). But, for Collingwood, each author was engaged in providing an answer to a specific, historical question, and thus the historian's goal was the "re-enactment in [his] mind of the thought whose history he is studying" (Collingwood 2013, 112); otherwise, to use an exceptionally British example, "if you allow yourself to think for a moment about the tactics of Trafalgar as if the ships were driven by steam and armed with long-range breech-loading guns, you have for that moment allowed yourself to drift outside the region of history altogether" (Collingwood 2013, 58).

Skinner's work on methodology can be seen as a continuation of Collingwood's contribution to the philosophy of the history of ideas: a return to historical context without allowing it to occupy a position of absolute causal priority in Marxist theories of the *Überbau* (Skinner 1969, 59).[1] In other words, while context is important, Skinner cannot risk letting the ideas themselves be epiphenomenal, or else political theory could just be collapsed into a sub-discipline of political economy or sociology. Additionally, Skinner targets the antithetical school of thought which "[insists] on the autonomy of the text itself as the sole necessary key to its own meaning" (Skinner 1969). The "text-

[1] As Tully (1989a) has argued, part of the radicalness of this position lies simply in rejecting the "academic division of labor between philosophers, methodoligists and theorists on the one side, and historians and social scientists on the other" (16).

itself" camp – at the time of the article's publication, this was most closely associated with Leo Strauss and his intellectual followers, though the critique applies to deconstructionist and hermeunetic theories as well – is committed to studying classical texts, with supposedly timeless, universal ideas. However, it is precisely because certain ideas reappear – and never identically – that they come to be interpreted within their "family resemblances" to other, more familiar concepts to the modern eye (30-32).

After offering a criticism of both the textualist and determinist methodologies within the history of ideas, Skinner offers an alternative methodology which aims to avoid both of the criticisms he has raised for the other methods: "the understanding of texts, I have sought to insist, presupposes the grasp both of what they were intended to mean, and how this meaning was intended to be taken. The essential question which we therefore confront … is what its author, in writing at the time he did write for the audience he intended to address, could in practice have been intending to communicate by the utterance of his given utterance" (Skinner 1969, 63). This last proposition on method points to J.L. Austin's (1962) concept of illocutionary force developed in *How to Do Things with Words*, which draws a distinction between the meaning of the words that were uttered and the intention of the utterance in a social context. As a result, Skinner is able to explore "this further question about what a given agent may be *doing* in uttering his utterance … about a force coordinate with the meaning of the utterance itself, *and yet* essential to grasp in order to understand it" (Skinner 1969, 61).

Indeed, as Dunn (1996) has argued, "no one is likely to deny that the great texts of political theory, whether secular or devout, are essentially human artifacts: products of intellectual labor and imaginative exploration by palpably human agents" (18). As a result, this necessitates a different treatment of the texts: given that they are written by humans within a specific historical context, the meaning of these very texts will be informed by its contemporaneous context. This means, pace Collingwood, that "this history of political theory is not the history of different answers to the same question, but the history of a problem more or less constantly changing, whose solutions are changing with it" (Dunn 1980b, 2). The task of a historian of political thought is to reconstruct the historical contexts surrounding these texts, and, by placing the text in its historical context, to elucidate the author's intended question to which the text is meant to be an answer.

The significance of contextualism for my thesis is as follows: first, it means that a reconstruction of Sieyes' and Robespierre's conceptions of constituent power is only possible by first placing the texts within their proper historical context, which is to say, respectively, the political discourses surrounding the first and second stages of the French Revolution; second, it then becomes possible to understand the illocutionary effect of the their works in relation "to available and problematic political action which makes up the political context" (Tully 1989a, 7); and thirdly, by examining how Schmitt appropriated concepts from Sieyes, I will aim to show how "political theories can be analyzed as justifications of the alteration or reinforcement of use-governing conventions" (Tully 1989a, 13). This means uncovering the latent normative implications of constituent power, and, following Skinner, to engage in a form of historical pragmatics , which "throws out as an old piece of positivist bric-a-brac the alleged logical distinction between factual and evaluative statements, concentrating as it does on a group of terms which perform an evaluative as well as a descriptive function in the language" (in Tully 1989b).

This has two further implications for my work: the first is that it is not in the first instance interested in all utterances in the history of philosophy dealing with the concept of constituent power nor with assessing the "validity" of each author's respective theory from the viewpoint of a modern understanding of the concept; rather, the task is to interpret Sieyes and Robespierre with reference to the political events and intellectual debates that originally shaped their discourse. Secondly, given the emphasis on the historical context of speech, this methodological approach amounts to an implicit rejection of Habermas' (1979) universal pragmatics, which has as its goal to "identify and reconstruct universal conditions of possible understanding" (1). Instead, historical pragmatics calls upon historical context to illuminate the multiplicity of divergences in meaning across differing historical periods, which will be argued in chapter 4 of my thesis.

CHAPTER 2: EMMANUEL JOSEPH SIEYES AND THE FOUNDING OF A NATION

"On his return from Italy, Bonaparte said to Sieyes: 'I have made the great nation.' Sieyes replied: 'That is because we first made the nation'" – Roederer (1989, 138)

In this chapter, I will begin by giving a brief discussion of Sieyes' life immediately preceding the publication of his three revolution pamphlets in 1789, which will function as a sketch of the intellectual and political climate in which he worked. After establishing a brief overview of the revolutionary drama rapidly unfolding, I will turn to an analysis of constituent power in Sieyes' texts and reconstruct his theory with a focus on the bearer of constituent power, the nation.

2.1 – The Abbot from Fréjus and the Revolutionary Stage

Emmanuel Joseph Sieyes was born in the town of Fréjus, on March 3rd, 1748, to Honoré and Anne Sieyes. Although his family was a common family of modest means, Sieyes was given access to an education in theology and philosophy between 1762 and 1772 as the result of favors owed to his father, a local tax collector. Ordained a priest in 1773, Sieyes never fully committed to "conservative theology," instead pursuing wide readings in philosophy –from Condillac to Locke and Voltaire (Van Deusen 1932, 12-17).[2] Despite being a priest, Sieyes did very little preaching – indeed, the modern image of a priest hardly fits Sieyes' profession. As Oelsner (1795) notes, at the time of his employment, the priesthood was divided into ecclesiastical preachers and ecclesiastical administrators (15).[3] Sieyes went out of his way to find the second type of employment, completing the administrative tasks required in his post at the diocese of Chartres. This position allowed the young abbot to continue his readings in philosophy and economics, all the while earning high esteem from his colleagues for his administrative skills (Van Deusen 1932, 13).

[2] Riklin (2001) suggests a much wider reading list, including Barthélemy, Beccaria, Descartes, Diderot, Malby, Quesnay, and Adam Smith, among others (19)

[3] This appears to be an authorized biography, with Sieyes having given material to the author; however, there is relatively limited information on this text, which I have tried to corroborate with other sources.

Sieyes' relatively normal career in the clergy would be radically altered when the *Ancien Regime* began to show stress fractures.[4] In June of 1787, the royal minister Lomenie de Brienne called for a meeting of provincial assemblies to determine tax rates and their distribution.[5] The French state faced a debt crisis, caused in part by military spending on projects as diverse as canal construction and French involvement in the American Revolutionary War, and further exacerbated by finance minister Necker's creative accounting methods – as demonstrated in his *Compte rendu au Roi* – and his foray into international financial markets (Bossenga 2002, 38-39).[6] As Baker (2009) has argued, Brienne's proposal fit in with the Enlightenment discourse of peaceful revolution which promised to do away with constraints of the old. Indeed, the proposal to call for provincial assemblies was referred to as an "astonishing revolution [which] is going to be effected not by force of arms, constraint, or violence, but on the basis of general conviction … the most complete and happiest of revolutions" (Baker 2009, 216). Further, because members of the assemblies were not necessarily members of the highest elite in French society, the Provincial Assemblies were seen at first as "a transfer of power from the King's servants to the people" (Schama 1989, 265).

In practice, however, the Provincial Assemblies could not help but disappoint the fledgling revolutionary spirit. The first half of the representatives to the assemblies were nominated by the King himself, and the remaining positions were nominated thereafter by this first round of previously elected representatives – Sieyes was elected in the second phase to the assembly of Orléans to represent the clergy (Van Deusen 1932, 19). This procedure ensured that the Provincial Assemblies would be overwhelmingly filled with representatives sympathetic to the King's preferred policy positions. Indeed, these assemblies were entirely tame in comparison with revolutionary drama which would emerge only a year later: while they established fixed-rate taxes and limited the ability for tax rates to be arbitrarily increased, both of these policies were

[4] As Furet (1989a) has argued, the "*Ancien Regime"* did not yet exist as a concept in French political thought; rather, it was only through the polemical discourse surrounding attempts to overthrow the existing order that the *Ancien Regime* came to be recognized as a political concept (605-606). Certainly by the time of de Tocqueville's study of the French Revolution in 1852, the *Ancien Regime* was conceived as a political actor, with its own "feelings, habits, and ideas" (de Tocqueville 2011, 1).

[5] For a history of the Assembly of the Notables leading up to the calling of the Estates General, see (Hampson 1988, 17-25).

[6] For a more detailed discussion of the financial situation of the French state immediately prior to the war, and particularly Necker's role in exacerbating the problem, see (Doyle 1988, 47-49).

never enacted (Van Deusen 1932, 20). Afterwards, Sieyes was appointed to an Intermediary Commission to continue the work of the Provincial Assemblies, but he seems to have contributed little to the debate, having missed the first twenty-nine sessions and returning to Paris at the end of May 1788 (Van Deusen 1932, 20-21). Despite all of this, as Van Deusen (1932) argues, Sieyes' experience with the provincial assemblies and intermediary commission surely influenced his later thought: "this experience strengthened his desire to amalgamate the Orders in the Estates General of 1789," reflecting the mixed character of the provincial assembles (21).

The seminal moment leading to Sieyes' revolutionary career was the parliamentary declaration of July 5th, 1788, which called for the Estates General to "be regularly convoked and composed in accordance with the form observed in 1614" (Baker 1989b, 315).[7] In calling for the Estates General to be modeled on a form seen for the last time almost two centuries previously, the declaration acted as a catalyst for archival research,[8] insofar as it attempted to ground the future meeting in the customs and traditions of its predecessor. However, by referring back to the only precedent available, such archival work was inherently conservative, "[appealing] to the legitimacy of a historically constituted order of things" (Baker 1989b, 315).

The decree calling for archival research had a second, wide reaching effect on public discourse in 1789: it tore down the remnants of a strict censorship apparatus. In the last 130 years of the *Ancien Regime*, over 17 percent of all prisoners in the Bastille were imprisoned on charges relating to the authorship, publication, or dissemination of banned texts (Roche 1989, 25-26). While imprisonment rarely threatened the intellectual elite – Voltaire was a clear exception – it had a chilling effect on the publication of radical texts or the trade of foreign texts.[9] However, Brienne's

[7] As Egret (1977) notes, Brienne's decision to invite archival research on the subject was meant as a strategic delay – Brienne almost certainly believed that the research would not be completed until 1789, thus giving him a year to enact legislative reforms. Of course, calling for the Estates General had the opposite effect (180-181).

[8] Cf. Habermas (2015): "It was Necker who first succeeded in opening a breach in the absolutist system for a public sphere in the political realm: he made public the balance of the state budget" (69). However, if it was Necker who opened the public sphere in the political realm, it was Brienne who started the flood of publications (Baker 1992).

[9] There was of course a backdoor for the procurement of "philosophical texts" – publishers in Geneva were willing to supply banned texts to French customers at a premium (Darnton 1989,

declaration legitimated the publication of pamphlets expressly dealing with the form of the Estates General and thus allowed for the free publication of texts which could have been considered too subversive just a decade earlier (Birn 1989, 50). The King had, after all, expressly requested the opinion of "all educated persons," though the deluge of pamphlets was likely not what he had anticipated (Birn 1989, 53).

Any contemporaneous archival researcher would have found three glaring facts about the Estates General. The first is that, historically, the Estates General was essentially impotent: "possessing no autonomy and no permanence, they left no trace of their activities. They owed their existence to an initiative of the government, which convoked and dismissed them at well. They lacked all authority in matters of government and even legislation" (Halevi 1989, 45). No matter the legislative proposal, the King would have veto authority, as he retained full legislative authority – at best, the Estates General performed an advisory function. Second, the Estates General was called into existence exclusively at the will of the king. As a result, any powers it had were derived from the initial act of the will of King and were thus not *sui generis*. Third, the Estates General was only called in moments of dire political emergency: it was first convened in 1483 after the death of Louis XI, and the most recent convocation in 1614 followed the assassination of Henri IV (Halevi 1989, 45). Thus, calling for the Estates General to meet was itself a sign of the tremendous financial pressure facing the monarchy.

As Halevi (1989) has succinctly put it, "faced with an exceptional situation, the monarch called upon the kingdom's 'representation' in order to build a consensus around his policy, or, more simply, to raise emergency revenues" (45). This was captured in the phrase "in accordance with the procedure of 1614," which was appended to the declaration by the Paris Parlement (Hampson 1988, 33). As it was originally proposed, each of the three orders would have the same amount of representatives in the Estates General, each order would reach its own decision and receive one vote, and the general outcome would be based on the vote of the majority of the orders. This voting procedure meant, as Marxist historian George Levebvre (1962) has argued, that "the

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32-33). Cf. Habermas (2015), "Not a line could be published without the consent of the censor" (67).

nobility and clergy were made masters of the assembly," initially limiting the influence of the Third Estate (101).[10]

The intellectual climate immediately preceding the calling of the Estates General was one dominated by three discourses: the discourses of justice, will, and reason. As Baker (1989b) has shown, these three discourses were traditionally unified under the control of monarchical authority, as it was "characterized by justice, according to which each receives his due in a hierarchical society ... justice is given effect by the royal will, which is in turn preserved from arbitrariness by reason and counsel" (314). However, through the decay of the *Ancien Regime*, these discourses lost their unity and instead became fragmented with competing ends. Justice became the language of parliamentary constitutionalism, which sought a return to the "historically constituted order of things"; the will was captured in Rousseau's general will (*volunté générale*), and "liberty appears as the active expression of a general political will"; and reason became the domain of the physiocrats, with their belief that "public life must be reconceptualized on the basis of reason and nature, political will must yield to enlightened understanding of the natural and essential order of societies, and the language of the political will must give way to a rational discourse of the social" (Baker 1989b, 315). Each of these discourses would only be rejoined in Sieyes' political work.

Sieyes was prepared for the convening of the Estates General: he had already written the entirety of *Views on the Means of Execution of which the French Representatives can Avail Themselves in 1989*, but instead rapidly published both *Essay on Privileges* and *What is the Third Estate?* in response to the risk that of the nobility would coopt the Estates General as well as the increasing threat of the *Ancien Regime*'s financial collapse (Forsyth 1987, 6; Oelsner 1795, 21). Thus, Sieyes' texts joined the exploding genre of the political pamphlet: shorter texts aimed at a large audience and commenting on the possible form of a new political order (de Baecque 1989, 166). In contrast to the texts typical of the period prior to 1788, which were predominantly caught up in the antagonism between the monarch and the aristocracy (Loft 2002, 169), Sieyes rejected both of the traditional political discourses in favor of a defense of the Third Estate. Each of Sieyes's pamphlets became exceptionally well-read in the period

[10] Although Levebvre's interpretation of the revolution has been discredited by revisionist historiography, his conclusion on this point is still considered valid.

leading up to the initial meeting – each was reprinted at least once (*What is the Third Estate* went through four editions in 1789 alone) – and would be responsible for Sieyes' booming popularity and his election as the last member of the delegation of the Parisian Third Estate (Van Deusen 1932, 33-35).[11] It is in these three pamphlets that Sieyes sets forward his theory of constituent power, to which I will turn in the following section of this chapter.

2.2 The Role of the Third Estate

Although Sieyes viewed *What is the Third Estate?* as an extension of his *Essay on Privileges* (Sieyes 2003, 93), the former is perhaps the most forceful and coherent articulation of his theory of constituent power. It is in this pamphlet that Sieyes set out a series three of questions and answers that would concisely (and polemically) describe his theory of constituent power, while simultaneously outlining the following portions of his argument:

> "1. What is the Third Estate? --- *Everything.*
> 2. What, until now, has it been in the existing political order? --- *Nothing.*
> 3. What does it want to be? --- *Something"* (Sieyes 2003, 94).[12]

It is clear from these initial remarks that Sieyes believed that the Third Estate was denied its rightful position, and that the first step would be to outline a revolutionary theory with the Third Estate at its center.

For Sieyes, the claim that the Third Estate is "everything" represents the idea that the Third Estate is a complete nation, for it alone provides the necessarily labor for a nation to continue. He writes, "What does a nation need to survive and prosper? It needs *private* employments and *public services*" (Sieyes 2003, 94). It is in this moment

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[11] Sieyes' appointment to the delegation was actually the result of a clerical error: the Parisian Third Estate had previously voted through a measure which forbid members of the nobility and clergy from being elected to the delegation; however, the presiding officer did not record the measure in the proceedings, making Sieyes' election possible. (Van Deusen 1932)

[12] The original French text deviates slightly from the translation offered by Michael Sonenscher, particularly in regard to the third question: here, "What does it want? -- *to become something*" would more accurately capture Sieyes' claim. After all, in the French formulation, the Third Estate could desire a number of other things (food, peace, lower taxes, etc.), but Sieyes' claim is that its sole demand is to become something.
"1° Qu'est-ce que le Tiers-État ? *Tout.* // 2° Qu'a-t-il été jusqu'à présent dans l'ordre politique ? *Rien.* // 3° Que demande-t-il ? *À y devenir quelque chose.*"

that Sieyes turns to a theory of productive labor,[13] dividing labor into four separate classes: first, those who work on the land; second, those laborers who transform the raw material given by the land through their handiwork; third, merchants and salesmen, who act as intermediate agents between the producer and consumer; and fourth, the service sector, or those who provide "individual activity and specialized services that are *directly* useful or agreeable to the *person*" (Sieyes 2003, 95). For Sieyes, the individuals who are employed in these four classes of private employment are "required to bear the whole burden of all the genuinely hard work, namely, all the things that the privileged order simply refuses to do" (Sieyes 2003, 95).

As Forsyth (1987) has argued, placing the creation of value into the hands of individual laborers had the effect of "[asserting] that man's active powers were as important as the automatic or quasi-automatic processes of the physical world" (52). Importantly, this allowed for Sieyes to reject the then-dominant interpretation of wealth offered by the Physiocrats, who placed landed property at the center of their economic theory and, by extension, of their theory of a natural political order. As the prominent physiocrat Mirabeau claimed in *Théorie de l'impôt,* landowners are "the only true – I do not say citizens, for this word comes from cities and republics – but régnicoles and nationals" (Rosanvallon 1989).

In his *Tableau Économique*, Quesnay – the founder of the Physiocratic school (Roll 1973, 133) – locates the generation of surplus value within the soil itself and surplus takes on the form of a "gift of nature" (Vaggi 1987, 95). Under the Quesnay's interpretation, it is the agricultural sector which "gives rise to and maintains all other economic activities of the country … the development of the industrial and commercial sectors is thus both dependent on, and limited by, the size of the surplus in the primary sector" (Vaggi 1987, 95). This allowed Quesnay to distinguish three economic classes: first, the propertied class of landowners; second, the productive class of agricultural workers; and third, the sterile class of artisans and merchants (Quesnay 1972). Within this division, it was the agricultural laborers who were the necessary catalyst for

[13] Given that Sieyes' argument begins with reference to economic theory, it is unfortunate that English and German language collections of his work have been exclusively focused on his political thought at the expense of his economic theory. See, for example, (Sieyes 1981; 2003; Weber and Lembcke 2014)

economic growth; however, at the same time, the implication was that artisans and merchants were a form of *unproductive labor*.

It is exactly this interpretation of productive labor offered by Quesnay that Sieyes challenges in the opening lines of his *What is the Third Estate?* While he agrees with Quesnay that "the basis of society is the means of men's subsistence and the wealth needed by the power that it to defend them" (Quesnay 1972 p. xxxiii), he challenges the origin of that wealth. Instead of locating the origin of surplus value in the land, which would have belonged to the nobility at the time of his writing, Sieyes instead argued that it was the individual's labor that resulted in the creation of wealth.[14] As a result, Sieyes is criticizing one of the common perceptions of the Physiocrats of the time, namely that "their views on landed property and their frequent defense of an enlightened despotism endeared them to those who were fighting a rearguard action on behalf of feudalism" (Roll 1973, 136). Thus, when one examines Sieyes four productive classes, the landowner is entirely absent – the landowner himself does not labor. In rejecting the supposed *natural* order of Physiocratic theory, Sieyes came down squarely on the side of Smith's theory of wealth.[15]

If we accept Sieyes' proposition that all the productive labor of the nation is performed by members of the Third Estate, then what is the position of the other two classes? Here, Sieyes claims "subtract the privileged order and the Nation would not be something less, but something more"; in fact, he goes on to claim that "nothing can go well without the Third Estate, but everything would go a great deal better without the two others" (Sieyes 2003, 96). Thus, in the first instance, members of the privileged orders occupy a parasitic position,[16] limiting the ability of the Third Estate to flourish.

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14 Or, as Riklin (Riklin 2001) succinctly described Sieyes' position, "nicht der Boden, sondern die Arbeit sei die Triebkraft der Wirtschaft" (28).

15 Sieyes was a wide reader of economics and even wrote an unpublished manuscript titled "Lettres aux économistes sur leur systèm de politique et de morale," which offers a more detailed critique of the Physiocrats' position.

16 Bien (1989) points out that, in fact, the majority of the aristocracy immediately prior to the French Revolution was quite active in commerce, industry, the clergy, and in various military divisions, but "reality and its perception are two totally different things. The fact that most nobles were active did not protect them from the charge that, as a class, they were idle and useless" (618).

However, Sieyes went one step further than merely claiming that the noble order weakens the Third Estate – he also claims that the nation properly understood excludes members of the privileged classes, precisely on account of their privileges. For Sieyes, a nation is defined as "a body of associates living under a *common* law, represented by the same *legislature*, etc." (Sieyes 2003, 97). To be clear, this was not an unique invention of Sieyes': the *Dictionnaire de L'Academie* had in 1694 already defined the nation as "all the inhabitants of a single state, a single country, *who live under the same laws and use the same language*" (Nora 1989, 743 italics mine). Sieyes' unique contribution to the understanding of nationhood in revolutionary discourse through *What is the Third Estate?* was to insist that the nation was synonymous with the Third Estate only and that the privileges of the other estates actually violated the idea of a common law.

For Sieyes, the privileged orders of the *Ancien Regime* violate his understanding of a nation because the privileges and exemptions they claimed made them into a sort of "*imperium in imperio"* (Sieyes 2003, 97). As Forsyth (1987) has shown, the enemy of the Third Estate in Sieyes' writings takes many different names – "*les privilégiés .. l'aristocratie, l'aristocratisme, la noblesse, l'ordre noble, la caste des nobles … une classe privilégaire*" – but what was meant was all the members of the nobility who, by virtue of their privileges, were placed outside the common law (89). Privileges marked a key point of demarcation for members of the nobility, and conferred a range of benefits including tax exemptions, the right to a trial by peers, or even the right for members of the nobility to carry swords in public (Bossenga 2002, 5). Although non-nobles were able to obtain privileges by virtue of their profession – such as magistrates and administrators – for members of the nobility, "the essence of nobility and its distinctive privileges were inherent in the person. Once acquired, nobility was intrinsic and permanent, transmissible only to one's children, and that without the slightest difficulty, without even requiring an appearance before a notary" (Bien 1989, 616). As a result of the hereditary transfer of privileges, "the birthright turned what ought to have been nothing more than a reward for a particular merit into a durable and essential inequality, contrary to the universal rights of individuals" (Bien 1989, 626).[17]

[17] Sieyes sees some merit in rewarding those individuals who have served the nation; however, "I would not make the rewards of a nation consist in any thing which is unjust or humiliating" (72). Rather, Sieyes argues that citizens ought to be permitted "to distribute their respect

It is precisely this element of civil inequality that Sieyes attacked in his *Essay on Privileges*. His argument starts with a recourse to natural law, claiming that "there is one *supreme* law which ought to be the parent of all others, and that is, '*Do wrong to no man'"* (Sieyes 2003, 70). From this initial natural law, Sieyes claims that all derivative laws which do not further this goal are "needless restraints upon liberty and … occupy the place of good laws" (70).[18] The last step in his argument is to show that, if it is true that laws ought to exist only to the extent that they follow the natural law of "do wrong to no man," then any granted exception to the law must therefore allow for the individual to do some wrong to others. Thus, privileges, by granting an exception to the law for some individuals, are "an assault upon liberty" and are a violation of that supreme law which ought to shape all other laws (Sieyes 2003, 70).

Aside from this natural rights argument, Sieyes maintains that privileges affect the perception of the public interest: "For a moment, inspect the sentiments of a person newly privileged. He looks on himself and his colleagues as forming a separate order, a chosen nation within the nation. He considers in the first place what he owes to his own caste" (Sieyes 2003, 75).[19] This is attributed to the nobility's essentially historic orientation: their gaze drawn to the farthest point of his genealogical history, while a member of the working class "fixes his attention on the *ignoble present* and the *indifferent future*" (Sieyes 2003, 78). With this point, Sieyes is at his most polemical, addressing the nobility directly: "Your insolence and your vanity are better pleased with privileges. It is then too plain that you wish rather to be distinguished *from* you fellow citizens, than *by* your fellow citizens" (Sieyes 2003, 74). Following Forsyth (1987), the effect of this diatribe was to place the concepts of justice and utility with the Third Estate, while showing that the privileged orders embodied injustice and disutility (93).

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according to their feelings and give themselves up to that expression … that they give it as by inspiration" (Sieyes 2003, 72-74). In short, public opinion should serve as a replacement for privileges.

[18] Cf. Rousseau (1968): "In fact, [the laws of natural justice] merely benefit the wicked and injure the just, since the just respect them while others do not do so in return. So there must be covenants and positive laws to unite rights with duties and to direct justice to its object" (81). See also (Noone 1972, 24) for a discussion of Rousseau's critique of Diderot's theory of natural law in the first edition of *Social Contract*.

[19] Compare with Jeremy Bentham's (2016) account of the aristocratic section in his Public Opinion Tribunal which, by definition, harbored sinister interests against the general good.

This proposition, in conjunction with the unequal distribution of political representation, could only lead to the conclusion that the nation needed to repossess itself.

Sieyes' last argument supporting the Third Estate as the revolutionary actor capable of exercising its constituent power was its sheer size in comparison to the other orders. As an initial matter, this points to an implicit majority decision principle, which will be discussed further in the next section of this chapter. For Sieyes, this is captured in the following claim: "We have demonstrated … the necessity of recognizing the *common* will solely in the opinion of the majority. This maxim is incontestable. It follows that in France, the representatives of the Third are the true depositories of the national will. They can without error speak in the name of the whole nation" (Forsyth 1987, 84-85). Given that the common will is the will of the majority, and the Third Estate was the clear majority in pre-revolutionary France, then it follows that the common will of the nation is synonymous with the will of the Third Estate.

Thus far, it is clear that Sieyes' conceptualization of "the nation" is not dependent on some sort of ethnic community, nor is it tied to a romanticized notion of a "past image of purity" (Forsyth 1987, 71). Rather, the nation is defined by two characteristics: first, in a politico-juridical sense, the nation is defined as that body of individuals which is equal under the law of a given territory; and second, in an economic sense, the nation is the productive force which uses its labor to sustain the life of its members.

This interpretation of the nation is particularly radical when juxtaposed against uses of the "nation" in the years prior to Sieyes' writing in the debates surrounding the Aristocratic Revolt (Greenlaw 1957). Take, for example, the text of a speech given by M. de Lamoignon, Keeper of the Seals of France on November 19, 1787 during the Royal Session of the Parlement: speaking immediately after the King, Lamoignon declared "these principles, universally recognized to be true, attest that… *the King is the Sovereign Chief of the nation and one with the Nation*" (de Lamoignon 1970, 2 italics mine). This conception, dominant in the discourse of the monarchy and the ministers who supported it, held that the King *was* the nation – it was not merely a matter of representation, but rather that "the bond uniting the King and the Nation is by its nature

indissoluble" and that "he is accountable only to God for the exercise of the supreme power" of sovereignty (2).[20]

But it is exactly this supposed unity between King and Nation which was first contested in early 1788 by the Parlement of Paris as a direct result of the financial troubles facing France. Rebuking the Parlement for their attempt at resisting the King's orders, the King claimed "if the majority in my parlement were able to go against my will, the monarchy would be no more than an aristocracy of magistrates, as harmful to the rights and interest of the Nation as to those of the Sovereign. It would indeed be an odd constitution that would reduce the will of the King to the equivalent of the opinion of one of his officers … I must protect the Nation from such a misfortune!" (Louis-XVI 1970, 4). Indeed, this early debate between the nobility and the monarchy shows a substantial division over the definition of the French Nation: while the King repeatedly claimed that he himself was synonymous with the nation, the nobility – speaking through the Parlement – identified itself as the true nation.

This debate between the nobility and the monarchy is important in so far as it was a debate over the status of privileges in relation to the definition of the Nation. The Nobility, in response to the King two weeks later, reminded him that "the first article of the customary law is an oath by the King to respect privileges; this oath is renewed at each reign, by the King in person, before the deputies of the estates of this province, after which the province renders its oath to the King" (Flammermont 1970, 9). And it is precisely in this sense that the nobility speak of an existing constitution – the privileges established for the nobility and clergy through the consent of the monarchy form a constituted political order. For the nobility, then, the Estates General was seen as the mechanism by which they could secure their privileges against the monarchy.

Indeed, the importance of the debate over representation leading to the calling of the Estates General cannot be stressed enough. In the "Memoir of the Princes," a letter sent privately to Louis XVI on December 12, 1788 and signed by five members of the nobility, the Baron de Montyon describes the state of the nation as being in "equilibrium" so long as the King agrees to "conserve the only manner of convoking the

[20] Compare with Schmitt (1928b, 77) on the divine origins of constituent power, covered in section 4.2 of this thesis.

Estates General that is constitutional," by which he means representation and vote according to order in the Estates General (Auget 1970, 12). For de Montyon, increasing the representation of the Third Estate could only lead to "*the nation [being] always divided,* and therefore always weak and unhappy" (13, italics mine). This document highlights three things: first, that equal representation according to order was perceived by the nobility to be an integral part of the political constitution prior to 1789. Indeed, the mere thought of disturbing this order leads de Montyon to claim apocalyptically that "the rights of the two orders of the state divide opinions; soon property rights will be attacked; inequalities of wealth will be presented as on object for reform; already it has been proposed that feudal rights be abolished as a system of oppression, a remnant of barbarism" (12). Second, that by the time of the publication of Sieyes' *What is the Third Estate?* the nobility already viewed the Third Estate as a direct threat to the political order precisely because of claims to increased representation in the Estates General. And third, while Sieyes would not have been aware of this private correspondence between the Princes and the King, the text makes clear how radical his proposal was: in defining the nation as the Third Estate, he went beyond the positions which the nobility already equated with the complete ruin of political order.

Now that Sieyes' conception of the nation has been properly defined, I discuss how Sieyes proposes that the Third Estate reconstitute itself. To follow Sieyes' formulation, it is time to see how the Third Estate will become *something*.

2.3 The Constituent Power of the Nation

In the fifth chapter of his *What is the Third Estate*? Sieyes addresses the formation of a constitution. He begins by claiming that "In every free nation (and every nation ought to be free), there is only one way to put an end to differences about the constitution. Recourse should not be made to the Notables, but to the Nation itself"(Sieyes 2003, 134). While the nation is the only actor that is able to decide on a constitution, Sieyes does not presume that it always speaks with a unified voice; rather, the "resultant general harmony," as he refers to it, is the result of a multiple phases in the development of the nation. These epochs are not meant to represent concrete historical periods, but instead are a hypothetical construct showing how distinct individuals could join together under a single nation.

Sieyes' account begins with an epoch containing "a more or less substantial number of isolated individuals seeking to unite. This fact alone makes them a nation" (Sieyes 2003, 134). At this point, the nation is already able to exercise all of its rights, in other words to associate and to create a constitution. As Sieyes notes, "This first epoch is characterized by the activity of *individual* wills. The association is their work. *They are the origin of all power"* (134, italics mine). Thus, the individuals who first look to form a political community are those who create the original moment of power for Sieyes. It is only in the second epoch in which these individuals "confer with one another and agree upon public needs and how to meet them" (134), which implies already that there is a concept of the *common good* which can be addressed through a *common will*. Thus, while "individual wills still lie at its origin [the origin of power] and still make up its essential underlying elements … taken separately, their power would be null. Power resides solely in the whole" (134).

The concept of representation emerges in the transition from the second to the third epoch: Sieyes imagines a growing political community in which it is no longer possible for each individual to personally decide on the issues which affect the common good. Instead, they must opt for "government by proxy" or through a representation of its common will. For Sieyes, there are three characteristics of this form of government which he enumerates at the outset: first, contra Hobbes, "the community does not divest itself of the right to will. This is its inalienable property"; second, the community only delegates those elements of its will that can be used "to maintain good order"; and lastly, "it is not up to the body of delegates to alter the limits of the power with which it has been entrusted" (Sieyes 2003, 134-135) or again "no type of delegated power can modify the conditions of its delegation" (136). It is precisely through these three observations that Sieyes maintains a conceptual distinction between constituent and constituted power.

For Sieyes, the constitution of a body is the "organization, forms, and laws it needs in order to fulfill the functions for which it has been established"; in the passage from the second to the third epoch, the common will has set forward the powers and limitations of the representative government through the act of constitution. As a result, "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" (Sieyes 2003, 135). This means that it is not government that designates fundamental law; rather, government is the product the fundamental law that emanates from the collective will of the nation. This becomes the highest priority for any people, as "for any people the first and most important of all the laws of the social order is to have a good constitution. This is because only a good constitution can give and guarantee citizens the enjoyment of their natural and social rights, can confer stability on everything that may be done for the good, and can progressively extinguish all that has been done for the bad" (Sieyes 2003, 5).

It is essential to note that in this sequence of events, "the nation exists prior to everything; it is the origin of everything" and is therefore only subject to the dictates of natural law (which, as we have seen above, amounts to "Do wrong to no man") (Sieyes 2003, 136). This means that a nation cannot be subject to a constitution: there is no authority that exists prior to the nation which can force the terms of its association. Sieyes goes further, arguing that even if a nation *could* be the subject of a constitution, it *should* not be the subject of a constitution for two reasons: first, because every nation is akin to an individual in the state of nature, "their will needs only to have the *natural* character of a will to produce all its effects"; and second, by placing the nation under a constitution, there is no longer a clear political actor who is able to decide "in every unforeseen difficulty" and "to be the supreme judge" in the newly founded political order (Sieyes 2003, 137-138). Failure to consider the nation as antecedent to the constitution would inevitably lead to a collapse of political order, as "there would no longer be a constitution if, at the slightest dispute between its component parts, the nation did not have an existence independent of all procedural rules and constitutional forms" (Sieyes 2003, 138). This idea is further captured in an unpublished review Sieyes wrote of *What is the Third Estate?* – meant to be published under a pseudonym – in which he claimed "I learn from this work that what we must call a constitution is by no means an attribute of the nation, but belongs to the government alone. It is the government, not the nation, which is constituted" (in Pasquino 1994, 111). Thus, the constitution cannot act as a limitation on the collective will of the nation.

Following Baker (1989c), through this analytical process, Sieyes "took the historical nation, stripped it of the constitutionalist trappings of its residual sovereignty,

and endowed it with the active, immediate sovereignty of the people in Rousseauian theory. In effect, he transformed the nation into purely political being" (850). While Sieyes was certainly aware of Rousseau's thought at the time of writing *What is the Third Estate?* – it would have been hard not to be on the eve of the French Revolution – Sieyes' account of popular sovereignty differs markedly from that of his counterpart. Firstly, key to Rousseau's argument is the notion of a social contract, which is entirely absent from Sieyes' account of constituent power in *What is the Third Estate*?[21] When Rousseau summarizes the nature of the social contract, he claims "Each one of us puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole" (Rousseau 1968, 61). This in turn implies that "every individual gives himself absolutely" through the act of contracting (Rousseau 1968, 60). Instead, Sieyes' view is diametrically opposed to that of Rousseau, namely by arguing that the nation as the bearer of constituent power cannot be the object of fundamental laws and cannot alienate its powers; rather, it can only be held accountable to the single dictate of natural law enshrined in the command "*Do wrong to no man."*

Secondly, Sieyes departs dramatically from Rousseau on the question of representation, a difference that would play a key role in demarcating the first and second stages of the French Revolution: Rousseau found the very concept of representation to be antithetical to his notion of a general will. In contrast, Sieyes turned to the concept of representation in order to overcome the logistical problem of direct democracy, as well as to extend the theory of the division of labor to cover political representation (Baker 1989b, 318). However, at the same time, representation allows for Sieyes to maintain his analytical distinction between constituent and constituted power:

[21] Here, I respectfully disagree with Asbach's (2009) interpretation of Sieyes, in which the latter "übernimmt das klassiche Drei-Stufen-Modell von Naturzustand, Gesellschaftsvertrag und staatlichem Zustand, wie es von Hobbes, Locke und Rousseau in unterschiedlicher Ausprägung entwickelt worden ist, und implementiert es gleichsam in die revolutionäre Praxis, indem er es in den politischen, staats- und verfassungsrechtlichen Grundlagen der Neubegründung der französischen Nation in den Jahren ab 1789 verankert"(123). The agreement taking place in Sieyes' second epoch is prepolitical and occurs before the formation of the nation – thus, it is not to be confused with constituent power itself. Indeed, Riklin (2001), while maintaining that there is a contractarian element in Sieyes' thought, disagrees with Asbach in arguing that "Sieyes verstand den Gesellschaftsvertrag als einen ausschliesslich horizontalen Vertrag zwischen den Gesellschaftern" (26), in contrast to the Hobbesian interpretation, in which it was "vertical" between sovereign and subject. However, Sieyes' notion of the nation as subject of constituent power is bound by no contract, not even the constitution that it creates.

by distinguishing between the nation and its representatives, Sieyes can insist that the nation maintains complete sovereignty while simultaneously limiting the authority of the constituted government (Baczko 1988, 122). In contrast, when, following Rousseau, the citizens maintain their sovereignty even after the constitution of a government, all actions of that government are essentially legal, as constituent and constituted power are now mixed within the same constitution. As a result, "a central role is attributed to the limitation of power" in Sieyes' thought through the concept of representation (Pasquino 1994, 112).[22]

For Sieyes, representation was the "true object of the revolution," going to the very heart of his constitutional theory (Forsyth 1987, 128). After the extraordinary moment of founding a constitution, the nation does, however, retain a form of power over its representatives: this is the function of Sieyes' *pouvoir commettant*, or the "authorizing power of the whole citizen body to select their representatives" (Kelly 2004, 124). As Forsyth (1987) has argued, this extension of the "common will" of the people can be best understood by a recourse to a majority decision, although Sieyes glosses over the exact voting procedure in *What is the Third Estate?* (74). Indeed, Sieyes goes so far as to reject the notion that each representative is meant to represent the particular interests of its district; rather, each representative was to be sent to the assembly to debate with other representatives with the best interest of the community in mind, not merely restating the view of the constituency that he represents.[23] For Sieyes, representation "confers on them power of attorney, so that they can meet, deliberate,

[22] Here, (Van Deusen 1932) makes a rather puzzling claim: "[Sieyes] states his theory of government which is that of Rousseau's *Social Contract*, plus a representative system" (27). However, by placing representation at the center of his political thought, Sieyes arrives at a completely different theory of power than Rousseau.

[23] This is a key point of departure between the first and second phases of the French Revolution. As Baker (1989c) noted, "The conception of national sovereignty for which Sieyes had argued in the early debates of the Constituent Assembly required only that diverse interests be transformed into a unitary will by the deliberation of the National Assembly. But the notion of sovereignty adopted by the Constituents in accepting the suspensive veto -- and intensified by the sans-culottes in their vision of the deputies as mandataires -- required more. *It required that the unity of the assembly emanate directly from the unity of the body of the nation/people. The will of the sovereign nation had to be as unitary as it as inalienable: the body of the people had to bear the same unity it sought to impose upon its deputies; difference simply could not be held to exist within it*" (855, italics mine).

reconcile their differences, and will in common: thus, instead of simple carriers of votes, [the nation] has genuine representatives" (Sieyes 2003, 21). [24]

2.4 Transition to the National Assembly

One of Sieyes' interlocutors in the month after the publication of *What is the Third Estate* was Jean Joseph Mounier (1970), who would go on to become President of the National Assembly in October of 1789. His book, *Nouvelle observations sur les États-Généraux de France,* published in late February 1789, became famous for the moderate position it described. First, while calling for an increase in legislative power in the hands of the nation, based on the model of the United Kingdom with a bicameral legislature and absolute royal veto. Furthermore, Mounier rejects calls maintain the Orders in their representation in either chamber. It is precisely because of the loss of privileges that Mounier maintains the need for a unified representative:

> "After having destroyed all pecuniary privileges, abolished exclusions that have been in operation against nonprivileged citizens, and subjected all the prince's subjects equally to the authority of the laws, we must, if we wish to enjoy liberty for any length of time, renounce this unfortunate mistrust that divides the orders; and we must see in a gentleman merely a citizen who has been decorated, who is as interested in the most obscure of men in resisting arbitrary power, demanding good laws, and remaining free" (39)

Thus, the creation of a bicameral legislature without representation based on order would to erase the distinctions that threaten the unity of the nation.

The view expressed by Mounier were echoed by the first two orders in the lead-up to the first meeting of the Estates General. From the Cahier of the Clergy of Troyes, the Clergy posits in their first line that "the distinction between the three orders will be maintained in the French government, just as it has existed since the beginning of the monarchy" (Cahier of the Clergy of Troyes 1970, 57). Similarly, in the Cahier of the Nobility of Crépy, each of its demands are conditioned upon acceptance by the Three

[24] Here, Sieyes' concept of constituent power differs markedly from Marx's theory of state founding. For Marx, the abolition of the capitalist system meant that the working class would dissolve the moment the dialectical contradictions of capitalism were overcome; Marx's revolutionary agent disappears the moment the revolution is complete (Spang 2014, 174-175). In contrast, while the nation for Sieyes has the extraordinary power to found a constitution, it continues to exist as a political actor, with its will represented by the constituted government.

Orders, for example, "no general or permanent law may be decreed except with the consent of the three Orders" (Cahier of the Nobility of Crépy 1970, 52).

However, it was once again Sieyes who urged members of the Estates General to follow him in breaking from the political demands of the privileged orders (Doyle 1988, 171). On June 10th, 1789, Sieyes motioned to invite members of the other two orders to join the Third Estate and verify credentials in common. Crucially, the motion contained phrasing that, regardless of the response of the other two orders, the Third Estate would begin the process of verification immediately: as shown above, the Third Estate was for Sieyes already the entirety of the nation without the presence of the other two orders. By passing this motion 493 to 41, as Doyle (1988) argues, "on this date, then, the bourgeoisie became revolutionary; and the transfer of power which lay at the heart of the French Revolution began" (172). Moreover, just a week later, the political body which began as the Estate General voted to transform itself into the National Assembly, the implication being that this political body – and not the monarchy – represented the interests of the resurgent nation. In so doing, Sieyes set into praxis the theoretical models he had developed in his earlier writings (E. Schmitt and Reichardt 1981, 10).

This revolutionary move reflects Sieyes' rejection of the principles of dualist representation best characterized in the English Constitution. For Sieyes, the English Constitution invites only the image of a unification of interests; in reality, however, the three orders "would still remain three types of heterogeneous matter that it would be impossible to amalgamate" (Sieyes 2003, 128). Drawing on the same arguments on privilege made above, Sieyes claims "a common legislature cannot be anything other than a body of citizens with the same civil and political rights. It is a mockery to conceive of one in any other terms and imagine that one can form a common legislature by making citizens with unequal civil and political privileges sit together in the same chamber" (Sieyes 2003). The key distinction between England and France has to do with the initial allocation of privileges and their (in)ability to be passed on hereditarily: while a member of the House of Lords does enjoy privileges, they are not conferrable to extended members of the family, such as his younger brothers (127).[25] And while

[25] See also (Riklin 2001, 22-24).

Sieyes is critical of the English preference for primogeniture, "an institution that at one and the same time is both gothic and ridiculous," it also represented an improvement from the French state of affairs by tying privileges to the position of "those granted a share in the legislative power by the constitution" (127).[26] But the correct form of government for France would have to be one that allowed the nation to speak in a unified voice, which is only achieved when representing the nation as a whole, not the interests of a particular order within the nation.

[26] Though, as Sieyes notes, "What the English people have is a constitution, however incomplete it may be, while we have none" (132).

CHAPTER 3: ROBESPIERRE AND THE INVERSION OF CONSTITUENT POWER

"The revolutionary government is the despotism of liberty against tyranny" – Robespierre, February 5th, 1794

Out of the many political figures the French Revolution helped to create, it is perhaps Maximilien Robespierre who remains the largest enigma: a survey done to commemorate the bicentennial of the Revolution found that less than one in five individuals surveyed in France could correctly identify his affiliation with the Montagnards, while just under one in three incorrectly responded that he had been a member of the rival Girondins (Doyle and Haydon 1999, 3). In addition to a general public ignorance of his decisive role in the Revolution – which surely extends to a number of revolutionary actors – scholarly research on Robespierre has tended to generate two diametrically opposing views of "the Incorruptible." On the one hand, scholars working in the Marxist tradition such as Albert Mathiez (1927) and Georges Lefebvre (1964) have presented a romanticized picture of Robespierre as a friend to radical democratic politics and revolutionary ideals;[27] on the other hand, historians such as Thompson (1935) have found "mediocrity where one would look for political genius and … mere rhetoric where others see the flame of revolutionary passion" (xvi). As the revisionist Hampson (1974) attempted to show in his split-narrative study of Robespierre, perhaps there are simply multiple, irreducible Robespierres depending on how one frames the sources.

There are five main problems associated with providing a contextualist analysis of Robespierre: the first is that the information scholars have on Robespierre comes from either the notoriously white-washed biography provided by his sister, Charlotte, or from his former classmate, Abbe Proyart, who provides a polemical account of Robespierre's life (Hampson 1974, 3). These biographies contradict one another on numerous points, and both were written after Robespierre's execution, meaning that each was likely written with the goal of influencing Robespierre's later reception. Secondly, the Thermidorians were equally aware that their own legacy was tied to the

[27] While one might be tempted to assume that the Marxist idealization of Robespierre had died with the emergence of the Revisionist school, Zizek's (2007) introduction to *Virtue and Terror* shows the lengths he is willing to go to rehabilitate Robespierre with claims such as "Robespierre was a pacifist" (ix) or elsewhere when he expresses surprise that "everyone … is somehow ashamed of the Jacobin legacy of revolutionary terror and its state-centralized characters" (Zizek 2011, 672).

man whom they removed from power. As a result, they "not only blackened his memory but possibly also exaggerated his importance for posterity" (Doyle and Haydon 1999, 5). After destroying his personal records, the Termidorians were free to shape their own discourse surrounding the events of the Terror. The Post-Jacobins were only too willing to vilify Robespierre in order to exculpate themselves (Ozouf 1994) – the more Robespierre was made to look as a dictator, the less responsibility they had for the revolutionary bloodshed. Thirdly, the Committee of Public Safety did not keep substantial minutes of their discussions, and left behind only partial accounts of their deliberation process (Doyle and Haydon 1999, 5), meaning an exact reconstruction of internal debates is impossible. Fourthly, Robespierre was an orator (although supposedly a poor one) and the period in which he published his texts and speeches was the period of the revolution itself: thus, one must approach his texts as the work of a political actor, whose speeches and pamphlets were designed to address specific political issues arising in the course of the revolution. Lastly, despite the first three problems, Robespierre has been made into the single most written about figure of the French Revolution – with close to 10,000 works written on him before 1936 alone (Jordan 1977, 282) – and thereby taking on an almost mythical role in the course of revolutionary events.

With this initial word of caution out of the way, this section of my thesis will provide a contextualist reading of Robespierre's theory of constituent power; in particular, I will argue that Robespierre inverted Sieyes' theory (articulated in the previous chapter) in order to make "revolution" an analytically prior concept to constitutional order. While Robespierre articulates a theory of constituent power, he is attempting to answer an entirely different question than that of Sieyes: Robespierre is interested in locating the moral and political justification for investing constituent power in the people, and he locates this through his theory linking *vertu* and terror. As where Sieyes locates the Third Estate as the inherent suppository of constituent power, Robespierre posits that the revolution must first create the revolutionary constituency through the twin concepts of *vertu* and terror before they can exercise their constituent power. However, before I delve deeper into his thought, I shall first introduce Robespierre and attempt to reconstruct his revolutionary career.

3.1 – Pre-Revolution

Maximilien de Robespierre (the "de" was dropped hastily after the start of the revolution) was born in Arras on May 6, 1758 to Jacqueline and Maximilien Sr. At the age of six, his mother died giving birth to her fifth child, leaving Maximilien in the care of his father; however, within four months, his father suffered extreme mental illness and abandoned his family leaving the young Maximilien in charge of his family and making him "a sedate and conscientious young head of his family, who spoke serious to his younger brothers and sisters, and only joined in their games to show how they should be played" (Thompson 1935, 4).

Like Sieyes, Robespierre was the beneficiary of a substantial scholarship which allowed him to attend the Collège d'Arras and, after three years of excellent grades, was selected for another scholarship to attend the University of Paris, Collège Louis-le-Grand. It was there that the young Robespierre would have read Voltaire, Raynal, Rousseau, and other Enlightenment thinkers, "whose corrupting works were … smuggled into College by the hair-dresser, or the lavatory attendant" (Thompson 1935, 9). His academic talent was considered "outstanding" while at the College, which led the college faculty, in a moment of historical irony, to select Robespierre to personally deliver a Latin coronation speech to Louis XVI in 1775 (Hampson 1974, 7). It is clear that neither the King nor Marie Antoinette, who was seated beside him, could have predicted the role that Robespierre would play in demanding their deaths less than twenty years later.

In 1781, Robespierre graduated with a degree in law, and returned back to his native Arras with the intention of starting a small law practice. He was quickly incorporated into the *Académie royale des belles-lettres*, a discussion group devoted to debating legal and literary issues, which encouraged him to submit essays on topics ranging from Criminal Law to the equality of the sexes (Thompson 1935, 21). It is in one of these essays in 1785 that we find Robespierre approvingly citing Montesquieu on the concept of *vertu*, which is one of the first recorded instances of Robespierre discussing *vertu*:

> "The mainspring of energy (*ressort)* in a republic … as has been proved by the author of *L'éspirit des Lois*, is vertu, that is to say, political virtue, which is simply the love of one's laws and of one's country; and it follows from the very nature of these that all private interests and all personal relationships must give way to the general good … *A*

> *man of high principle will be ready to sacrifice to the State his wealth, his life, his very self -- everything, indeed, except his honor*" (Thompson 1935, 22 italics mine).

Further, this theme is echoed in the following year when Robespierre writes "politics is nothing but public morality" (Hampson 1974, 16). These essays show three things: first, that Robespierre came to arrive at a conception of *Virtu* which he understood to be indebted to Montesquieu; second, that well in advance of the outbreak of the revolution Robespierre had drawn the conceptual link between politics and morality which would come to inform his understanding of constituent power; and third, that despite claiming there was a deficit of public morality in France, Robespierre at this point viewed minor legal reforms such as "abolishing the confiscation of a criminal's property, and the legal disabilities of bastards" as providing a sufficient remedy (Thompson 1935, 24). This provides us with an early picture of Robespierre as an incremental reformer, but nonetheless one who was interested in implementing the philosophical ideas of the Enlightenment.

As a young lawyer, Robespierre was exceedingly successful: partly to do with his father's high reputation as a lawyer before his disappearance, Robespierre was able to secure a judgeship in the Episcopal Court, as well as a position as a secretary to a local lawyer (Thompson 1935, 33). By 1782, he was ranked seventh among lawyers of Arras; however, his practice began to shrink as increasingly the senior lawyers of Arras found his rhetorical style to be too flamboyant, one having written "A University prizeman // is not a universally prized man" (Thompson 1935, 33-38). Indeed, many of the more senior lawyers felt that, instead of defending a particular client in a case, Robespierre was engaged in denouncing entire moral conceptions (Hampson 1974, 30). Thus, when Brienne called for the Estates-General, "[Robespierre] had few hopes of permanent success at Arras, and the Revolution seemed to him, as it did to so many of his contemporaries, a heaven-sent invitation to Paris and fame" (Thompson 1935, 45).[28]

3.2 – Robespierre and Road to the Constitution of 1791

[28] While I agree with the general sentiment of Thompson's statement, it is an anachronism to suppose that Robespierre would have conceived the calling of the Estates General as a "revolution"; rather, it would be more accurate to suppose that he saw a political opportunity to implement the reforms he had previously advocated while a lawyer in Arras.

At once, Robespierre jumped into the revolutionary debate, attempting – like Sieyes – to shape the representational procedure which would take form at the Estates-General (Scurr 2006, 63). It is this occasion that prompted his first published text, *Adresse à la nation Artésienne, sur la nécessité de reformer les États d'Artois*, one of the plethora of political pamphlets which aimed at responding to Brienne's call for archival research on the form of the Estates-General.[29] However, in contrast with Sieyes' pamphlets, Robespierre's is more clearly addressing local grievances and as a result he "illustrates his argument with examples that will appeal to an Artois audience" – leading Thompson (1935) to imply that this pamphlet was meant to increase popular support for Robespierre's candidacy to represent Artois' Third Estate. He was ultimately successful, becoming one of eight deputies sent to Versailles to represent Artois.

While the delegation from Artois made themselves a reputation for patriotism, the whole of the Estates-General was not at once an exhilarating affair for Robespierre: in a letter to Buissart on May 24, he complains that the Third Estate still refuses to chart its own course, instead waiting for the clergy and nobility to join them (Scurr 2006, 76). Ultimately, Robespierre was not successful in campaigning for the Third to move alone; instead, it was Sieyes who, as described in the previous chapter, was responsible for the creation of the National Assembly. And it was precisely in this moment that the nation became a political actor, symbolizing a break with the previous order and necessitating the constitution of a new order.

The connection between Sieyes and Robespierre in the early days of the Revolution is well established: both were regularly present at the *club Breton*, a meeting of representatives aimed at achieving a common agreement on policy before the next day's debates (Thompson 1935, 115). Although there are no records of the proceedings of these early meetings – they were held in secret – the membership of these meetings was confirmed afterwards, as the *club Breton* renamed itself the *Société de la Révolution*, and later, *Société des Jacobins, amis de la liberté et de l'Égalité.* However,

[29] As Burrows (2015) has shown, the number of French-language pamphlets published in 1787 was 217; by 1789, that number had exploded to 3,305 (79). For Burrows, this further proves Habermas' (2015) thesis on the role of the public sphere in his *Strukturwandel,* namely that Necker's announcement allowed the public sphere to be a space for critical discourse on politics. For a critique of this thesis, see (Baker 1992, 189-198).

for the time being, the group was no where significantly less influential as it would later become; it instead contented itself "to discuss the agenda for the Assembly; and parliamentary incidents which seemed to happen spontaneously had sometimes been rehearsed beforehand at the club" (Thompson 1935, 115). This degree of political staging meant that Sieyes and Robespierre would have been intimately aware of each other's positions, having heard them among a small group of delegates in advance.[30]

Once the National Assembly had been created, Robespierre made a name for himself, as one of his colleagues described him, as being "too verbose, and does not know when to stop; but he has a fund of eloquence and originality which will not be lost in the crowd" (Thompson 1935, 51). However, he was clearly well received, as in this period he was invited to meet with Necker, and even a chance meeting with the Mme de Staël, who would become one of his fiercest critics(Scurr 2006, 75; Thompson 1935, 52). This shows two things: first, that the ideological divisions between politicians had not yet solidified, allowing Robespierre to meet with the finance minister and his family; and secondly, while criticized as verbose, Robespierre could not have been seen as overly radical – rather, he was seen as advocating a reformist platform which cannot have been far from someone like Sieyes'.

Indeed, like Sieyes, it was the issue of the royal veto that crystalized the issue of popular sovereignty for Robespierre: in a speech on September 7, he argued that "the sole origin of law … is the General Will (*volunté générale*), working, for convenience, through a National Assembly. To allow any individual to veto the decision of such an assembly is to put the particular will above the general – 'a monstrous situation, both morally and politically inconceivable'"(in Thompson 1935, 59). Thus understood, morally there could be no check on the General Will, which originated from the people directly – a clear reference to the theory presented by Rousseau in *Du Contrat Social*; however, Robespierre also held the view that the people "can only exercise its power through its chosen representatives; and it is right that the people should change them

[30] Thus, one example of the post-Thermidor distancing from Robespierre can be seen in (Oelsner 1795): "Sieyes never addressed a single word to Robespierre, nor Robespierre to Sieyes … They never met together, either at table or in company … Sieyes is therefore the last man who can be imagined to have formed any intimacy with Robespierre" (65-66). This is most certainly false.

frequently; for nothing is more natural than the desire to exercise its rights, to make known its opinions, and to state its wishes at frequent intervals" (Thompson 1935, 59).

Yet it was Louis' reaction to the suspensive veto that in fact generated the most controversy. On August 4th, royalists within the Assembly attempted to argue that decrees issued prior to the suspensive veto were retroactively subject to it; for Robespierre, this was logically false, since it would allow the King to veto the very foundation of the new constitutional order. However, he did not personally intervene, instead allowing Mirabeau to argue the issue (Thompson 1935, 60). However, Louis pressed the issue and claimed that he should be able to intervene on specific decrees passed, leading Robespierre to say "in constitution-making the nation only needs one will, and that is its own" (Thompson 1935, 60). The implication here being that any attempt by the king to intervene on laws passed through the National Assembly was a violation of the general will of the nation; and further, in issues which were fundamental to drafting a constitution, there ought to be no weight given to the King's desires.

On September 30th, Robespierre gave a speech titled "*Contre le veto royal, soit absolu, soit suspensif,"* which further laid out his objection to the royal and suspensive vetoes: since the representatives of the French nation are "imbued in constituent power,"[31] then it is clear that "the will of the Representatives must be regarded and respected as the will of the nation; it must necessarily have the sacred authority and superiority to any particular will, since without it, the nation, which has no other way of creating laws, would be en effect stripped of its Legislative Power and its sovereignty" (Contre le veto royal, soit absolu, soit suspensif 1789).[32] These comments show that Robespierre conceived of the National Assembly as being constituted by the French nation, and is echoing the sentiments advanced by Sieyes. Further, Robespierre uses constituent power as an answer against the arguments raised by supporters of the monarchy in the Assembly. While the Monarchiens, supporters of the monarchy, claimed that it was necessary to give the executive – under this proposed constitution,

[31] Original: 'L'Assemblée des Représentans de la Nation Française revêtue du pouvoir constituant." Translation mine.

[32] Original: "Mais alors il est évident que la volonté de ces Représentans doit être regardée & respectée comme la volonté de la Nation ; qu'elle doit en avoir nécessairement l'autorité sacrée & supérieure à toute volonté particulière,puisque, sans cela, la Nation, qui n'a pas d'autre moyen de faire les Loix, serait en effet dépouillée de la Puissance législative & de sa Souveraineté." Translation mine

the King – a veto over the legislature to provide a check against bad laws, Robespierre retorts "A wise constitution must establish the periods when the people shall appoint representatives, carrying constituent power, to examine, see, and look for, within that extraordinary convention, a safeguard far more useful than ministerial protection" (Contre le veto royal, soit absolu, soit suspensif 1789).[33] In other words, since the legislature was constituted by the French nation, it alone can establish safeguards without resorting to the dictates of the King. The constitution, given to the people and written by the people, ought to contain the necessary procedures.

One of Robespierre's most famous interventions into the debate surrounding the Declaration of Rights was over the proposed property qualification for holding office (Scurr 2006, 107), introduced and advocated by Sieyes. Following the Assembly's movement back to Paris from, a shortage of bread caused riots on the streets on October 22nd. The more reactionary members of the Assembly – seeing the masses protesting food shortage – proposed a qualification limit for both electors (three days' wages) and candidates (ten days' wages), both of which aimed to keep the more populist elements out of the political system. For Robespierre, this proposal was hopelessly at odds with the basic principles of the Declaration, particularly the notion that "Every citizen ... has an equal claim to representation, whoever he may be. Sovereignty resides in the people – that is, it is distributed among all the individuals composing the people" (Thompson 1935, 69). However, this was a debate that Robespierre would not win for another two years; instead, the Assembly voted through an even more restrictive property requirement called the *marc d'argent*, which required that all candidates pay the equivalent of fifty days of work in taxes – effectively keeping out the sections of the population deemed too radical.

At this point in his political career, Robespierre's ambitions were overshadowed by the more moderate Mirabeau whose principle goal was the creation of a constitutional monarchy and the reorganization of France's bureaucratic structures (Thompson 1935, 82-85). However, once Mirabeau died on April 3rd 1791, he left

[33] Original: "Ajoutez à cela qu'une Constitution sage doit fixer des époques où le Peuple nommera des Représentans, revêtus du Pouvoir constituant, pour l'examiner & la revoir, & qu'elle trouvera, dans cette convention extraordinaire, une sauve-garde bien autrement utile que la protection ministérielle." – Translation mine.

behind a power vacuum in the assembly, which Robespierre eagerly rose to occupy. Although the two were often on opposing sides, "they had always respected one another as good fighters; the younger man had copied and courted the elder; and the elder had been generous enough to express his praise" (Thompson 1935, 121). Importantly, at the time of his death, Mirabeau's "relations with the court were as yet guessed rather than known" (121) -- this was not the symbolic death of the monarchy, and Robespierre could still let himself be seen at the front of Mirabeau's funeral procession. As one contemporary newspaper wrote, "The Assembly has perhaps lost its foremost orator, but M. Mirabeau did not hold the same place among the small group of patriot deputies. The French people need not despair of the conduct of public affairs as long as they still have a representative of the caliber of M. Robespierre" (in Rudé 1975, 24). After Mirabeau's death, Robespierre came to occupy the position of an unwavering Republican[34] without the limitations of a strong orator to represent the opposition. Furthermore, after the King's attempted Flight to Varennes on the night of June 20th, Robespierre was in a position to both mobilize the increasingly influential Jacobins, as well as push back against what was left of the moderate platform in the assembly.

The moderate constitution advanced on August 30th and 31st, however, reflects little of the radicalism that one might expect; instead, it voted through restrictions on changing the future constitution in an attempt to prevent another Revolution from taking place. "In their fear of democratic reaction … the deputies were anxious to make revision as difficult as possible: they therefore proposed an arrangement which would involve a ten years' moratorium for any constitutional change" (Thompson 1935, 170). Interestingly, Robespierre did not speak out against this constitution, instead "urged that the Constituent Assembly should have power to review the conduct of the legislature; for 'the sovereignty of the nation means its ability to repress, when it wishes, any usurpation of power by the authorities it sets up'" (Thompson 1935, 170). This view of political representation shows that Robespierre still places sovereignty with the nation even after the moment in which the constitutional order is introduced – in other words, representation was not the alienation of sovereignty but rather contingent upon it.

[34] Though Mme Roland would later write that Robespierre did not understand the meaning of the word "Republic" when he heard it the first time (Roland 1901). This could be fictitious, given that she was writing it from a prison cell after Robespierre had called for the expulsion of the Girondists.

Robespierre's reaction came on the occasion or giving the constitution to the King for his official signature in September. His opposition is worth quoting in full:

> The constitution gives Louis "complete control of the executive … the right to veto the actions of a series of national assemblies; the opportunity of influencing their proceedings through his ministers' right of entry into the House; absolute authority over his agents, the administrative bodies; power to regulate the foreign policy of the nation; finally, the use of a huge army, and of a public treasury, swollen with all the national property which has come into his hands … Why! There is not a power in the state, but it pales before the King's!" (Thompson 1935, 171).

The constitution which emerged was thus unsatisfactory for the more radical members of the National Assembly – while a step in the right direction, basic limitations on Republicanism such as the property qualification were seen as a political maneuver to deny the General Will its true expression.

3.3 Robespierre contra Condorcet

Before the purge of the Girondists, Robespierre was decidedly less radical in relation to property rights – on April 24th, 1793, in a speech given at the Convention, Robespierre railed against calls for a redistribution of wealth to be included in the Declaration of Rights to precede the new Constitution. Robespierre claimed "there was certainly no need of a revolution to teach the world that the present very unequal distribution of wealth is the source of many evils, and of many crimes: we are equally convinced that it would be impossible to distribute it equally… It is much more necessary to make poverty respected than to ban millionaires" (Thompson 1935, 352).

However, Robespierre goes further in his objection to the Girondinist Declaration of Rights, in claiming that all humans have an implicit obligation to one another. This manifests itself in four articles which he proposed to add to the Declaration:

Article 1: Men of all countries are brothers, and the different peoples ought to help one another according to their ability, like citizens of a single state

Article 2: He who oppresses a single nation declares himself the enemy of all

Article 3: Those who make war on a people to arrest the progress of liberty, and to destroy the rights of man, deserve to be attacked by all, not as ordinary enemies, but as brigands, rebels, and assassins

Article 4: All kings, aristocrats, and tyrants of whatever kind, are slaves in rebellion against the human race, which is the sovereign of the world, and against nature, which is the legislature of the universe. (Thompson 1935, 353).

Historian Mathiez (1927), ever in search rehabilitating Robespierre's legacy, has claimed that the above four articles are Robespierre's "outline of the League of Nations" (p. 102). However, there is good reason to doubt the sincerity of these statements: in a convention controlled by the Girondins,[35] Robespierre was forced politically to propose a theory that countered their justification for extending the war in 1792. Although at this point, the Girondins were losing their control in the Convention (Thompson 1935, 366), they still would have been powerful enough.

In order to better understand what was at stake in Robespierre's proposed amendments to Condorcet's Declaration of the Natural, Civil, and Political Rights of Man, a brief detour into that document is necessary. First, the declaration opens with the language of contractualism: "The aim of every group of men who form a society Is to maintain their natural, civil, and political rights; these rights form the basis of the social pact and must therefore be recognized and declared before the Constitution, which acts as their guarantee, is established" (Condorcet 1994, 280). This would imply that Robespierre's Article 4, establishing the human race as the sovereign of the world, is a right that he holds as pre-political: by attempting to add sovereignty to Condorcet's list, the assertion is that this is independent of any future constitution or political arrangement. However, Condorcet's declaration of rights does establish a series of rights relating to popular sovereignty:

> Clause 25: The Social guarantee of the rights of men resides in national sovereignty.
> Clause 26: Sovereignty is one, indivisible, indefeasible and inalienable.
> Clause 27: Sovereignty must reside in the people as a whole, and every citizen has an equal right to it.
> Clause 28: No individual or partial group of citizens may claim sovereignty, exert any authority or carry out any public office without being formally and legally delegated to do so. " (Condorcet 1994, 283).

Similarly, Robespierre takes up similar language in insisting that "the law is the free and solemn expression of the will of the people" and that "the people is sovereign; the government is its work and property: public officials are its agents" (Thompson 1935, 355). Crucially for a discussion of constituent power, "every section of the sovereign assembly ought to have the right to express its will with entire freedom: it is essentially independent of all constituted authorities, and free to manage its own police and its own

[35] Here, I use "controlled" loosely: despite their political power and shared intellectual interests, the Girondists suffered from the lack of a unified political agenda (Johnson 2011, 299).

debates. The people can change its government and recall its deputies whenever it pleases" (Thompson 1935, 355-356). This proposed amendment goes further than Condorcet's Clause 28 – while Condorcet holds that individuals and groups can claim sovereignty when they meet the legal and formal requirements for doing so, Robespierre maintains that the people remain sovereign even after the constitution of a government. The message embodied in this article represents an extension of the Constitution of 1791: while the first Constitution pointed to the constituent power of the nation, Robespierre's proposal insisted that it must be the will of the complete people and not merely a sub-segment which constitutes the government. Furthermore, the people are charged with the "sacred duty" to revolt against their government, should it ever "violate the rights of the people" (Thompson 1935, 357).

As Thompson has argued, Robespierre's proposed Declaration of April 24 was his attempt at developing a Rousseauist political document. Roughly two weeks later, Robespierre gave a speech at the Convention which opened with the lines "man is born for happiness and freedom, yet everywhere he is unhappy, and enslaved. The object of society is the preservation of his rights, and the perfecting of his nature" – clearly referring to the opening of *Contrat Social* (Thompson 1935, 359). Furthermore, in his speech, Robespierre directly addresses the objection that his proposal weakens the rule of law by a direct turn to Rousseau's general will: "When the law is based on the public interest, the people itself is its support, and its sanction is that of all the citizens, who made it, and to whom it belongs. The army and the police are simply the people in arms, carrying out the general will, and defending the body politic against attacks from the outside. The law can only clash with the general will through some fault of its own, or some misuse of it by a magistrate. A properly ordered State – that is, one in which the laws embody the general will—is peaceable and free" (Thompson 1935, 362). In other words, as long as the general will is sufficiently general, then there is no opposition between government and governed – his relatively weak conception of the state cannot slide into anarchy precisely because citizens will obey they laws which they themselves author. As a result, the entire notion of a social contract is rendered superfluous – the people and the government are the same.

This is a clear Rousseauist departure from Condorcet's Declaration. Condorcet, by this point having already worked out the series of voting paradoxes for which he is

now famous in Social Choice, had come to the realization that the general will is not infallible – while sovereignty may be "indivisible, indefeasible and inalienable" in the "people as a whole," it is not guaranteed that the voting mechanism would reflect that. Thus, he establishes that "members of society must be provided with the legal means to combat oppression" and that "when a law violates the natural, civil, and political rights which it should guarantee, that is a form of oppression" (Condorcet 1994, 283). Thus, when Robespierre declares "the law can only clash with the general will through some fault of its own, or some misuse of it by a magistrate," he is directly combatting the idea that the general will can err and thereby defending a Rousseauist position.

3.4 The Jacobin Constitution

Immediately prior to the formation of the Committee on Public Safety on April 6th, 1793, which more than any institution became synonymous with revolutionary terror, Robespierre gave a speech at the Convention claiming "What we need is a *single will* … this rising must continue until the measures necessary for saving the Republic have been taken. The people must ally itself with the Convention, and the Convention must make use of the people" (Rudé 1975, 36). In some sense, this summarizes the revolutionary platform which Robespierre would advance until the Thermidorian Reaction. The rhetoric of continual existential threats to the Republic was nothing new in Robespierre's discourse; however, with the Mountain having finally limited the power of the Girondins, Robespierre was finally in a position to implement a more revolutionary policy. It is in this period that Robespierre the speeches which are today considered his classic defense of revolutionary political theory, and it is also here where he makes the most substantial comments on the notion of constituent power.

The exact starting date of the Terror is itself controversial – being that it was only solidified into a concrete event after the fact – but can generally be dated to the immediate aftermath of Louis XVI's execution (Scurr 2006, 234). Under this interpretation, Danton becomes a key figure in establishing the Terror which would turn on him less than a year later for two reasons. First, after the Convention moved to declare war on England and the Netherlands, Danton called for a revival of the

Revolutionary Tribunal (Scurr 2006, 234).[36] Robespierre was eager to revive the institution, going one step further and arguing for the introduction of capital punishment for any acts "against the security of the state, or the liberty, equality, unity and indivisibility of the Republic" (Scurr 2006, 234). By reestablishing a revolutionary tribunal with the ability to issue capital punishment without appeal, one element of the revolutionary apparatus had been firmly established – the ability to permanently remove all elements of opposition. The second key moment also came down to Danton's initiative: he hoped to create a special committee capable of steering the Republic through its multi-front war. Once established, this committee would become the Committee of Public Safety, and although Robespierre did not initially receive a seat, its emergency powers would allow him to harness the Revolutionary Tribunal.

A third event can hardly be overlooked in the formation of Robespierre's political career: the complete defeat of the Girondins. Since Brissot and Robespierre had begun their infighting at the Jacobin Club over the issue of war immediately after the 1791 Constitution, the relationship between the two only deteriorated. "Beyond all such considerations lay Robespierre's perception that the Girondins were not as sincerely, thoroughly, uncompromisingly for the people as he was himself … he genuinely believed he had committed himself to the people, the poor especially, and was acting accordingly to save their Revolution for them" (Scurr 2006, 239). Since their victory over Robespierre and the rest of the Mountain in declaring war in 1791, the Girondins had suffered through a series of losses at Robespierre's hands: despite their protests, Louis XVI was executed, the Revolutionary Tribunal was reestablished, and the Committee of Public Safety was instituted without a single representative of the Girondin faction. As a result, they had been pushed to the fray of the revolution.

However, in targeting Marat, who by this time was widely celebrated by the radical elements of the Jacobins as *L'Ami du Peuple* after his enormously successful newspaper and enjoyed considerable support among the sans-culottes, the Girondins instigated their own downfall: the Revolutionary Tribunal, which was to decide on Marat's fate, was Jacobin. As Scurr recounts it:

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[36] Georg Büchner captured the irony of this moment in *Dantons Tod*: "die Revolution ist wie Saturn, sie frißt ihre eignen Kinder" (Büchner 2012)

> "His Jacobin Colleagues on the Tribunal not only acquitted him, but also crowned him with civic garlands. Marat was carried into the street on the shoulders of a jubilant crowd, who took him straight back to the Convention, where he mounted the tribune again. He was determined to take revenge against the Girondins" (Scurr 2006, 242).

The result of such a miscalculation ended with the complete expulsion and arrest of the Girondins, ultimately transferring political power to those victorious: Robespierre and the Mountain.

It was against this backdrop that the Constitution of 1793, or henceforth the Jacobin Constitution, came into existence. The Girondins were expelled on June 2nd; the first draft of the Jacobin Constitution was presented by the constitutional committee – now firmly under the control of Robespierre via Saint-Just and Couthon – on June 10th.[37] The expulsion of the Gironists cannot be overlooked as a major turning point in the political thought of Robespierre: as (Geuniffey 1989) has shown, "after June 2, Robespierre could identity the people with the Convention and thus dispose of the dualism operative since 1789; he could set aside his critique of representation in favor of a defense of power to make decisions. The people, it was assumed, now wanted what the Convention wanted, and the Convention wanted what Robespierre and the Committee of Public Safety dictated" (307). The act of expulsion thus represented the (artificial) creation of a general will synonymous with Robespierre's political ambitions and the removal of any limitations to his political power.

The speed by which the new constitution was created prompted one historian to comment wryly that "the Constitution of 1793, like the world itself, was created in six days" (in Scurr 2006, 246) and the former Minister of Justice opined that it was merely "drawn up by five or six young men in five or six days" (Hardman 1981, 193). The Constitution was radical in so far as it extended universal male suffrage – which Sieyes had been instrumental in preventing in the previous constitution – as well as enshrines the idea that those citizens were sovereign.

[37] As Madame Roland (1901), one of the intellectual leaders of the Girondins, noted from her prison cell: "However charming the written principles of a constitution may be, if I behold a portion of those who have adopted it in grief and tears, I must believe it to be no other than a political monster; if those who do not weep rejoice in the sufferings of the rest, I shall say that it is atrocious, and that its authors are either weak or wicked men" (283)

Although the Constitution was not written by the pen of Robespierre, his interventions in the Convention on debates on the Constitution give us insight into his constitutional thought. First, echoing the influence of Rousseau, Robespierre proposed that laws "should be promulgated 'in the name of the French people' instead of 'the French Republic' – that is, in the name of the sovereign, not the government" (in Thompson 1935, 368).[38] Here, it is clear that Robespierre conceived of members of the proposed legislature as being bound by the will of the people; in contrast to Sieyes' theory of representation, the deputies were to receive a mandate from the people, to which they would be bound. Furthermore, it was an explicit rejection of the formulation encapsulated in the 1791 Constitution, which still maintained that laws were promulgated in the name of the King, not the people.

It is useful to read the Jacobin Constitution as a response to the immediately prior Constitution proposed by Condorcet. The Girondist Constitution of 1793 was a highly technical document, detailing at length the voting procedures which would be used at every level of government. [39] However, in a text accompanying Condorcet's report on the Constitution titled "A Survey of the Principles underlying the Draft Constitution," he laid out the guiding principles of the constitution, crucially that "[The new constitution] must calm the disturbances without weakening the public spirit and allow the revolutionary movement to die down without being repressive and thereby aggravating it" (190). In this moment, Condorcet effectively doomed his own constitution – Robespierre and the Mountain, being in firm control of the revolutionary apparatus, did not yet see the Revolution as being complete; rather, precisely because the end of revolutionary government meant the end of their political power, the Mountain could not admit a constitution that would usher the end of the Revolution. This is the sense in which Condorcet wrote in a Pamphlet on June 1st, 1793, clearly responding to the expulsion of the Girondins,[40] that "Let us make revolutionary laws, but only to advance the moment when we no longer need them. Let us adopt

[38] Interestingly, after the Thermidorian Reaction, Sieyes would claim that errors in understanding the concept of sovereignty were responsible for the Terror, which was later reiterated by liberal theorists such as Constant, Staël, and Guizot (Furet 1989b, 149).
[39] Condorcet himself admitted that, while theoretically sufficient, his proposed voting procedure was too complicated to be feasibly implemented(McLean and Hewitt 1994, 26).
[40] While Condorcet was responsible for what is now referred to as the "Girondist Declaration" and "Girondist Constitution," he was not considered to be a core member of the Girondin and thus escaped their initial expulsion only to be arrested for protesting the expulsion.

revolutionary measures, not to prolong the revolution or shed more blood, but to bring the revolution to fruition and to speed up its conclusion" (Condorcet 2012, 195). The target of his critique was the events of August 10, which he viewed as the usurpation of political power by a radicalized minority (Baker 1989a, 208).

Perhaps indicating the extent to which the Jacobin Constitution was a political maneuver more than a legitimate attempt at creating a constitution, it contained no discussion of a voting procedure, entirely ignoring Condorcet's proposals (McLean and Hewitt 1994, 28). Indeed, Hérault de Séchelles, who along with Saint-Just wrote the Jacobin Constitution, expressed enormous doubts on the viability of his own constitution: speaking after a dinner, he lamented "But hasn't Condorcet's constitutional imbroglio forced us into issuing nothing but a popular impromptu? Our political Decalogue worries me. Will the people's sanction of laws proposed by the legislative body be effective in such a vast empire … Will democracy be contained within its limits?" (Hardman 1981, 173).

Conversely, on the other side of the political spectrum, the Jacobin Constitution was deemed not radical enough – while formally establishing rights for all French citizens and moving equality into the center of the new constitution, the *enragés* as a group of loosely affiliated publishers argued that the constitution did not adequately represent the interests of the *sans-culottes*. In a speech at the Cordelier Club on June 22, 1793, Jean Varlet bitterly contested the notion of "the people" presented in the Jacobin Constitution; instead, he claimed:

> "I have studied the people for four years, I have mingled in their gatherings. The *sans-culottes* of Paris, Lyon, Marseilles, and Bordeaux are the same: they alone constitute the people. We must therefore establish a line of demarcation between, on the one hand, the shop-keeper and the aristocrat and on the other the artisan … The people of Paris … must give a mandate to the Convention tomorrow; within 24 hours they must decree that all nobles will be dismissed from all the employments which belong to the *sans-culottes* alone. Tomorrow the people must triumph, tomorrow we must complete our work" (in Hardman 1981, 172)

In contrast to Robespierre's universalizing impulse – extending representation to all males in France – the *enragés* wanted a constitution that represented the interests of an economic subgroup which they understood as constituting the real French people.

Varlet's motion above was carried with considerable applause and led to the presentation of the "Manifesto of the *Enragés"* by Jacques Roux two days later at the Convention. Roux's claim was that the rhetoric of revolution contained in the Constitution was nothing more than empty promises. For example, "Liberty is put a vain phantom when one class of men can starve each other with impunity. Equality is but a vain phantom when the rich exercise the power of life and death over their fellows through monopolies … it is only by putting foodstuffs within the reach of the *sans-culottes* that you will attach them to the Revolution and rally them around the constitutional laws" (Hardman 1981, 173). In perhaps the most famous and incisive moment of his speech, Roux directly addressed Robespierre's faction:

> "Deputies of the Mountain, had you but climbed from the third to the ninth floor of the houses of this revolutionary city you would have been touched by the tears and groans of a vast populace without bread and clothes, reduced to this state of distress and misfortune by speculation and hoarding because the laws have dealt cruelly with the poor, because they have only been made by the rich and for the rich" (Hardman 1981, 174).

The implication of this speech is that, although the Mountain has begun to move in the correct direction in securing liberty and equality for the people, at the same time the deputies had neglected the concrete needs of the very poorest in the city.

Precisely because Robespierre viewed Roux and the *enragés* as a threat to the Mountain's political position, he had the good sense to denounce him in the Jacobin club on August 5th, 1793 and then immediately after incorporate their ideas into his revolutionary program through policies such as the Law of General Maximum. Speaking at the Jacobin club, Robespierre argued that "those who go around preaching against the Mountain and against the Convention are the only enemies of the people … Do you suppose that a priest who, in concert with the Austrians, denounces the finest patriots can possibly have pure motives or legitimate intentions?" (Richet 1989, 340). On another occasion, Robespierre denounced Roux as "trying to saddle the patriotic party with modérantisme, and thus trying to destroy public confidence in the government" (Thompson 1935, 377).[41] From this, its clear that Robespierre already viewed himself and his supporters as being the true representatives of the general will – anyone who attacked his position would become ipso facto an enemy of the people.

[41] Already on June 26th, Robespierre had made his feelings on the enragés clear: there were three enemies of the state, "Austria, Spain, Pitt (the royalists and émigrés), the *Brissotins*, and Jacques Roux" (Thompson 1935, 378).

However, it had a second consequence: Robespierre had created a pincer out of both moderate and extremist opposition by rejecting all policies which were not his own. While this suppressed his political opposition, it simultaneously meant that the revolution was in the hands of the Mountain.

Thus, this was the constitution that was voted on a month after it was accepted by the Convention in all areas of France which were under the authority of the Parisian government. In what would appear a resounding victory, it received 1,801,918 votes for and only 11,610 against through a vote carried out with universal male suffrage; it is important to note, however, that the Montagnard Constitution was never actually applied; or, more accurately, the moment it was approved, it was subsequently suspended in favor of revolutionary government. This action was, even within the limits of the constitution that had been drafted by the Mountain, beyond the constitutional order: suspending the constitution was "strictly illegal"(Baczko 1994, 28). Instead of taking the overwhelming majority vote to be an indicator of the people's favor towards the constitution, it was instead seen as an indication of their support to the revolutionary politics of the Mountain (Woloch 1994, 313). Thus, some historians have speculated as to whether the Jacobins were at all sincere in drafting a new constitution, or if it was merely a way to cover the tensions created by the *journée* of May 31st (Hardman 1981, 177).

A different way of approaching the suspension of the Jacobin Constitution would be to view the action as a paradoxical extension of the principles established in the Revolution of 1789. As Baczko (1994) has argued, "The doctrine of the illimitable power of the people devised in 1789 could thus serve, if not as a precedent, at least as a reference point for the establishment of revolutionary government, which is to say a government without limits. Suspending the constitution could thereby become a paradoxical way to wield the constituent power, the terrorist laws simply the exercise of the illimitable sovereignty in the name of public safety" (29). In this view, "The 'constituent power,' Sieyes' discovery in 1789, was the expression of this limitless sovereignty. In proclaiming the rights of man and of the citizen, and giving itself a constitution, the nation at once affirmed its sovereignty and freely set limits on that sovereignty by accepting constitutional restraints" (Baczko 1994, 28). As a result of these limits being self-imposed, they could just as easily be removed.

3.5 "Revolutionary for the Duration of the War"

Two events helped to further radicalize the Robespierre and other members of the Mountain: first, Danton was removed from power on the Committee of Public Safety on July 10th, creating a power vacuum by depriving the committee of its most famous member. Second, and most important for the immediate history, Marat's murder on July 13th created the image of internal dangers to the more radical members of the Jacobins. As his trial in the Revolutionary Tribunal at the request of the Girondins had shown, Marat was one of the most charismatic and emblematic members of the Jacobins, particularly adored by the people themselves. As Thompson (1935) notes, following his death, "there was an outburst of public affection, even greater than that which accompanied the death of Mirabeau" (380). However, it was not his death in itself that radicalized members of the far left; rather, it was the circumstances: Charlotte Corday had murdered Marat intending to seek revenge for the Girondins. Robespierre was quick to take advantage of the situation, and by the 26th of July, Robespierre was elected to the Committee of Public Safety with the intent of bringing the Girondins to stand trial before the newly reestablished Revolutionary Tribunal (Thompson 1935, 382).[42]

The structure of the Committee of Public Safety was such that it must be re-elected every month by the Convention. Originally, the name derives as a euphemism for a *commission d'exécution*, which was meant to reflect the executive power which would be held by the committee; instead, fearing that the name was too provocative, the name Committee of Public Safety (*salut public)* emerged as a compromise (Thompson 1935, 384). Once Robespierre was elected to the Committee, it began a rapid expansion of its authority through measures passed by the convention: first, on July 28th, the ability to issue arrest warrants; second, on August 2nd, it was endowed with unconditional secret service funds; third, on September 13th, it was given the authority to nominate members of other committees; and most importantly, on April 17th of the following year, the Committee subordinated all ministers to *commissions exécutives*, who were to directly report to the Committee instead of the Convention (Thompson 1935, 386).

[42] For a further discussion of the events following Marat's murder, see (Gottschalk 1927).

There are two important things to note here: first, that the expansion of powers given to the Committee were passed in the Convention – even if members there were privately opposed to the policy, the Mountain itself was only a small minority in the Convention. Second, that each of these powers was a clear violation of the principles of representation and popular sovereignty established in the Constitution of 1793 – they could only be justified under a notion of revolutionary government which supplanted the very legal foundation upon which the constitution rested.

The English historian Alfred Cobban has advanced the thesis that while "Burke and Rousseau had foreshadowed the new ideas, Sieyes carried the theoretical development of the idea of national sovereignty much further, but it required the catalytic agency of actual events to precipitate the new ideology" found in the political thought of Robespierre (Cobban 1946, 73). He goes on to claim that "the new doctrine of national sovereignty, it may be suggested, is the key to the policy of the Committee of Public Safety, and to that of Robespierre as its member" (73). However, the concepts of national sovereignty advocated by Sieyes and Robespierre are radically different on account of their divergence on constituent power: while Sieyes turns to the Third Estate as the concrete, historical embodiment of the French Nation, Robespierre viewed the revolution as a necessary mechanism for constituting the Nation. More than a continuation or radicalization of Sieyes' thought, Robespierre had turned the concept on its head.

However, it was Saint-Just and not Robespierre who declared that "the provisional government of France is revolutionary for the duration of the war" on October 10th, 1793 (*19 vendémiaire*) and was responsible for the subsequent decree of the convention placing the newly ratified constitution under erasure (Hardman 1981, 180). His justification for doing so in a speech immediately preceding the reading of the declaration was steeped in the language of sovereignty: "You have to punish not only the traitors but even those who are neutral; you have to punish whoever is inactive in the Republic and does nothing for it: because, since the French people has declared its will, everyone who is opposed to it is outside the sovereign body; and everyone who is outside the sovereign body is an enemy" (Hardman 1981, 180). As a result, "The constitution cannot be implemented; people would use it to destroy it. It would protect attempts against liberty, because it would lack the force necessary to repress them …

the sword of justice must stride everywhere rapidly and your arms must be present everywhere to prevent crime" (Hardman 1981, 180). His justification is interesting in that Saint-Just appears to believe that the constitution is too good for the current state of the revolution and that the people must be prepared for the liberties which are contained in it.

The Counter-Revolution in France was one of the largest tasks for Robespierre on the Committee of Public Security, and one of the four roles he ascribed to any proper government (Thompson 1935, 400-405). Thus, by November, Robespierre could argue that "it will be necessary to dispatch all over the Republic a small number of strong commissioners, armed with sound instructions, and above all with good principles, in order to restore public opinion to unity and republicanism: this is the only way to bring the Revolution to an end in the interests of the people" (Thompson 1935, 400-401). As a result, it became clear that the general will had to be formed through revolutionary means: while Robespierre believed that the Constitution of 1793 had been the work of a unified people, participation in the vote had been limited to areas under the Convention's authority. The internal struggle with counter-revolutionaries and monarchists in Lyon, Bordeaux, or Toulon meant that there was an internal barrier to the full exercise of popular sovereignty. It is precisely this internal dissent that the Committee of Public Safety had to eradicate before it could be said to speak for the entirety of the French people.

3.6 On the Principles of Revolutionary Government

Out of members of the Committee of Public Safety, it was both Robespierre and Saint-Just who can be said to have championed the Terror as a means of creating the unity of will. In a significant speech given on December 25th, 1793, Robespierre echoed Caesar in claiming in the convention that "nothing has been done, so long as there remains anything to do" – while critics of the Committee have been urging a return to the Constitution of 1793, Robespierre articulates a theory of revolutionary government echoing Saint-Just's earlier justification. And while "the constitutional vessel was not built to stay in dry dock forever," he asks "should it have been launched in mid-tempest, into unfavorable winds?" (Robespierre 2007, 99). Interestingly, this would seem to imply that the Constitution was not robust enough to survive when faced with internal

and external dangers – the only way to protect the constitution was to maintain its suspension.

Robespierre asserts at the outset that his government is based on an entirely new set of political principles: "The theory of revolutionary government is as new as the revolution which brought it into being. It should not be sought in the books of political writers" (Robespierre 2007, 98-99). It is here that Robespierre introduces a dichotomy between revolutionary and constitutional government: "The object of a revolutionary regime is to found a republic; that of a constitutional regime is to carry it on. The first benefits a time of war between liberty and its enemies; the second suits a time when freedom is victorious, and at peace with the world" (Thompson 1935, 439). However, the revolutionary government – acting outside of the constitutional order – still has to follow rules "all drawn from justice and public order. It has nothing in common with anarchy or disorder; its purpose on the contrary is to suppress them, to introduce and consolidate the rule of law. It has nothing in common with arbitrary rule; it should not be guided by individual passions, but by the public interest'" (Robespierre 2007, 100). Thus, the revolutionary government carried out in accordance with the abstract principles of "public interest," "justice" and "public order" – empty signifiers except to indicate to the members of the Convention that Robespierre did not view himself as having no limits to his authority.

Here, there is an immediate political justification for his remarks: a return to the constitutional regime would mean the abolishment of the Committee of Public Safety and, therefore, the dissolution of Robespierre's major instrument of power. This is clearly the case when Robespierre states "reaction is to moderation what impotence is to chastity, and exaggeration is to energy what a craving for drink is to a health thirst" – the implication that the more moderate actors in the revolution such as Danton and Desmoulins were as guilty as those who had cooperated with England (Thompson 1935, 440).

It is in a major speech given in the Convention – after a period of protracted silence – that Robespierre attempts to present a systematic vision of revolutionary government. Later published as *Rapport sur les principes de morale politique qui doivent guider la Convention nationale dans l'administration intérieure de la*

République, Robespierre's principle objective is to answer the simple question, "What is our aim?" His answer is that it is "the peaceful enjoyment of liberty and equality, and the reign of that eternal justice whose laws are engraved, not on marble or stone, but in the hearts of every man – whether the slave who forgets them, or of the tyrant who denies their truth" (Scurr 2006, 274-275). So far, this speech would be wholly unremarkable – how many times had liberty and equality already been named as the goals of the Revolution? -- if it were not for Robespierre's insistence that it would take nothing less than the *virtu publique,* or "a love of one's country, and of its laws" (Thompson 1935, 451). He goes on to explain, "the French are the first people in world-history to establish a real democracy, by inviting all men to share equality, and the full rights of citizenship" – in other words, the universal (male) suffrage, which he had championed since 1789, was the first step to establishing *vertu*.[43]

Robespierre then asks rhetorically "What nature of government can achieve these prodigies [of vertu]? Only democratic or republican government: these two words are synonymous … Democracy is a state in which the sovereign people, guided by laws which are its own work, does for itself all that it can do properly, and through delegates all that it cannot do for itself" (Robespierre 2007, 111). However, "to found and consolidate democracy among us, to achieve the peaceful rule of constitutional law, we must first end the war of liberty on tyranny and successfully weather the storms of the revolution: such is the goal of the revolutionary system you have adopted" (Robespierre 2007, 111). Thus, under Robespierre's conception, *vertu* is both the necessary condition in conjunction with revolutionary government of bring about the Republic, but it is also simultaneously the moral underpinning of that very Republic.

However, it is the second step of this argument which explicitly links Robespierre's revolutionary program with the suspended constitutional regime: "if the basis of popular government in time of peace is virtue, its basis in a time of revolution is both virtue and intimidation [*terreur*] – virtue, without which intimidation is disastrous, and intimidation, without which virtue has no power" (Thompson 1935, 452). This analytical move allows Robespierre to repurpose the tools of oppression in the name of a virtuous cause – indeed, his argument is the much stronger claim that virtue requires

[43] Upon hearing Robespierre discuss *Vertu*, Danton reportedly quipped "there is no *Vertu* more substantial than what I show my wife every night!" (Hampson 1978, 163).

terreur in order for it to have any force. Thus, there is no contradiction within his system of thought when Robespierre claims "The revolution's government is the despotism of liberty over tyranny" (Robespierre 2007, 115) – for as long as the ends of despotism include the realization of the democratic government founded in vertu, despotism is only a means of achieving that end.

Thompson (1935) has argued that the lack of concrete policy proposals in his speech means that it can only have had two intended purposes: one the one hand, that it was "to secure a vote of confidence in the government," increasingly under attack from the newly returned Danton, and that broad generalities such as *virtu* and *terreur* were ways of attracting popular support; on the other, that this speech was meant as a warning shot to figures such as Hébert, Chaumette, Fabre, and Danton, who would have likely understood they were the likely targets of the coming Terror.

The arguments set forth in Robespierre's Februrary 5th speech were rearticulated by Saint-Just just three weeks later on February 26th. He declared "the Republic is built on the ruins of everything anti-republican. There are three sins against the republic: one is to be sorry for State prisoners; another is to be opposed to the rule of virtue; and the third is to be opposed to the Terror" (Scurr 2006, 276). Similar to Robespierre's speech, it would have been obvious to those listening that Danton and his associates were guilty of all three of the sins laid out by Saint-Just – this speech would have signaled to the Convention exactly how they should vote on Danton's arrest.[44]

3.7 Robespierre and the Supreme Being

Out of all the numerous festivals of the French Revolution, it was the Festival of the Supreme Being which has become almost synonymous with the revolutionary career of Robespierre: to his apologists, it represents an articulation of genuine revolutionary ideals; to his critics, the festival was the culmination of Robespierre's aspirations to a

[44] For a discussion of Robespierre's role in Danton's arrest and trial, see (Scurr 2006, 280-283). For a discussion of Danton's incredulity at the whole affair, see (Hampson 1978, 150-180): resigned to his fate, Danton's last words were reportedly "Above all, don't forget to show my head to the people: it's worth seeing" (174).

dictatorship. However, as Ozouf (1988) has argued in her work on revolutionary festivals, festivals were an elaborate staging, "aimed at spontaneity, yet they were really a combination of precautionary and coercive measures" (11). The people were made to participate in a way that reflected the particular revolutionary ideals of the organizer, thus giving a performative articulation to that system of thought.

The speech given marking the start of the worship of the Supreme Being on May 7, 1794 came only a month after Danton's public execution and was meant to launch a new era in revolutionary politics. It came after a period of complete silence from Robespierre in the Convention, his attendance being unrecorded for just over three weeks (Thompson 1935, 485). Robespierre himself was not the originator of the term *l'Être Suprême* for the new deity – he preferred the term 'Immortal Legislature' – but rather lifted the term from the 1793 Constitution and which was proposed by Pomme (Thompson 1935, 489). As Thomspon (1935) notes, when Robespierre delivered his address to the convention, his reputation "was by now so great that the occasion was less like a parliamentary debate than the first performance of a new play by the dramatist of the hour" (490).

Once again, Robespierre began his speech with a reference to Rousseau: "Nature tells us that man is born for freedom: the experience of centuries shows us man enslaved" (Thompson 1935, 490). Through a return to civic religion, Robespierre hopes to lead the revolution in "a transition from the reign of crime [despotism] to the reign of justice" (Thompson 1935, 491). Thus, civic religion marked the possibility of return to normal, constitutional government – the reign of justice being a characteristic of non-revolutionary government. At the center of his new religion – and juxtaposed to the now tainted Catholicism associated with the Counter-Revolution – was a return to nature: "Nature is the true priest of the Supreme Being: his temple is the universe; his worship, virtue; his feasts, the happiness of a great people assembled under his eyes, to renew the pleasant ties of universal brotherhood, and to present the oblation of sensitive and pure hearts" (Thompson 1935, 493).

The Cult of the Supreme Being was not widely accepted in the areas of France outside of Paris – it had existed before the Festival without much fanfare; however, two events rapidly changed that. First was the attempted assassination of Robespierre on

May 23rd by Admiral. The second event happened not a day later – a young girl was caught in an attempt to assassinate Robespierre as well (Scurr 2006, 293). With two assassination attempts within one day, Robespierre -- already one for sensing intrigue all over – immediately wrote to Saint-Just that "liberty was exposed to fresh dangers" (Thompson 1935, 500) and began to use the incidents as political capital in the Jacobin club. In a speech later that night, he proclaimed "We swear by the daggers already reddened with the blood of the Revolution's martyrs [implied here is of course Marat], and recently sharpened for us too, to exterminate every single one of the criminals who want to rob us of happiness and liberty" (Scurr 2006, 295). This mass hysteria and the invocation of royalist plots for the assassination of the Jacobin leadership led to his appointment as the President to the Convention on June 4 (Thompson 1935, 503). It was through his position as President to the Convention that Robespierre was able to preside over the first celebration of the Cult of the Supreme Being on June 8th.

For Scurr, "the joyous Festival of the Supreme Being and the dreadful Law of 22 Prairial were all to compatible. Together they aimed at realizing the republic of virtue that Robespierre dreamed of" (Scurr 2006, 298). Critically, the Festival of the Supreme being was meant to display the characteristics of the post-revolutionary utopian society – replacing the rigidly hierarchical processions which took place before 1789, the procession in Paris marking the opening of the Festival was instantiated such that individuals representing all levels of society were included (Ozouf 1988, 106). Importantly, on the day of the festival, the symbols of the revolution were hidden from the public: where the guillotine once stood, the people of Paris saw instead a great number of flags to represent their patriotism (Ozouf 1988, 111). Thus, "the festival was an indispensible component to the legislative system, for although the legislator makes the laws for the people, festivals make the people for the laws" (Ozouf 1988, 9). The Festival of the Supreme Being can thus be read as the final closure to the puzzle of constituent power in Robespierre's thought: a year after giving the people a constitution, the Festival of the Supreme being represents the first moment where the post-revolutionary people can be said to exist.

In a speech at the Jacobins on July 9 (21 Messidor), Robespierre began to use his concept of virtue to discredit his former political enemies. For, it was Necker who was a "tyrant in his own home," and Roland, who Robespierre claimed was

"diametrically opposed to heroism and humanity" (Scurr 2006, 308). In some sense, *vertu* became a retroactive justification for the elimination of his political opposition in the years leading up to the present.

3.8 A Revolutionary Dénouement

The month before his death was spent in extreme solitude – despite attendance records to the contrary, it would appear that Robespierre neglected to attend committee meetings for the entire month, thereby opening a political vacuum for his increasingly large list of opponents (Thompson 1935, 540-546). On the one hand, members of the Committee of Public Safety such as Carnot who wrote in April "woe to a Republic in which the merit of a single man, or even his virtue, has become indispensable" (Thompson 1935, 547). But it was ultimately Robespierre's devotion to the goals of the Revolution, couched as they were in the language of a sovereign people, that ultimately alarmed his opposition. The day before the arrest, Robespierre told the Convention:

> Remember that, unless justice alone rules in our Republic – love of equality, and love of the fatherland – liberty is a mere name. People! You are feared, you are flattered, and yet you are despised. They call you Sovereign, and they treat you as a slave. Remember that, where justice ends, there begins the arbitrary rule of officials. (Thompson 1935, 561).

Importantly, throughout his speech, Robespierre never once makes reference to the Constitution of 1793; to his skeptics, it would appear as if the revolutionary government were doomed to continue ad infinitum, with a renewal of the Terror. As he continued his speech, he demanded the continued unmasking of those "tyrants, men of blood, oppressors of patriotism" who were preventing the completion of the Revolution (Scurr 2006, 312). It was in this moment that he went from leader of the Jacobin Club to being denounced as a dictator within the club.

Yet even the final hours of Robespierre's life gave rise to a constitutional crisis. After being arrested by the convention, Robespierre was declared *hors la loi*, or outside the law. An immediate consequence of declaring Robespierre outside the law was that he was no longer guaranteed the protections afforded to a citizen – he could be killed on sight (Jones 2014, 704). As a result, he was no longer taken to be a representative of the people; indeed, he could no longer legitimately command the small army which was backing his restoration (Thompson 1935, 576). Thus, in his last moments, Robespierre

was faced with an issue of legitimacy: if he were to continue to resist the orders of the convention, in whose name could he act? In contrast with his last speech at the Convention, where he could identify himself as the personal embodiment of universal Justice (Anderson 2013, 282), Robespierre had found himself in a state of exception. Indeed, by the time that he was captured forces loyal to the Convention, it was possible for passersby to exclaim "Even if he were Caesar, he should be thrown into the gutter!" (Thompson 1935, 579). His execution the following day not only signaled the end of Robespierre the man, but also that of his theory of revolutionary government.

CHAPTER 4: CARL SCHMITT'S APPROPRIATION OF CONSTITUENT POWER

"Non est potestas super terram quae comparetur ei" – Job 41:24

The previous two chapters of this thesis have been devoted to reconstructing the theory of constituent power by examining its origins in the history of the French Revolution, particularly in its articulation by Sieyes and Robespierre. The following chapter skips nearly a century and a half to the constitutional theory presented by the German legal scholar Carl Schmitt. While there were certain broad similarities between the two periods – most notably looming economic crisis and political upheaval – this chapter takes a different approach to the previous two: instead of seeking to situate Schmitt's use of constituent power within the discursive context of the Weimar Republic, I first reconstruct Schmitt's concept of constituent power as articulated in his *Verfassungslehre* (1928b); second, I argue that constituent power acts as a key for understanding wider constitutional and political concepts within Schmitt's oeuvre; and lastly, I examine the points of divergence between Schmitt and Sieyes, whom Schmitt cites as the source of his theory.

At this point, one might ask why it is necessary to study a theorist once referred to as the "Crown Jurist of the Third Reich" (Können 1995; Rithers 1989), one who leveraged his legal and political thought to justify the National Socialists' rise to power (C. Schmitt 1934). Indeed, even as late as 1986, Habermas (1989) predicted that Schmitt would not have "a similar power of contagion in the Anglo-Saxon world" compared with Heidegger on account of the themes of Schmitt's writings (135). However, it would appear that Habermas underestimated the Anglo-Saxon willingness to return to Schmitt: John McCormick (1998a; 2012; 1994; 1997; 1998b), William Scheuerman (1998; 1999), and David Dyzenhaus (1998; 2007; 2012) were integral in starting the deluge of Schmitt studies which has only picked up pace in recent years.[45] As a result, it is no longer possible to ignore Schmitt's intellectual legacy, particularly in regards to key legal concepts such as constituent power.

[45] For a broad overview of the Schmittian resurgence in Anglo-Saxon academia, see (Caldwell 2005) and (Berstein 2011).

As Maus (1998) has argued, scholarly work on Schmitt tends to focus on his "superficially 'political' writings" such as *Der Begriff des Politischen* and *Politische Theologie* at the expense of his legal writings (196). Furthermore, as is still common today, attempts at a biographic reading of Schmitt's work creates a false dichotomy whereby "[his] theory is either reduced to an option based on political theology or understood as a whole in terms of his relationship to National Socialism" (196). With Maus' warning in mind, this paper takes a different route: by first locating constituent power at the center of Schmitt's thought, I am to show that it is precisely his misreading of Sieyes which systematically permeates his thinking in public law. Thus, instead of following Böckenförde's (1988) oft-repeated dictum that "der Begriff des Politischen [ist der] Schlüssel zum Staatsrechtlichen Werk Carl Schmitts" (283), I will instead aim to show that his conceptions of dictatorship, representation, pouvoir neutre, and sovereignty are all predicated in the first instance on a theory of constituent power.

4.1 The Concept of the Constitution

Schmitt begins his *Verfassungslehre* (1928b) by noting that his work deals specifically with an analysis of "die Verfassungslehre des bürgerlichen Rechtstaates" (IX), the type of government he claims is dominant internationally and finds a particularly strong articulation within the Weimar Constitution of 1919.[46] By focusing on a specific type of constitutional regime, Schmitt claims "deshalb schien es auch zweckmäßig, in den Beispielen vor allem auf die klassischen Ausprägungen französischer Verfassungen zu verweisen" (IX), thereby allowing Schmitt to situate an analysis of "überlieferten Formeln und Begriffe" developed in French constitutional debates within an analysis of the Weimar Constitution. It is precisely the appropriation of these concepts that I will aim to explicate in the first section of this chapter.

Key to Schmitt's constitutional theory is the concept of a "Positive" theory of the constitution, in which the constitution is treated as a "Gesamt-Entscheidung über Art und Form der politischen Einheit" (20). But what exactly does Schmitt mean with the

[46] Given the linguistic ambiguities in Schmitt's writing (see for example the discussion on the meaning of "über" in McCormick 1998a) and the presumed audience of this thesis, I have opted to leave quotations in the original German. This also allows for a more uniform analysis of the linguistic continuities between arguments presented in different texts (section 4.3 of this thesis), which might be disrupted when using texts prepared by different translators.

phrase "Art und Form"? This phrase can be best interpreted through a reference to the Relative theory derided in the previous section: under the relative theory, the constitution can be reduced to a series of constitutional laws (Verfassungsgesetze) included under the broad rubric of "constitution." To follow his examples from the Weimar Constitution, these laws can then range from "Das Deutsche Reich ist eine Republik" (Artikel 1 Abs. 1), to a particular favorite of Schmitt's, "Die Lehrer an öffentlichen Schulen haben die Rechte und Pflichten von Staatsbeamten" (Artikel 143) (12). The problem according to Schmitt is that each of the constitutional laws is, at least theoretically, supposed to be equal in importance: "Diese relativierende, sog. Formale Betrachtungesweise macht vielmehr unterschiedslos alles, was in einer 'Verfassung' steht, gleich, d.h. gleich relativ" (11). Evoking his contemporary Hans Kelsen without citing him, Schmitt continues noting that by including a disparate list of "Einzelheiten" in the constitution, Kelsen would be forced to interpret each as a "Grundnorm" or "Gesetz der Gesetze" without taking into consideration the fundamental decision contained in "Das Deutche Reich ist eine Republik."[47] Thus, what one ought to consider an important decision on the part of the German people – here, he uses the phrase "die verfassunggebende Gewalt des deutschen Volkes" – is instead reduced to the same level of significance as a law covering the rights of teachers, which is to say trivial.

Schmitt further rejects the position advocated by Jellinek**,** operating within the same relative conception of the constitution, in which "Das formale Merkmal der Verfassung und (underschiedslos) des Verfassungsgesetzes wird darin gefunden, dass Verfassungsänderungen einem besonderen Verfahren mit erschwerten Bedingungen unterliegen" (16). Such interpretations of constitutional laws are meant to emphasize their continuity and stability, particularly in protecting specific rights guaranteed to citizens. However, in looking to the moment of exception,[48] Schmitt points to the stringent requirement for change as itself "der wesentliche Kern und der einzige Inhalt der Verfassung": it is the only content which cannot be changed through constitutionally legitimate political tactics (19). Thus, he writes every single constitutional guarantee contained in the Weimar Constitution, including "Das Deutsche

[47] For an early statement of Kelsen's legal theory, see (Kelsen 1992). For a comparison of Schmitt and Kelsen in both the German Empire and the Weimar Republic, see (Caldwell 1997), particularly chapters two and four.

[48] Or, to follow Kennedy's (2004) summation, "the norm is only normal by reference to an exception" (80).

Reich ist eine Republik" must be logically followed by "vorbehaltlich des Art. 76 RV," the article which detailed the requirements for constitutional change (19).[49] For Schmitt, such a conception of the constitution cannot be upheld, since it would allow the authorities delineated in Art. 76 to change the fundamental nature of the political community without reference to the power that gave itself the constitution in the first instance.

In contrast to the Relative constitutional theory outlined above, Schmitt argues there must be a clear delineation between the constitution as such and the laws emanating from the constitution (Verfassungsgesetzte). This is achieved through a return to the concept of constituent power: "Die Verfassung im positive Sinne entsteht durch einen Akt der verfassunggebende Gewalt" (21). Instead of being conceived as a series of norms which can be isolated individually, "Der Akt der Verfassunggebung … bestimmt durch einmalige Entscheidung das Ganze der politischen Einheit hinsichtlich ihrer besonderen Existenzform" (21).[50] In other words, the constitution is the totality of all key *political* decisions of an entity, with the fundamental being juxtaposed with the concept of ordinary law represented in the form of Artikel 143 ("die Lehrer an öffentlichen Schulen").

The phrase "hinsichtlich ihrer besonderen Existenzform" points to the temporal relation between the subject of constituent power and its deployment: for Schmitt, "Es ist nicht so, dass die politische Einheit erst dadurch entsteht, dass eine 'Verfassung gegeben' wird" (21). Rather, "Dieser Akt [der verfassunggebenden Gewalt] konstituiert Form und Art der politischen Einheit, deren Bestehen vorausgesetzt wird" (21). This has five implications for Schmitt's theory of constituent power: first, Schmitt holds that constituent power assumes the presence of a political entity which can wield it – the subject does not constitute itself but rather constitutes the "Form und Art" which characterizes their political unity. Second, this implies that the questions contained in

[49] Artikel 76(1): "Die Verfassung kann im Wege der Gesetzgebung geändert werden. Jedoch kommen Beschlüsse des Reichstags auf Abänderung der Verfassung nur zustande, wenn zwei Drittel der gesetzlichen Mitgliederzahl anwesend sind und wenigstens zwei Drittel der Anwesenden zustimmen. Auch Beschlüsse des Reichsrats auf Abänderung der Verfassung bedürfen einer Mehrheit von zwei Dritteln der abgegebenen Stimmen. Soll auf Volksbegehren durch Volksentscheid eine Verfassungsänderung beschlossen werden, so ist die Zustimmung der Mehrheit der Stimmberechtigten erforderlich."
[50] Cf. (Kalyvas 2008, 139-145).

the phrase "Form und Art" (which I will discuss in the next section of this chapter are held to be non-essential for the formation of a political unit. In other words, the political unit exists as a unity even without yet deciding on the nature of its political existence. As a result, there must be an additional criterion through which unification is achieved. Third, the constitution is entirely the product of the political subject who gives it: "Die Verfassung gilt kraft des existierenden politischen Willens desjenigen, der sie gibt" (22). There can be no other political subject who lends its authority beyond the true subject of constituent power. Fourth, it is the very existence of the political unit which, for Schmitt, endows it with constituent power: "Jede politische Einheit hat ihren Wert und ihre 'Existenzberechtigung' nicht in de Richtigkeit oder Brauchbarkeit von Normen, sondern in ihrer Existenz" (22). Schmitt thus links the question of unity to the sphere of the existential. Fifth, as a result of the above analysis, Schmitt claims that "Weil jedes Sein konkretes und bestimmt geartetes Sein ist, gehört irgendeine Verfassung zu jeder konkreten politischen Existenz" (23). This points to a plurality of constitutional forms, each reflecting a specific, concrete political existence. Thus, there can be no ideal constitutional form equally applicable to all political unities.

4.2 The Act of Constituent Power

In the previous section, I have provided a brief sketch of Schmitt's theory of the positive conception of constitutions ('der positive Verfassungsbegriff') in order to describe the object of constituent power. In this section, I will now turn to Schmitt's particular development of constituent power itself, and in the process describe its proper subject.

Schmitt offers the following definition of constituent power: "Verfassunggebende Gewalt ist der politische Wille, dessen Macht oder Autorität imstande ist, die konkrete Gesamtentscheidung über Art und Form der eigenen politischen Existenz zu treffen, also die existenz der politischen Einheit im Ganzen zu bestimmen" (76). Here, there are two things to note: first, in contrast to Rawls' (1971) theory of the original position, Schmitt emphases a concrete, historical decision which led to the creation of the constitution, which he identifies as the act of constituent power. Secondly, the outcome of such a decision is not bound by any normative criterion, as "eine Verfassung beruht nicht auf einer Norm, deren Richtigkeit der Grund

ihrer Geltung ware" (76). This is because the theory of constituent power offered by Schmitt operates beyond the sphere of "ratio und richtigkeit" and is instead concerned with "das wesentlich Existenzielle dises Geltungsgrundes" (76). As the act of constituent power is the fundamental act creating the very basis for all future law, it cannot be the case that the will is held to any pre-existing legal norms.[51]

As a consequence of Schmitt deriving all constitutional rules from the initial act of constituent power – or, as he puts it, "Aus den Entscheidungen dieses Willens leitet sich die Gültigkeit jeder weiteren verfassungsgesetzlichen Regelung ab" – he subsequently claims that the political will of the holder of constituent power remains alongside and over the constitution itself ("neben und über") (77). This means that Schmitt's subject of constituent power retains its authority, even once the constitutional order has been established on the grounds that it alone can intervene to settle moments of constitutional conflict and ambiguity. Moreover, precisely because Schmitt bases the origin of constitutional power on a concrete political unit, it follows that a legal order cannot dissolve that fundamental unity: "Die politische Entscheidung welche die Verfassung bedeutet, kann nicht gegen ihr Subjekt zurückwirken und dessen politische Existenz aufheben" (77). Thus, constituent power is not placed under erasure the moment a constitutional order is enacted; rather, the original, concrete decision of the political unit influences all future law.

Schmitt then delineates four historic subjects of constituent power: first, in the context of the Middle Ages, all constituent power was held to originate from the power of God, captured in the phrase "Alle Gewalt (oder Obrigkeit) ist von Gott" (77). Second, Schmitt considers the King as the subject of constituent power, particularly conceived as such in France after the Restoration. Schmitt rejects this conception of constituent power, precisely because a hereditary monarchy is bound by the rules of hereditary succession, as where the constituent power is supposed to be unbound in its decisions concerning political existence. Third, Schmitt considers the possibility of a

[51] This interpretation has been rehabilitated by Böckenförde (1992), in that "Verfassunggebende Gewalt ist diejenige (politische) Kraft und Autorität, die in der Lage ist, die Verfassung in ihrem normativen Geltungsanspruch hervorzubringen, zu tragen und aufzuheben" (94). In a footnote, Böckenförde tells us this differs from Schmitt in that Schmitt's interpretation was focused on political *decisions*, while his emphasizes "das Hevorbringen, Fortragen oder die Aufhebung des normativen Geltungsanspruchs der Verfassung" (94)

minority as the subject of constituent power. This is not a minority in the sense of a statistical minority in a democratic election; rather, Schmitt has in mind groups who claim to act in the name of the interests of the entire population. They can be the proper subject of constituent power, but only insofar as they have made the decision to reject "die liberale Methode der Mehrheitsentscheidung … sowie die Prinzipien des bürgerlichen Rechtstaates" (82).

However, Schmitt identifies the dominant conception of the subject of constituent power since the French Revolution as being the people ("das Volk"). This particular conception was shown for the first time in the American Declaration of Independence, in which the creation of new states was equiprimordial with the creation of their constitutions; and yet it was precisely the French Revolution in which Schmitt claims the true character of constituent power was first understood. In contrast to the American Declaration of Independence, the same French state existed both before and after the Constitution of 1791. Rather, the monumental change that "ein Volk nahm mit vollem Bewusstsein sein Schicksal selbst in die Hand und traf eine freie Entscheidung über Art und Form seiner politischen Existenz" by giving itself a constitution (78). For Schmitt, this occurred in the moment the Estates General transformed itself into the National Assembly, which was based on the constituent power of the people ("das seine verfassunggebende Gewalt ausübende Volk") instead of the King(78).

The next step in Schmitt's argument is to claim an essential division between people ("Volk") and nation based on his previous arguments on political unity. He defines a nation as "das Volk als politisch-aktionsfähige Einheit mit dem Bewusstsein seiner politichen Besonderheit und dem Willen zur politischen Existenz," while Volk is taken to mean "eine irgendwie ethnisch oder kulturell zusammengehörige, aber nicht notwendig *politisch* existierende Verbindung von Menschen" (79). This implies first that the Volk precedes the nation, and it does so through some sort of cultural or ethnic connection between the members, though Schmitt does not specify the exact nature of this supposed connection in his *Verfassungslehre*. Secondly, it shows that the nation is the necessary political unit for the exercise of the constituent power of the people: through its consciousness of its political existence, the Volk transforms into the

Nation.[52] It is precisely this transformation that Schmitt holds to be a necessary condition for constituent power.[53]

The exercise of the will of the people through constituent power is essentially unlimited in Schmitt's conception. Precisely because constituent power constitutes the legal system itself – originating in the act of deciding the "Art und Form" of political existence – there cannot be any legal norms or procedures which bind the range of acceptable conclusions. Thus, quoting Sieyes, Schmitt claims "Es genügt, dass die Nation will," regardless of the content of that which it wants. Thus, "an Rechtsformen und Prozeduren ist die verfassunggebende Gewalt nicht gebunden; sie ist 'immer im Naturzustande', wenn sie in dieser unveräußerlichen Eigenschaft auftritt" (79).[54] This would seem to imply that the conditions for the exercise of constituent power cannot be changed once the power has been exercised; and further, that in the binary of State of Nature on the one hand and political order on the other hand, the rules governing the latter cannot be subsequently applied to constituent power.

Lastly, Schmitt makes the argument that the state is not synonymous with the constitution (93). Rather, a constitution, being that it is derived from constituent power, "ist aus dieser Gewalt abgeleitet und kann deshalb nicht in sich selbst die Kontinuität der politischen Einheit tragen" (93). It is only in particular instances of revolution in which the continuity of the state can be disputed – only in such instances where the holder of constituent power has changed, for example from the monarch to the people

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[52] This is in direct contradiction with Volker Neumann (2015): "Was Sieyes zu den Nationen gesagt hat, gilt auch für Schmitts *Völker als Träger des verfassunggebenden Gewalt*" (109, italics mine). Schmitt's argument holds that the *Volk* is not the subject of constituent power, only a *necessary precondition* for the nation.

[53] See, for example, Schmitt's statement that "Die Lehre von der verfassunggebenden Gewalt des Volkes setzt den bewussten Willen zur politischen Existenz, also eine Nation voraus" (C. Schmitt 1928b, 79).

[54] The complete text of the section Schmitt is paraphrasing:

"Man muß die Nationen der Erde als Individuen auffassen, die sich außerhalb des gesellschaftlichen Bandes, oder wie man sagt, im Naturzustande befinden. Die Ausübung ihres Willens ist frei und von allen bürgerlichen Formen unabhängig. Da ihr Wille nur in der natürlichen Ordnung vorhanden ist, braucht es nur die natürlichen Eigenschaften eines Willens zu besitzen, um seine ganze Wirkung zu entfalten. Einerlei auf welche Art eine Nation will, es genügt, daß sie will; alle Formen sind gut, und ihr Wille ist immer das höchste Gesetz." Accessible at http://www.zum.de/psm/frz_rev/frz_siey.php3

(94). In such cases, the political unity has itself changed, meaning that the continuity of the state is in question; however, in instances where the holder of constituent power has remained the same, "die Kontinuität liegt dann in der gemeinsamen Grundlage, und weder völkerrechtlich noch staatsrechtlich kann die Frage der Kontinuität des Staates aufgeworfen werden" (93).

4.3 Constituent Power at the Center of Schmitt's Theory of Constitutional Law

Speaking at a Sonderseminar in 1986, German Constitutional lawyer and judge at the Bundesverfassungsgericht Ernst-Wolfgang Böckenförde (1988) presented the argument that Schmitt's Concept of the Political – specifically the Freund/Feind distinction – was the key to understanding Schmitt's theory of constitutional law.[55]Given that *der Begriff des Politischen* and *Verfassungslehre* were prepared at roughly the same time (286), there is undoubtedly continuity between the texts; however, in this section, I wish to challenge Böckenförde's argument and instead offer Schmitt's theory of constituent power as the key to understanding his constitutional thought. Furthermore, I aim to show that constituent power is the key to understanding Schmitt's concept of dictatorship, giving it wider explanatory power than the Freund/Feind distinction. To do this, I will adopt the same strategy as Böckenförde and provide several examples where Schmitt's concept of constituent power can provide better theoretical coherence.

However, before progressing to the examples, it is first important to review what is meant with Schmitt's Freund/Feind distinction. This distinction, Schmitt claims, is the fundamental categorization of the political sphere, irreducible to distinctions such as good and evil in the ethical sphere, or beautiful and ugly in the aesthetic. In contrast to other types of distinctions, Schmitt claims that the political signifies the highest degree of intensity.[56] The Feind need not be morally condemned; rather, for Schmitt (1963), "Er ist eben der andere, der Fremde, und es genügt zu seinem Wesen, dass er in einem besonders intensiven Sinne existenziell etwas anderes und Fremdes ist, so dass im

[55] Cf. the passing remark in (Münkler 1987) that "Für Thukydides ist deshalb – so wie spatter für Carl Schmitt – die ausschlaggebende Unterscheidung der Politik die zwischen Fruend und Feind" (43).
[56] As Schmitt (1963) put it, "die Unterscheidung hat den Sinn, den äußersten Intensitätsgrad einer Verbindung oder Trennung, einer Assoziation oder Dissoziation zu bezeichnen" (27).

extemen Fall Konflikte mit ihm möglich sind" (27). Thus, the Feind need not even be declared as an enemy; instead, it suffices that he could possibly become an enemy, that the possibility of an existential struggle with the enemy is always latent (34-35). Furthermore, Schmitt returns to the distinction between *hostis* and *inimius* to clarify that a Feind cannot be considered a private enemy *(inimicus*) – "Feind ist nur der öffentliche Feind, weil alles, was auf eine solche Gesamtheit von Menschen, insbesondere auf ein ganzes Volk Bezug hat, dadurch öffentlich wird" (29).

4.3.1 Dictatorship and Constituent Power

Schmitt's study on dictatorship begins like his *Verfassungslehre* with an analysis of the forms and contemporaneous usage of the term dictatorship. Writing in the 1920s, the term dictatorship had returned to German political discourse in the form of Marx's dictatorship of the proletariat (see McCormick 1998a, 220-221).[57] This dictatorship takes a transitory form and "dadurch erhält der wesentliche Umstand, der in der bürgerlichen Literatur zurückgetreten war, wiederum seine Bedeutung. *Die Diktatur ist ein Mittel, um ein bestimmtes Zweck zu erreichen*" (VI, italics mine). This is, for Schmitt, one of the defining characteristics of dictatorship in contrast to despotism: all dictatorships have the goal of making themselves superfluous by achieving a given goal, while despots seize power indefinitely (VIII).

The central result of Schmitt's historical study of dictatorship is the distinction between commissarial and sovereign dictatorships. The commissarial dictatorship is derived from the Roman practice of appointing an individual with the distinct goal of quelling a war or internal uprising. Critically, "er ist an Gesetze nicht gebunden und eine Art König mit unumschränkter Gewalt über Leben und Tot" (2). In other words, for the period following his appointment, the dictator stood above the law, able to use

[57] Schmitt's conception of the dictatorship of the proletariat is challenged by his former student, Otto Kirchheimer (1969b), who argues that it must be understood in less formalistic terms and instead as "[representing] the external reflection and final consummation of a process already completed beneath the cover of hitherto existing conditions" (22). The divergence here is striking: while Schmitt emphasizes sovereign dictatorships a moment of supreme decision and a means for bringing about the desired political order, Kirchheimer situates the dictatorship of the proletariat as being brought about by an unfolding dialectical process. As a result, it is not so much the will of the people, but rather the mode of production that triggers the sovereign dictatorship of the proletariat in his thought.

whatever means necessary to restore order.[58] But it is precisely the idea of restoring order which captures the essential characteristic of the commissarial dictator: while he is able to suspend the constitution, he is at the same time acting to preserve that very same constitution in the face of some existential threat. In short, "die Allmacht des Diktaturs beruht auf der Ermächtigung durch ein verfassungsmäßig bestehends, konstituiertes Organ. Das ist der Begriff der kommissarischen Diktatur" (130).

In contrast, Schmitt's theory of the *sovereign dictator* is in no way bound to the current constitutional order. This is because "die souveräne Diktatur sieht nun in der gesamten bestehenden Ordnung den Zustand, den sie durch ihre Aktion beseitigen will" (137): while the commissarial dictator is appointed to deal with a specific, concrete threat to the order, the sovereign sees the current order itself as the threat which must be overcome before the (true) constitutional order can be implemented. As Schmitt specifies, the sovereign dictator suspends a constitution not in the interest in saving it, but rather in order to create the necessary conditions for the introduction of a new constitutional order. Thus, while the two conceptions of dictatorship both conceive of themselves as temporary (in contrast to pure despotism), they differ drastically in their relation to their goals in relation to the existing constitutional order.

Given that Schmitt's differentiation between sovereign and commissarial dictatorship turns on their relation to the existing constitutional order, it should be no surprise that Schmitt looks to the theory of constituent power to explain the possible legitimacy of sovereign dictatorship:

> Das ist aber dann nicht der Fall, wenn eine Gewalt angenommen wird, die ohne selbst verfassungsmäßig konstituiert zu sein, trotzdem mit jeder bestehenden Verfassung in einem solchen Zusammenhang steht, dass sie als die begründende Gewalt erscheint, auch wenn sie selbst niemals von ihr erfasst wird, so dass sie infolgedessen auch nicht dadurch negiert werden kann, dass die bestehende Verfassung sie etwa negiert. Das ist der Sinn des pouvoir constituant (137).

Here, the concrete will of the subject of constituent power acts as the enabler of the powers of the sovereign dictator. In this section, Schmitt is clearly referencing the

[58] Schmitt (1928a) emphasizes this again in his discussion of Bodin: "Im Interesse des durch die Aktion des Diktators zu erreichenden Zweckes erhält der Diktatur eine Vollmacht, deren wesentliche Bedeutung in der Aufhebung von Rechtsschranken und in der Befugnis zu den nach Lage der Sache notwendigen Eingriffen in Rechte Dritter besteht" (39).

democratic theory of constituent power, as opposed to the monarchical or divine, as discussed in section 4.2 of this thesis. As such, it is "das immer vorhandene Volk" which is able to give "ein Mimumum von Verfassung" in order to justify the actions of the sovereign dictator (145). This results in the following formulation: "der kommissarsiche Diktatur ist der unbedingte Aktionskommissar eines pouvoir constitué, die souveräne Diktatur die unbedingte Aktionskommission eines pouvoir constituant" (146). Thus, we can trace back the concept of dictatorship to a theory of constituent power, which forms the basis for Schmitt's conceptual distinction between sovereign and commissarial dictatorship (Breuer 1984, 495).

It is important to note that in Böckenförde's article, he never once discusses nor cites Schmitt's *Die Diktatur* and therefore one can only read into his argument possible points of convergence. One possible reason for its complete exclusion is that the theory of dictatorship is difficult to reconcile with the Böckenförde's reading of the Freund/Feind distinction, in which he emphasizes that the distinction cannot be applied to domestic debates *within* the state except in exceptional situations.[59] However, as in other areas of Schmitt's thought, it is precisely with the exception that the proper domain of analysis begins – and in the domestic context of the Freund/Feind distinction, that is located squarely within the concept of dictatorship. Within the first page of *Die Diktatur*, Schmitt (1928a) has already referenced *dictatura seditionis sedandae*,[60] or the Roman practice of appointing a dictator in order to defeat internal insurrections. The very possibility of internal insurrections points to the continuation of the Freund/Feind distinction into the domestic sphere, and therefore directly contests Böckenförde's interpretation.

However, the extension of the Freund/Feind distinction into the domestic sphere is predicated on Schmitt's theory of constituent power and can be seen through his comments on high treason. Schmitt (1928b) holds that high treason is distinctly a possibility within the positive interpretation of constitutional theory (in contrast to ideal

[59] More precisely: that it would constitute a misunderstanding of Schmitt's thought to do so (Böckenförde 1988, 284). This stands in stark contrast to Habermas' (1989) analysis of the Friend/Foe distinction, in which "Domestic affairs too should be conceived in terms of the dangers posed by an enemy who threatens one's very existence" (129).

[60] See for example (Cohen 1957). The single most important example in antiquity remains the second dictatorship of Cincinnatus who was called to defend against Spurius Maelius' attempt to seize power (Agamben 1998; Lowrie 2010).

or relative described in section 4.1). In other words, high treason can only be intelligible in reference to the constitution as a whole, instead of the violation of individual laws (Verfassungsgesetze) contained within the constitution. In so doing, Schmitt refers directly back to the concept of constituent power, writing "es ist nicht das gleiche, ob ein Unternehmen nur dazu dient, die verfassunggebende Gewalt des Volkes in Bewegung zu setzen, also eigentlich nur rein Appell an das Volk ist, dessen verfassunggebende Gewalt durch einen Apparat von Organisationen und Kompetenzen erstickt sein kann, oder ob diese verfassunggebende Gewalt selbst beseitigt werden soll, und das Ziel des hochverräterischen Unternehmens eine Restauration des monarchischen Prinzips oder eine Diktatur des Proletariats ist" (121). Thus, the very notion of a domestic *hostis* is defined in relation to the subject of constituent power.

Lastly, one might argue that a theory of dictatorship is not within the confines of constitutional law proper – particularly within the Anglo-American context, the term dictatorship has become synonymous with tyranny, despotism, and authoritarian regimes, which are thought to lack constitutional order. In this understanding, constitutional law and dictatorship would be diametrically opposed concepts. However, Schmitt would address this claim in the following way: first, that the Anglo-American understanding of constitutional order is based on an ideal concept (Idealbegriff) of the constitution, in which "aus politischen Gründen wird als 'wahre' oder 'echte' Verfassung oft nur das bezeichnet, was einem bestimmten Ideal von Verfassung entspricht" (36). In the context of Anglo-American liberalism, "[Es] liegt nur dann eine Verfassung vor, wenn Privateigentum und persönliche Freiheit gewährleistet sind; alles andere ist nicht 'Verfassung'" (37). Thus, to dismiss the theory dictatorship from the domain of constitutional law would be to arbitrarily impose a set of liberal ideals onto the possible content of constitutional law and thereby violate one of the main principles of Schmitt's constitutional thought. Second, at the time of his writing both *Die Diktatur* and *Verfassungslehre*, dictatorship was a written part of the Weimar Constitution and therefore within the domain of constitutional law in the Weimar context. In particular, dictatorship was connected to the state of emergency ("Ausnahmezustand") through Art. 48, Abs. 2 RV through which the President could temporarily suspend other basic rights explicitly stated in the constitution. As a result, any complete analysis of the Weimar Constitution would have to include some analysis of the theory of dictatorship.

4.3.2 Schmitt's Theory of Representation

In Böckenförde's reading of Schmitt, the latter's concept of representation "ist … stets bezogen auf die politische Einheit des Volkes, d.h. den Staat, nich auf die Repräsentation der Gesellschaft gegenüber dem Staat und nicht auf die Repräsentation der Interessen *in* der Gesellschaft" (296). In other words, representation in Schmitt's thought already assumes the political unity of the Volk, which Böckenförde claims is achieved through the preexisting Freund/Feind distinction. This becomes particularly clear when he claims that "der Begriff der Repräsentation ist auch eher statisch gedacht, als Darstellung eines unsichtbaren, aber vorhandenen Seins, das durch Repräsentation sichtbar gemacht wird" (297).

This interpretation of Schmitt's theory of representation has the effect, however, of suppressing the function of constituent power in his theory. The conceptual relation can be established with regards to the form of Schmitt's argument in two ways: first, Schmitt's discussion of the theory of representation immediately follows his lengthy discussion of constituent power in *Die Diktatur* and is considered an extension of it (C. Schmitt 1928a)*;* and second, Schmitt draws heavily on Sieyes for his theory of representation (Kelly 2004), the latter of whom drew a line of continuity between the two concepts as a logical necessity.[61]

However, beyond these superficial points of continuity between the two concepts, Schmitt's concept of representation is the direct result of his theory of constituent power and importing Sieyes' distinction between pouvoir constituant and pouvoir constitué. The former, Schmitt claims, "ist einseitig im Naturzustande [und] ist an nichts gebunden", while the latter remains in a "Rechts(oder besser Pflicht-)zustande" (143). Precisely because Schmitt holds that constituent power always remains outside and over the established constitutional order, he must make recourse to a concept of representation in which the people's representatives receive some sort of

[61] In her chapter on "Sources of Schmitt's Theory of the State," Kennedy (2004) fails to mention Sieyes as an intellectual influence of Schmitt's. As a result, she sees *Begriff des Politischen* and *Verfassungslehre* as two fragmented texts, as where a return to constituent power as I am suggesting would unify the two (89).

limitation to their power while leaving the power of the people themselves untouched.[62] In other words, because the people (Volk) hold a form of unmediated constituent power owing to their position in the state of nature, representation is the means by which Schmitt can maintain the conceptual distinction between constituent and constituted powers. Schmitt had precisely this in mind when he wrote that "die politische Einheit des Volkes als solche [kann] niemals in realer Identität anwesend sein und [muss] daher immer durch Menschen persönlich repräsentiert werden" (205).

Supporters of Böckenförde's argument could claim that it is precisely on the issue of representation that Schmitt criticizes Sieyes for a democratic deficit in his theory: "Mit der demokratischen Lehre von der verfassunggebenden Gewalt des Volkes … hat Sieyes die antidemokratische Lehre von der *Repräsentation* des Volkswillens durch die verfassunggebende Nationalversammlung verbunden" (80). For Schmitt, the decision in 1791 to implement a constitution without a democratic vote on the constitution could not help but turn a democratic power into an aristocratic one, thus placing representation and constituent power as two diametrically opposed concepts. However, in this passage, Schmitt is explicitly rejecting the ability for the constituent power to be represented in deciding the "Art und Form" of their political existence. This is an analytically distinct moment form of representation from that which begins once the constitutional order has been created – for Schmitt, this is captured in the terminological distinction between "außerordentlichen Repräsentanten" of the constituent power and the constituted "Repräsentanten" (C. Schmitt 1928a, 144). As a result, it is still possible to maintain that representation can function to transcend the conceptual distinction between pouvoir constituant and pouvoir constitué.[63]

4.3.3 The Subordination of Pouvoir Neutre to Pouvoir Constituant

The next argument I will consider from Böckenförde deals with the "necessity of a pouvoir neutre" in the organization of a state (296). The role of a pouvoir neutre is

[62] For a juxtaposition of Schmitt's and Kelsen's views on representation, see (Neumann 2015, 71-74).

[63] As a consequence of this interpretation of Schmitt's theory, it cannot be the case that, as Kelly (2004) has argued, "representation provides the key with which to understand his densely structured constitutional argumentation" (114). Rather, Schmitt's concept of representation is analytically derived from his theory of constituent power.

precisely to prevent "das Eskalieren des Interessenwiderstreits und auch sonsitger Konfliktpotentiale zu einer Freund-Feind-Gruppierung und damit zu einer Infragestellung der politischen Einheit selbst hintangehalten wird" (296). Since political parties in a parliamentary system compete within the constitutionally defined order, there remains the potential for irreducible conflict between the parties. Thus, to follow Böckenförde, Schmitt needed to find a pouvoir neutre who could intervene and subdue the political conflict before it approaches the level of Freund/Feind. In the specific constitutional context of the Weimar Republic, Schmitt locates the pouvoir neutre both within the offices of the public service (Beamtentum) as well as the Reich's president (Neumann 2015, 232).

For Schmitt, an essential aspect of pouvoir neutre is that it cannot be conceived as being "over" over "above" (*über*) but must be located rather "alongside" (*nebengeordnet*) the other constitutional powers (C. Schmitt 1931, 132). Further, the subject of pouvoir neutre is not meant to be one of the other organs of governance (as the theory was borrowed from Constant, one can assume Schmitt is referring here to the distinction between legislative, executive, and judicial), as Schmitt claims this would lead to it becoming the dominant organ (132). This argument is meant to be a criticism of a prior court decision in which the highest court "had designated itself as the protector of the constitution" and which Schmitt regarded as overlooking the fundamentally political nature of the problem by retreating to a purely legal solution (Bendersky 1983, 111). Thus, for Schmitt, "Es ist daher notwendig, eine besondere neutrale Gewalt neben die anderen Gewalten zu stellen und durch spezifische Befugnisse mit ihnen zu verbinden und auszubalancieren" (132).

The concept of pouvoir neutre as Schmitt understands it is not meant to be an alternative to the theory of pouvoir constituant as developed by Sieyes; rather, this concept is taken directly from the liberal theorist Benjamin Constant's writings after the Jacboin phase of the French Revolution.[64] Thus, not only is the concept the product of a different intellectual framework, but the context in which it was initially deployed was remarkably different as well. This, however, does not mean that the two concepts are not interrelated in Schmitt's understanding: there are at least three reasons to believe

[64] Although it is beyond the scope of this thesis, Florian Weber provides an excellent analysis of pouvoir neutre in the history of French political thought (Weber 2005, 266-286).

that the concept of pouvoir neutre can be derived from pouvoir constituant within the theoretical framework advanced by Schmitt.

The first argument deals with the procedure by which the subject of pouvoir neutre was to be selected in the Weimar Constitution. According to article 41 (1) of the Weimar Constitution, the *Reichspräsident* was elected by the *entirety* of the German people.[65] As a result of being elected by the entire German people, the Reichspräsident carries a certain democratic legitimacy that enabled him to intervene in the name of that same people (Neumann 2015, 233). Here, it is worth quoting Schmitt in full:

> Der Reichspräsident wird vom ganzen deutschen Volk gewählt, und seine politische Befugnisse gegenüber den gesetzgebenden Instanzen sind der Sache nach nur ein "*Appell an das Volk*". Dadurch, dass sie den Reichspräsidenten zum Mittelpunk eines Systems plebiszitärer wie auch parteipolitisch neutraler Einrichtungen und Befugnisse macht, sucht die geltende Reichsverfassung gerade aus demokratischen Prinzipien heraus ein Gegengewicht gegen den Pluralismus sozialer und wirtschaftlicher Machtgruppen zu bilden und die Einheit des Volkes als eines politischen politischen ganzen zu bewehren" (159, italics mine)

Under this interpretation, the subject of pouvoir neutre must refer back to the authority who brought him into power: the entirety of the German people.[66] Using this procedure, the office of the Reichspräsident encompasses the permanence of the constituent power as described in *Verfassungslehre* – the powers given to the "Hüter der Verfassung" are so fundamental that they must refer back to the very power that instituted the current constitutional order.[67]

Secondly, as I have intimated above, the function of the pouvoir neutre is to preserve the current political order. However, the current political order has only come into existence through an act of constituent power, which is to say the function of the Reichspräsident can take on any significance only once the constitution itself has come into effect. As a result, his position as the subject of *pouvoir neutre* is derivative from the initial decision over the "Art und Form" of political existence which put him there in the first place: without the specific constitutional provisions detailing his election

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[65] Original text of the relevant Article: "Der Reichspräsident wird vom ganzen deutschen Volke gewählt"

[66] For a discussion of how this line of argumentation was used in 1933, see (Jung 1995, 6-16).

[67] Cf. *Verfassungslehre* (91).

procedure and enumerating his powers, the Reichspräsident would not be *sui generis* the holder of the pouvoir neutre. This can be seen on the one hand in that Schmitt claims to be engaged in a purely descriptive analysis of the Weimar Constitution without adding a normative layer of analysis (Quaritsch 2000). On the other hand, as Neumann (2015) has argued, Schmitt did not just believe that "ein Staatsoberhaupt sei zum Hüter der Verfassung am besten geeignet, sondern *der Reichspräsident nach der geltenden Verfassung eben dieser Hüter sei*" (233, italics mine). Thus, the subject of pouvoir neutre can only be derived from the existing constitutional order.

Thirdly, as Schmitt made clear in his *Verfassungslehre*, there can be no greater power than that of the constituent power. This sentiment is captured in the phrase "Aus den Entscheidungen dieses Willens [der verfassunggebenden Gewalt] leitet sich die Gültigkeit jeder weiteren verfassungsgesetzlichen Regelung ab" (77). Thus, it is necessarily the case that constituent power plays a fundamental role in the establishment of a pouvoir neutre, as no authority can be conceived as higher than the subject of constituent power. Even if the subject of the pouvoir neutre is exercises his authority to overcome the potential for escalating conflict in a pluralistic party system as Böckenförde suggests, constituent power is functions as an analytically prior concept.

4.3.4 The Concept of Sovereignty

In perhaps Böckenförde's strongest argument, he claims that Schmitt's concept of sovereignty – considered to be his legacy through interlocutors such as Agamben (1998) and Benjamin (Benjamin 1965) – is predicated on the notion of an ever present enemy. The political unity "constitutes and preserves itself by superseding tensions, antagonisms, and conflicting interests … For this to happen, however, the possibility of a final decision, i.e., a decision beyond further appeal, it needed" (Böckenförde 1988). Thus, the very concept of sovereignty deployed by Schmitt differs from Hobbes or Bodin in so far as it implies not "a monopoly of coercion or power, but a monopoly of decision" (Böckenförde 1988 FN9).[68] Within a state, the sovereign is he who holds the "right to rescue" in the *Ausnahmezustand* posed by the existential threat of the enemy (42). Thus, as a corollary, "sovereignty can neither be limited by legal means nor be

[68] Schmitt's exact phrasing referenced by Böckenförde: "[Der Souverän] hat das Monopol dieser letzter Entscheidung" (19)

given up"; if it does, "the state itself as a self-preserving political unity ceases to exist" (42).

To properly understand Schmitt's concept of sovereignty, one must first return to his earlier text, *Politische Theologie* (C. Schmitt 1993), which opens with the infamous dictum that "Souverän ist, wer über den Ausnahmezustand entscheidet" (13). The Ausnahmezustand – comparable to a secularized notion of the religious miracle (45) – cannot be confused with a state of anarchy or chaos, as "[es] besteht im juristischen Sinne immer noch eine Ordnung, wenn auch keine Rechsordnung" precisely because the State continues to exist through the emergency which necessitated the State of Emergency: "Ist der Zustand eingetreten, so ist klar, dass der Staat bestehen bleibt, während das Recht zurücktritt" (18). However, for Schmitt, it is precisely this moment of exception in which the true nature of sovereignty emerges, for "die Entscheidung macht sich frei von jeder normativen Gebundenheit und wird im eigentlichen Sinne absolut" (C. Schmitt 1993, 18-19). Thus, for Schmitt, the "norm" of neo-Kantians such as Kelsen has no independent validity, as it can be suspended ("beseitigt") or even destroyed ("vernichtet") through the sovereign decision to implement the state of emergency.

Such an interpretation of sovereignty distinguishes itself from the work of Rousseau, who held in his conceptualization that "if the danger is such that the apparatus of law is itself an obstacle to safety, then a supreme head must be nominated with power to silence all the laws and *temporarily suspend the sovereign authority*" (Rousseau 1968). Although Rousseau acknowledges the need for emergency laws, it is their relation to the sovereign authority which is diametrically opposed to that of Schmitt's interpretation (Pasquino 2016): while for Rousseau, emergency laws function by suspending the sovereign authority – which he locates with the "legislative authority" – for Schmitt, the state of emergency is the moment in which the true bearer of sovereignty is revealed.[69]

[69] Compare with Schmitt's commentary in *Die Diktatur* (116-129)

Instead, Schmitt turns to one of the great thinkers of the Counter-Revolution in France and a polemical critic of Rousseau's, Joseph de Maistre (1974; 1996).[70] De Maistre contested the idea of a secularized basis for the origin of the state: "One of the great errors of this century is to believe that the political constitution of nations is purely human work, and that one can make a constitution as a clock maker makes a watch" (de Maistre 1996, 67). Rather, all states have divine origins, either growing organically "like a plant" over centuries, or through exceptional moments of state founding (Armenteros 2007b). Through the second method, it is not, however, the will of the people that brings about the new government; instead it is God who "invests them with an extraordinary power, often unrecognized by their contemporaries, and perhaps to themselves" (61). What might appear to be an act of popular sovereignty is in fact an act of the divine.

Furthermore, de Maistre claims that it is the divine alone that is sovereign: although monarchs and statesmen may be recognized as sovereigns, they only attain this status by channeling the divine (Tarrago 2008, 173). Even in republics, de Maistre claims that the sovereign was established through "nature, time, and circumstances – that is to say, God" (73). Precisely through this divine source of authority, the sovereign of a republic exists apart from the secular will of the people; instead, "A people respects a government only because it is not its own creation ... It submits to sovereignty because it senses that it is something sacred it can neither create nor destroy" (74).[71] Thus, de Maistre interprets any constitution – regardless of the type of government it instantiates – as "only the mode of political existence attributed to each nation by a higher power" (84). Whether republic or absolute monarchy, constituent power lies solely within the divine. Or, as de Maistre himself declared, "each form of sovereignty is the immediate result of the will of the Creator, like sovereignty in general. Despotism, for a given nation, is as natural, as legitimate, as democracy is for another" (91). Thus, for de Maistre, God creates the sovereign on earth within a particular state.

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[70] For Berlin, despite their intellectual differences, they're both treated as forefathers to fascism (Berlin 2005).

[71] De Maistre's conception of sovereignty is intimately tied to his deeply pessimistic conception of human nature (Armenteros 2007a). Boffa (1989) explains "where the revolutionaries with their voluntarism had set out to change the world in order to restore man to his essential goodness, reactionary thought posited the irremediable corruption of human nature" (967). Thus, the only holder of sovereignty must be divine – humans were too corrupted to be trusted as sovereigns.

Following Schmitt's claim that "alle prägnanten Begriffe der modernen Staatslehre sind säkularisierte theologische Begriffe" (C. Schmitt 1993, 44), it is precisely through a secularized notion of de Maistre's theory of sovereignty that Schmitt produces a connection between sovereignty and constituent power. For de Masitre, the sovereign is infallible as a result of its divine origins, or to follow Schmitt's characterization, "Der Wert des Staates liegt darin, dass er eine Entscheidung gibt, der Wert der Kirche, dass sie letzte inappelleable Entscheidung ist," and Schmitt repeats this in claiming "die beiden Worte Unfehlbarkeit und Souveränität sind 'parfaitement synonymes'" (60). It is this infallibility that grounds the sovereign for de Maistre, and it is translated through the secular notion of constituent power as the infallible and absolute will of the people from which all further power is derived.

Just as the divine acts as the subject that constitutes the state in de Maistre's account, so the nation as subject of democratic constituent power acts as the will to bring about the modern state. It is precisely this that Schmitt has in mind when he quotes Sieyes as claiming "Es genügt, dass die Nation will" (C. Schmitt 1928b, 71) – the nation's will is infallible, and the decision it reaches regarding its "Art und Form" of political existence is incontestable by a higher authority. Thus, it is the constituent power which takes on the role of a secularized sovereign in Schmitt's following de Maistre's definition of the sovereign as the infallible.[72]

There is a second method of reading constituent power as providing the key theoretical foundations for sovereignty through a reading of one of Schmitt's former students, Kirchheimer (1969a): "Schmitt's 'decisionism' too … had given up the hope of finding a permanent subject of sovereignty that would be intent on, and capable of, balancing the interests and volitions of different groups and factions. He then proceeded to attribute sovereignty to those persons or groups that would prove able to exercise political domination under extraordinary circumstances" (191). Schmitt's turn to the exceptional lies at the heart of his theory of sovereignty: it is, after all, the sovereign who decides on the exception. In Schmitt's *Verfassungslehre*, sovereignty appears

[72] For further discussion of de Maistre's influence on Schmitt, see (Spektorowski 2002).

through the concept of "Verfassungsdurchbrechung"[73] or the ability to decide in a concrete case ("Einzelfall") to deviate from the constitutional law without amending the constitution in any way:

> "Der Gesetzgeber kann als Gesetzgeber nur Gesetze Geben, nicht durchbrechen; die Frage betraf nicht die Gesetzgebung sondern die Souveränität, die existenzielle Überlegenheit über die Normierung. Auch für den modernen Rechtsstaat sind diese Durchbrechungen das Kriterium der Souveränität" (C. Schmitt 1928b, 107)

This, for Schmitt, points to the fundamental nature of sovereignty within a constitutional order: "Wer zu solchen Handlungen [Verfassungsdurchbrechungen] befugt und imstande ist, handelt souverän" (C. Schmitt 1928b, 107).

First, Schmitt's interpretation of sovereignty as being present in the act of Verfassungsdurchbrechungen can only be interpreted within the context of a positive constitution, which I have already shown to be dependent on the concept of constituent power (see section 4.2 above). If the constitution were understood in the relative sense, then ignoring individual constitutional laws would be illegitimate: it is only through recourse to saving the constitution as a whole that it can be constitutionally justified to deviate from the constitution itself. As Neumann argues, "Die Verfassung ist – so Schmitt – für den Reichspräsidenten unantasbar, während er Verfassungsgesetze suspendieren und durchbrechen darf" (Neumann 2015, 114). This points back to the importance of the exception for Schmitt in bringing out the true character of sovereignty, but this true character is dependent upon a positive theory of the constitution.

4.4 Schmitt's Divergence from Sieyes

In the previous two sections, I have first reconstructed Schmitt's theory of constituent power and second argued that constituent power acted as a key for interpreting several of his political and legal concepts. This move was to establish the central role that constituent power plays in Schmitt's larger political thought. In this

[73] This term, arising from its specific context in the Weimar Republic (Unruh 2002, 278), has no comparable term in English. I have chosen to leave it in German throughout this section instead of the awkward "Constitutional Rupture" or "Constitutional Violation" used by one of Schmitt's translators (C. Schmitt 2008, 458), the latter of which carries a clear negative connotation which is not implied in the original German.

section I will turn to a comparison of Schmitt's use of constituent power with his supposed inspiration, Sieyes. In addition to locating points of divergence between the two thinkers, I aim to explain the function of Schmitt's divergences.

4.4.1: Qu'est-ce que la Nation?

Before comparing Schmitt and Sieyes on the concept of the nation as the subject of constituent power, it is first necessary to reconstruct Schmitt's interpretation; however, this is itself a source of dispute between two influential political theorists, Jürgen Habermas (1989; 1998) and Andreas Kalyvas (2008). Thus, I will turn to their arguments before moving on to a comparison between Schmitt and Sieyes.

For Habermas (1998), Schmitt's concept of the nation is inescapably bound within the discourse of ethnonationalism, in which the image of a pre-political, ethnically homogenous community is held to be the founding authority of the nation (130). This ethnically homogenous community forms a politic unity, and as such, forms the basis of coming constitutional order. As a result, Habermas claims that in Schmitt's thought, "Democracy must take the form of a national democracy because the 'self' of the self-determination of the people is conceived as a macrosubject capable of action and because the ethnic nation seems to be the appropriate entity to fill this conceptual gap -- it is viewed as the quasi-natural substrate of the state organization" (135). To follow Habermas' argument further, Schmitt cannot begin to imagine a democracy of humanity, as the demos of a democracy is for him tied to the ethnically homogenous group. Thus, Habermas argues that while Schmitt speaks of democracy, he in fact means *Volksdemokratie* by arguing that "national homogeneity is a necessary precondition for the democratic exercise of political authority" (134). The key intuition here is that "[Schmitt] wants to lay the conceptual groundwork for detaching democratic will-formation from the universalist presuppositions of general participation, limiting it to an ethnically homogenous substratum of the population, and reducing it to argument-free acclamation by immature masses" (Habermas 1989, 139).

Kalyvas (2008) rejects Habermas' interpretation outright, claiming "Once this 'substantialist' interpretation of the sovereign popular subject is pronounced, without, it should be noted, any textual evidence to support it, it is but a short leap to turn it into a

dangerous political category that justified the Nazi politics of mass extermination" (120). Immediately, there are two counterpoints to make against Kalyvas: first, Habermas himself does not claim that Schmitt's "ethnonaturalism" is linked to any of the policies of National Socialism, and Kalyvas must instead cite the work of Scheuerman (1999); and second, even if Habermas did make such a claim, it is not clear from Kalyvas' argument why that would constitute a ground for rejecting Habermas' analysis. It does not follow that one must reject an interpretation of a theorist because it shows lines of continuity between his thinking fascist politics – if it did, it would also mean having to ignore much of Isaiah Berlin's writing.[74]

Kalyvas' argument against Habermas continues by challenging the compatibility of such an interpretation within Schmitt's theory of constituent power:

> "If Habermas' critique were correct, it would seem that Schmitt reduced the political to the prepolitical, the constituent popular sovereign to some prior naturalistic ethnic or racial collective identity, and the constitution to a mere reflection of a deeper set of existential, irrational values deployed against the Other, the enemy, who might endanger the ethnic unity of the people. I do not think this is the case" (121).

Rather, Kalyvas argues that "Schmitt hardly identified the people and the constituent power with a prepolitical substance, and there is nothing in his Weimar writings to suggest that he thought that the ability of the people to act as a constituent sovereign was due to common ethnic origins" (121). Instead, Schmitt's thinking is based on a an extension of the friend/foe distinction, in which the democratic people comes into an awareness of itself through its dialectical relationship with the "other" – "political identities and shared conceptions of the 'we' are constituted through struggles, antagonisms, and differential relations among groups" (122). In summary, Kalyvas has offered two arguments against interpreting Schmitt's theory as being reliant on an ethnonationalist ideology: first, that Habermas does not provide any textual proof of this claim; and second, that such an interpretation does not fit in with Schmitt's wider thought. Thus, as Kalyvas claims in an astonishing footnote, "Given this lack of textual support, it is worth asking if Schmitt was a nationalist after all" (121).

I will treat both of Kalyvas' arguments together, since textual support against his second claim necessarily invalidates his first. In fact, Schmitt *does* discuss the role of

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74 See for example Berlin (1959; 1973; 2001; 2005; 2012).

ethnic homogeneity in relation to constituent power before 1933 in his *Verfassungslehre*. Here, he discusses the distinction between "Nation" and "Volk," in which

> "die Nation [ist] das Subjekt der verfassunggebenden Gewalt … [Sie] bezeichnet nämlich das Volk als politisch-aktionsfähige Einheit mit dem Bewusstsein siner politischen Besonderheit und dem Willen zur politischen Existenz, *während das nicht als Nation existierende Volk nur eine irgendwie ethnish oder kulturell zusammengehörige, aber nicht notwendig politisch existierende Verbindung von Menschen ist*" (79, italics mine).

Under this interpretation, it is the nation that is considered the proper subject of constituent power; however, the nation is nothing more than a unity with the capability of political action through its will to political existence. As Schmitt makes clear, this is transformation of the ethnic or culturally unified *Volk* which has decided to exercise its will (79).

Schmitt returns to this argument in a later chapter, claiming that "Zur Einheit der Nation … können verschiedene Elemente beitragen: gemeinsame Sprache, gemeinsame geschichtliche Schicksale, Traditionen und Errinnerungen, gemainsame politische Ziele, und Hoffnungen" (231). This is part of an attempt to distance the concept of democracy from liberalism, by claiming that any democratic government must be made to function for the demos that brought it into being. As a result, democracies can attempt to achieve national homogeneity through imposing immigration controls (232), or the possibility of denaturalizing unwanted citizens (233). For Schmitt this is essential in demonstrating that the very principles of a democratic state brought about by the constituent power of the people are at odds with the basic notions of liberalism, freedom and equality (Preuss 1999, 171). Thus, he claims "Ein demokratischer Staat würde sich durch eine konsequente Anerkennung der allgemeinen Menschengleichheit auf dem Gebiet des öffentlichen Lebens und des öffentlichen Rechtes seiner Substanz berauben," (233) which is then summarized in his expression "Der zentrale Begriff der Demokratie ist Volk und nicht Menschheit" (234). In other words, the Nation is the politicized form of the ethnic or culturally homogenous Volk, and as such, Schmitt's concept of constituent power is based in its roots in the sort of ethnonationalism that Habermas describes. To

claim otherwise, as Kalyvas does, is to ignore the foundations of his thinking on constituent power even as it was presented before 1933.[75]

This particular conception of the nation as subject of constituent power diverges radically from that put forward by Sieyes: while Schmitt locates the origin of the nation in the ethnic and cultural connection of a specific Volk, Sieyes explicitly argued that the nation is free from an assumption of linguistic or ethnic homogeneity. Rather, Sieyes' conception of the nation is dependent on two criteria, both of which are absent in Schmitt's understanding: first, the nation is defined as that group of individuals living under the same set of laws; and second, the nation is the productive force which uses its labor to sustain the life of its members (see above, section 2.2).

Schmitt is forced to diverge from Sieyes on the juridical equality of the subjects of constituent power precisely because of the temporal gap he creates: for Schmitt, prior to the exercise of constituent power, there is no positive law, since the latter is derived entirely from the constitutional order brought into effect by the former (Croce and Salvatore 2013, 15). In other words, the subject of constituent power cannot be determined by recourse to the particularities of positive law, as positive law as such does not yet exist or it is based on the preceding and invalidated constitutional order. This is most expressly seen in relation to Schmitt's commentary on the destruction of constitutions ("Verfassungsvernichtung"), in which he claims that the National Assembly of 1789 represented the destruction of the previous constitution precisely because the subject of constituent power shifted from the monarchy to the French nation . There are several things to note here: first, for Sieyes, it would have been impossible to consider the King as the legitimate subject of constituent power, as not only was he not an economically productive member of society, but he most certainly was not operating within the same legal framework as the Third Estate; second, from Sieyes' quip on the English Constitution – "What the English people have is a constitution, however

[75] To be clear, Schmitt's thinking in regards to the nation does become radicalized after 1933. For an extended discussion, see (Lauermann 1992, 67), which takes Schmitt's (1940) *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles* as representative of his work in this period. See also (Müller 1997) for the thesis that Schmitt used anti-Semitism after 1933 as a means to overcome theoretical ambiguities in his earlier work and fall in line with National Socialist discourse (21). This thesis makes no attempt to defend such discourse, as Quaritsch (1989) does in stating "Wer zu Wölfen Reden will, muss mit den Wölfen heulen" (79), nor does it present a sanitized version of Schmitt in which his intellectual work miraculously stops in 1933.

incomplete it may be, *while we have none*" (132, italics mine) – it is clear that at the point of his writing *What is the Third Estate?* Sieyes held that there was no constitution despite there being positive laws in the sense of privileges. This points to a fundamental divergence between Schmitt and Sieyes over the relationship between positive and fundamental law: for Sieyes, it was possible to have the former *without* the latter, while Schmitt derives the validity of the former *from* the latter. As a result, Schmitt's concept of constituent power must be free of any references to an existing political order, leading him to wholly ignore the first criterion of a nation in Sieyes' understanding.

Schmitt's divergence from Sieyes in regards to the role of productive labor – or, more generally, the exclusion of political economy informed analysis from his system of thought – can be explained in two ways: first, as Schmitt argues in *Begriff des Politischen*, economic distinctions such as "competitors" are a conceptual invention of political liberalism meant to suppress the true role of the political sphere (C. Schmitt 1963, 28). Instead, the political properly understood "ist jedenfalls immer die Gruppierung, die sich an dem Ernstfall orientiert. Sie ist deshalb immer die maßgebende manschliche Gruppierung" (C. Schmitt 1963, 39).

Secondly, even in the case of the constituent power exercised in founding the Soviet Union, Schmitt argues that the authority of the Soviet Councils ("Räte") is derived from the entirety of the Russian people, regardless of the rhetorical claim to be called into existence solely by the proletariat. This is because the communist doctrine calls for the elimination of the necessary sociological and ideological artifacts of capitalism such that the will of the people can be properly articulated (C. Schmitt 1928b, 82). Thus, Schmitt notes, not only is the Soviet case an example of a dictatorship, but it also represents a constitutional decision insofar as the liberal principle of majority voting was expressly rejected: "Endgültig entschieden ist hier nur die Ablehnung der *liberalen* Methode er Mehrheitsentscheidung … Insofern liegt hier allerdings ain Akt der Verfassunggebung vor" (C. Schmitt 1928b, 82).

4.4.2 Positive Constitution and Natural Law

For Schmitt, there is no natural law which limits the actions of the subject of constituent power: "der pouvoir constituant ist *an nichts gebunden*, die pouvoirs constitutes haben umgekehrt nur Pflichten und keine Rechte" (C. Schmitt 1928b, 143 italics mine) Instead, the nation is radically free to decide over the "Art und Form" of its political life without reference to any sort of law, be it natural or positive law. In contrast, Sieyes holds that "there is one *supreme* law which ought to be the parent of all others, and that is, '*Do wrong to no man'"*(Sieyes 2003, 30). It is precisely from this initial formulation of natural law that Sieyes derives all further requirements in the formation of both fundamental and positive law, meaning that both the *pouvoir constituant* as well as the *pouvoir constitué* are bound by natural law.

This difference emerges due to Schmitt's reading of Bodin and his theory of sovereignty. While the sovereign may have obligations as a result of promises made to his subjections, these disappear in moments of emergency: "Versprechen [sind] bindend, weil die verpflichtende Kraft eines Versprechens auf dem Naturrecht beruht; im Notfall aber hört die Bindung nach allgemeinen natürlichen Grundsätzen auf" (C. Schmitt 1993, 15). Following Bodin, in the moment of exception, the sovereign is released from the dictates of natural law the moment that a divergence can be justified in the interest of his subjects (15). Precisely because Schmitt conceives of constituent power as being exercised in exceptional moments and the subject of constituent power as sovereign, then it follows that if there were natural laws, the subject of constituent power could not be bound by them.

For Howse (1998), Schmitt's exclusion of natural law from his theory is explained by an embrace Machiavelli over Hobbes: "[Schmitt's] last word is the eternal relation of protection and obedience, the unconstrained rule of the strong over the weak as the one authentic form of order implied in the universality of man's animal striving" (59). Natural law, as a limitation on the political power of the sovereign, cannot be admitted to the realm of the political and instead the unlimited and extra-constitutional power of the sovereign in emergencies must be affirmed (61). However, Howse's argument seems to be more interested in rehabilitating Strauss' call to find a "horizon beyond liberalism" in Schmitt's works than a critical evaluation of them. Indeed, as Galli (2016) has convincingly shown, "Machiavelli is for Schmitt more interesting than important, more cited than studied" (1).

Instead, it is precisely through Schmitt's reconstruction of Hobbes' Leviathan that he makes a parallel divergence from natural law theory: "der Inhaber der souveränen Gewalt [hat] die höchste irdische Macht ungetweilt allein in seiner hand" (C. Schmitt 1982, 32). And further, as Skinner (1999) has argued, "The concept of the political covenant is not a means of limiting the powers of the crown; properly understood, it shows that the powers of the crown have no limits at all" (27). Schmitt's only conceptual move was to establish the powers of the Leviathan in the subject of constituent power, the nation.

Perhaps more accurately capturing the reason for this divergence is the general intellectual climate in Germany at the period of Schmitt's writing. As Bendersky (1983) has argued, the hegemonic position of positivism within legal faculties in Germany meant "an increasing emphasis on observation and analysis in lieu of idealist metaphysics or philosophical speculation. It signified a departure from the universalism of natural-law theory in favor of the idea that the law was the creation of the sovereign state" (9). Against this, Schmitt returned to a form of neo-Kantianism, in which "a 'higher law' existed above the norms created by the state" without merely returning back to a restatement of natural law theory (Bendersky 1983, 11). Thus, natural law became supplanted by the will of the people as constituting the fundamental laws governing society (Stacey 2012, 589).

Most recently, Benhabib (2012) has advanced the thesis that concepts such as "order of the earth" as articulated in Schmitt's later treatise on international law, *Nomos der Erde* (C. Schmitt 2011), are a makeshift form of natural law argumentation (692). However, there is reason to doubt Benhabib's interpretation of Schmitt's stance on natural law: first, Schmitt develops a critique of natural law as being inherently unstable and threatening the rule of law of an established constitutional order (McAleer 2014, 67). Second, Schmitt conceived of himself as carrying on the tradition of the *jus publicum europaeum*, which for him was antithetical to the notion of natural law – natural law, in claiming universal validity, attempted to break down the geographically specific legal order established by the *nomos* (McAleer 2014, 75).

The result of this divergence is the establishment of a type of absolutism of popular sovereignty ("ein Abosolutismus der Volkssouveränität") in which the constituent power of the nation becomes unbound from any checks to its power (Breuer 1984, 515; Neumann 2015, 109). In rejecting natural law as a limitation on constituent power, Schmitt's work prior to 1933 emerges as a radically democratic,[76] placing the full amount of power within the hands of the people to act in an exceptional moment to create a constitution fitting their particular "Art und Form" of political existence.

4.5 Conclusion

While Schmitt makes recourse to the theory of constituent power developed by Sieyes in the months leading to the French Revolution, his theory diverges in two essential elements: first, in the conceptual distinction between "Volk" and "Nation"; and second, in removing the limitations imposed by natural law on the set of possible actions to be taken by the subject of constituent power. Thus, it must be noted that the term has been used to articulate two diverging theories, and future theorists ought to be careful in drawing the consequences of working within a particular framework. In other words, Schmitt's claim to be working entirely within the framework developed by Sieyes should not be taken at face value, but instead be interpreted as a rhetorical strategy to import legitimacy on his ethnonationalist argument.

[76] Compare, for example, Schmitt's critique of Sieyes' concept of representation in *Verfassungslehre* as being undemocratic (80 and above, section 4.3.2). See also the thesis advanced by Kennedy (2004) that Schmitt's reading of the Weimar Constitution was an attempt to save it. Of course, I don't mean to imply that this reading is sustainable in his post-1933 texts.

CONCLUSION: THE RESURGENCE OF CONSTITUENT POWER

Over the past decade, the concept of constituent power has made a resurgence, particularly within the field of international political theory (IPT) (Niesen, Ahlhaus, and Patberg 2015; Patberg 2013). Elsewhere, authors such as Spang (2014) and Kalyvas (2008) have offered a reading of constituent power deeply indebted to the conceptual framework established by Schmitt: Loughlin (2004) diverges radically from Sieyes' original understanding of the concept in writing "Constituent power is a political concept. *This means that the concept can only be understood once political power is differentiated from economic power*" (112, italics mine).

This research project has been motivated by the desire to return to a close reading of Sieyes' original formulation of constituent power and locate it within its political, economic, and discursive surroundings. As a result, I have employed the contextualist methodology to recover the meaning of constituent power through a reference to its intent within a particular political discourse. By returning to the original context, I have aimed to restore to the concept of constituent power a means of establishing its rightful subject: first, by identifying the subject as a being characterized by adherence to a common legal code; and second, by restating the importance of political economy in Sieyes' analysis and its subsequent disappearance in both Robespierre and Schmitt.

From Robespierre, I argued that a fundamental inversion took place in the concept of constituent power: instead of the nation giving itself a constitution, the nation must be created through the twin concepts of *vertu* and terror. Particularly seen through the struggle between the Mountain and the Girondin factions, Robespierre's attempt at constitution-making can be interpreted as justifying the immediately preceding purge of his political opposition, as well as adapting the principles advocated by Condorcet. As a consequence of this radical shift in understanding, the revolutionary Jacobin government was conceptualized as a means of establishing the nation based on the nation's true interests. And while this process came to its apotheosis in the Festival of the Supreme Being, it is clear that Robespierre would have continued to cleanse the nation in the name of preparing it for its own constitution through the twin concepts of *vertu* and terror had the Thermidorians not intervened

In contrast, my analysis on Schmitt's theory of constituent power shifted to an analysis of his conception of constituent power as articulated in *Verfassungslehre.* From there, I went on to argue that constituent power serves as a fundamental concept in Schmitt's political and constitutional thought, from which it is possible to derive an interpretation of dictatorship, representation, pouvoir neutre, and sovereignty. The last step of my argument was to criticize Schmitt's appropriation of Sieyes, particularly in divergence in interpreting the nation and the role of natural law in limiting the actions of the subject of constituent power.

Following Dunn (1985b), "the key task of political philosophy is not the task of grasping why power usually deserves to be distrusted (seldom an arduous task). It is that of seeing how power could or can be fashioned and maintained so that it *deserves* trust and loyalty" (184). To that end, I have tried to locate the original foundations for the legitimacy of constituent power in Sieyes, as well as trace its metamorphosis in the works of Maximilien Robespierre and Carl Schmitt. It is only by addressing the fundamental question of legitimacy that further efforts to locate a subject of international constituent power can be made.

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Hamburg, August 15th, 2016